



MISSISSIPPI CODE 1972

Annotated

Regulation of Trade, Commerce
and Investments

UNIFORM COMMERCIAL CODE

(§ 75-1-101 to
§ 75-3-805)

Title 75

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME SIXTEEN

**REGULATION OF TRADE, COMMERCE
AND INVESTMENTS**

(Uniform Commercial Code)

§§ 75-1-101 to 75-3-805

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2002 REGULAR AND
1ST EXTRAORDINARY LEGISLATIVE SESSIONS



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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the legislature, the attorney general's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972. A copy of that act is set out in Volume 1, following the Publisher's Foreword.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER
ATTORNEY GENERAL

PUBLISHER'S FOREWORD

This 2002 Replacement Volume 11 of the Mississippi Code of 1972 Annotated represents material appearing in both the original 1973 bound volume and the 1993 Replacement Volume 11, as well as reflecting amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2002 Regular and 1st Extraordinary Legislative Sessions.

This volume contains the text of Title 75, of the Mississippi Code of 1972 Annotated, as amended through the 2002 Regular and 1st Extraordinary Legislative Sessions.

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals with decision dates up to April 30, 2002, and decisions of the appropriate federal courts with decision dates up to March 10, 2002. These cases will be printed in the following reporters:

Southern Reporter, 2nd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 5th Series: through 97 A.L.R.5th
American Law Reports, Federal Series: through 177 A.L.R.Fed
Mississippi College Law Review: through Volume 20, No. 1, p. 211
Mississippi Law Journal: through Volume 70, No. 2, p. 851

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

A comprehensive Index appears at the end of this volume.

PUBLISHER'S FOREWORD

Visit the LexisNexis website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

August 2002

LexisNexis

User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of your Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- Advance Code Service
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If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and

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approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, as well as a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

ATTORNEY GENERAL OPINIONS

Opinions of the attorney general for the state of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant code provisions under the heading "Attorney General Opinions." The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the state of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

The text of Chapter 394 is printed in Volume 1, on the pages following the Publisher's Foreword. In addition, Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and coop-

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eration with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully-annotated softcover volume, which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and are edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, which may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States and Federal Aspects*.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor. Acts affecting voting rights and procedures take effect on the date the United States Attorney General interposes no objection under § 5 of the Voting Right Act of 1965.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the

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Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States*.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation “§ 1-3-65,” the first digit (“1”) means the provision is in Title 1 (“Laws and Statutes”); the second (“3”) indicates Chapter 3 (“Construction of Statutes”); and the last two digits (“65”) mean the 65th section in that chapter (“Construction of terms generally”).

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indentation scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute section or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article. Look for these unit-wide notes between the title, chapter, or article analysis and the first section in that unit.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, Ameri-

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can Jurisprudence Trials, American Law Reports, First through Fifth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

SOURCE NOTES

Each section of the code is followed by a brief note showing the acts of the legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note. References to comparable provisions in statutes also are listed.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

STATUTE HEADINGS

Headings or "catchlines" for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
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§ 75-1-101. Short title.

Chapters 1 through 10 of this title shall be known and may be cited as Uniform Commercial Code.

SOURCES: Codes, 1942, § 41A:1-101; Laws, 1966, ch. 316, § 1-101, eff March 31, 1968.

Cross References — Application of general definitions and principles of construction and interpretation contained in this chapter to UCC provisions on funds transfers, see § 75-4A-104.

Comparable Laws from other States — Alabama Code, §§ 7-1-101 through 7-11-108.

Arkansas Code Annotated, §§ 4-1-101 through 4-10-104.

Georgia Code Annotated, §§ 11-1-101 through 11-12-102.

Louisiana Revised Statutes Annotated, §§ 10:1-101 through 10:9-509.

Tennessee Code Annotated, §§ 47-1-101 through 47-9-607.

Texas Business and Commerce Code, §§ 1.101 through 11.108.

JUDICIAL DECISIONS

1. In general.

The sales provision of the Code will be applied to situations involving other commercial contracts because although not controlled by the Code "the Code is persuasive here because it embodies the foremost modern legal thought concerning commercial transactions". *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. V.I. 1967).

Reference has been made to the Code in interpreting the effect of an "as is" sale of real estate, the court recognizing that the Code would not apply but pointing out that cases thereunder "by the process of reasoning by analogy are appropriate precedents to apply in an interpretation of the contract provision." *Tibbitts v. Openshaw*, 18 Utah 2d 442, 425 P.2d 160 (1967).

Because of the provision of UCC § 1-102(2) decisions in other states "are more than mere persuasive authority." *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

The court should seek to follow interpretations of the Code made in other states. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

The UCC is inapplicable to commercial events which took place before it became effective. *Streeter v. Middlemas*, 240 Md. 169, 213 A.2d 471 (1965); *Peachtree News Co. v. Macmillan Co.*, 112 Ga. App. 556, 145 S.E.2d 666, 3 U.C.C. Rep. Serv. 244 (1965).

A lease of standing timber for the purpose of producing turpentine therefrom is a lease of an interest in land to which the Uniform Commercial Code has no application. *Newton v. Allen*, 220 Ga. 681, 141 S.E.2d 417, 2 U.C.C. Rep. Serv. 770 (1965).

Moreover, notwithstanding that a transaction relating to the sale of goods was entered into after the enactment of the Uniform Commercial Code, the prior Uniform Sales Act governs where the transaction took place before the effective date of the Uniform Commercial Code. *Paramount Paper Prods. Co. v. Lynch*, 182 Pa. Super. 504, 128 A.2d 157 (1956).

An indictment made under a section of the Sales Act, which was repealed by the Uniform Commercial Code is valid where violation of a similar provision of the Uniform Commercial Code is punishable, since the legislature did not intend by the repeal of the Sales Act to grant a pardon to those committing offenses under it. *Commonwealth v. Davis*, 4 Pa. D. & C.2d 182 (1954).

The Uniform Commercial Code, as specifically provided therein, is inapplicable to transaction arising prior to its effective date. *Thomas v. First Nat'l Bank*, 376 Pa. 181, 101 A.2d 910 (1954); *Roller v. Jaffe*, 387 Pa. 501, 128 A.2d 355 (1957); *Hahn v. Andrews*, 182 Pa. Super. 338, 126 A.2d 519 (1956); *GFC Corp. v. Antrim*, 2 Pa. D. & C.2d 377 (1953); *In re Consorto Constr. Co.*, 212 F.2d 676 (3d Cir. Pa. 1954), cert. denied, 348 U.S. 833, 75 S. Ct. 57, 99 L. Ed. 657 (1954); *Gould v. City Bank & Trust Co.*, 213 F.2d 314 (4th Cir. Md.

1954); *First Trust & Sav. Bank v. Fidelity-Philadelphia Trust Co.*, 214 F.2d 320, 50 A.L.R.2d 1218 (3d Cir. Pa. 1954), cert denied, 348 U.S. 856, 75 S. Ct. 81, 99 L. Ed. 674 (1954); *Durkin v. Siegel*, 340 Mass. 445, 165 N.E.2d 81 (1960); *A. Belanger & Sons v. United States*, 275

F.2d 372, 39 CCH Lab. Cas. P 66294 (1st Cir. Mass. 1960); *United States ex rel. National U.S. Radiator Corp. v. D.C. Loveys Co.*, 174 F. Supp. 44, 37 Lab. Cas. (CCH) P 65620 (D. Mass. 1958), aff'd, 275 F.2d 372, 39 Lab. Cas. (CCH) P 66294 (1st Cir. Mass. 1960).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 1-2, 4, 9, 10, 11, 15, 17, 24, 25, 30.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

Squillante, Uniform Commercial Code Bibliography. 89 Com L. J. 280, June/July, 1984.

§ 75-1-102. Purposes; rules of construction; variation by agreement.

(1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this code are

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this code may be varied by agreement, except as otherwise provided in this code and except that the obligations of good faith, diligence, reasonableness and care prescribed by this code may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this code of the words "unless otherwise agreed" or words of similar import does not imply that the effect of other provisions may not be varied by agreement under subsection (3).

(5) In this code unless the context otherwise requires

(a) words in the singular number include the plural, and in the plural include the singular;

(b) words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

SOURCES: Codes, 1942, § 41A:1-102; Laws, 1966, ch. 316, § 1-102, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general.
2. Nature and purpose.
3. Construction.
4. —Reference to official comments.
5. Policy of uniformity.
6. Effect of agreements.
7. —Particular agreements.

1. In general.

In action by insurer as subrogee of subcontractor for indemnification of claims settled by insurer, which claims arose out of fire in municipal filtration plant which started when spark from welding torch landed on defective plastic equipment supplied by defendant company to subcontractor for installation in plant, defense contention that policy of UCC § 1-102(2)(b) to permit continued expansion of commercial practices through custom, usage, and agreement of parties demonstrated legislative intent to allow “commercial-industrial specialists,” such as subcontractor and defendant in present case, to regulate relationships among themselves and determine liability for defective products by agreement, had no merit because party injured by defective product was remote user thereof. *Potsdam Welding & Mach. Co. v. Neptune Microfloc, Inc.*, 57 A.D.2d 993 (3d Dep’t 1977).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee’s endorsement forged by other payee, co-payee, which was not a “customer” of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee “and” other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank’s failure to ascertain whether co-payee’s signature

was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. *Atlas Bldg. Supply Co. v. First Indep. Bank*, 15 Wash. App. 367, 550 P.2d 26 (1976).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner’s warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. *Brannon v. First Nat’l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

2. Nature and purpose.

While the effort was not totally successful, one of the purposes of the draftsmen of the Uniform Commercial Code was to eliminate resort to the concept of title in resolving controversies arising out of commercial transactions. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Provisions of Uniform Commercial Code could not be resorted to by students to support contention that university and its officers were bound by a standard of reasonableness in determining future tuition rates (see UCC § 1-102(2)). *Eisele v. Ayers*, 63 Ill. App. 3d 1039, 381 N.E.2d 21, 99 A.L.R.3d 876 (1st Dist. 1978).

UCC was designed to regulate commercial transactions, and legislature did not intend through Code to create contractual cause of action for wrongful death arising from breach of warranty. *Geohagan v. GMC*, 291 Ala. 167, 279 So. 2d 436 (Ala. 1973).

Taking note of the Uniform Commercial Code’s purpose to “make uniform the law among the various jurisdictions”, an Indiana Appeals Court held that electricity

qualified as "goods" under the Code, relying upon the authority of a Pennsylvania case holding that natural gas was "goods" within the Code. *Helvey v. Wabash County REMC*, 151 Ind. App. 176, 278 N.E.2d 608, 48 A.L.R.3d 1055 (1972).

In matter of first impression in state, where there is authority in other jurisdictions, court will look to comments and examples of drafters of legislation as guide to "promote its underlying purposes and policies". In *re Rivet*, 299 F. Supp. 374 (E.D. Mich. 1969).

The purpose of this act, to be liberally construed, is specified as the stipulation, clarification and modernization of the law governing commercial transactions to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; and the statute mandates a liberal administration to the end that an aggrieved party may be put in as good a position as if the other party had fully performed without consequential, special, or penal damages unless specifically provided for. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

The UCC was designed to bring the body of commercial law into the contemporary world of business. In *re United Thrift Stores, Inc.*, 363 F.2d 11 (3d Cir. N.J. 1966).

The Massachusetts court regards the Uniform Commercial Code less as a novel enactment than as largely a restatement and clarification of existing law which has the approval of American scholars. *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

The Pennsylvania Uniform Commercial Code was enacted to codify all existing laws on commercial transactions. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

3. Construction.

Exculpatory provision of assignment that conditional sale contract and judgment note assignor warranted compliance with all filing and recording requirements, agreeing that any filing or recording or renewals thereof which the assignee might undertake at assignor's request, or otherwise, should be at assignor's expense and without responsibility

whatsoever on assignee's part for any omission or invalid accomplishment thereof, whether through assignee's failure, neglect, or for any other reason, and that such omission or invalid accomplishment should not relieve assignor of any responsibility to assignee, was void under UCC § 1-102(3). *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

The Article on letters of credit is to be liberally interpreted. The requirement of rigid adherence to material matters must strike a balance with the concept of reasonable flexibility as to minor matters in order to facilitate trade. *Banco Espanol de Credito v. State St. Bank & Trust Co.*, 385 F.2d 230 (1st Cir. Mass. 1967), cert. denied, 390 U.S. 1013, 88 S. Ct. 1263, 20 L. Ed. 2d 163 (1968).

A court should not seek to restrict the Code by interpretations which preserve former inconsistent rules or law. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

Where repurchase agreement executed by automobile dealer failed to establish the time for performance, evidence of custom and usage showing that bank must repossess and return car for purchase within 90 days after default was admissible to establish what was a reasonable time, and bank's undue delay in repossession and demand precluded it from recovering from automobile dealer the amount due from the buyer under the contract less the amount received at the execution sale. *Valley Nat'l Bank v. Babylon Chrysler-Plymouth, Inc.*, 53 Misc. 2d 1029 (1967), aff'd, 28 A.D.2d 1092, 284 N.Y.S.2d 849 (2d Dep't 1967).

A liberal construction is to be placed upon the Commercial Code even to the extent of ignoring the requirement of § 9-402 that a financing statement is to be signed by the debtor, at least during the period of transition between the application of former statutes and the present Code. *Alloway v. Stuart*, 385 S.W.2d 41 (Ky. 1964).

The Code is to be liberally construed to promote its purposes and policies. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515, 4 U.C.C. Rep. Serv. 1 (1967); *Annawan Mills, Inc. v. Northeast-*

ern Fibers Co., 26 Mass. App. Dec. 115, 4 U.C.C. Rep. Serv. 787 (1963).

A liberal construction must be given to the Uniform Commercial Code so as to secure a reasonable meaning and to effectuate the intention of its framers and make it workable and serviceable to the important business to which it relates. *Universal Lightning Rod, Inc. v. Rischall Elec. Co.*, 1 Conn. Cir. Ct. 623, 192 A.2d 50 (1963).

The Uniform Commercial Code is an attempt to codify all existing law governing commercial transactions and reference should not be made to one section alone. The Code must be considered as a whole, and each section should be read in conjunction with others in order to ascertain the intent of the legislature. *Girard Trust Corn Exch. Bank v. Warren Lopley Ford, Inc.*, 12 Pa. D. & C.2d 351 (1957).

4. —Reference to official comments.

Where jury could reasonably have concluded that buyer's revocation of acceptance of new 1970 Lincoln Continental automobile was timely and justifiable, buyer under UCC § 2-711(1) was entitled to recover amount of purchase price that he had already paid. Moreover, such recovery was not limited by warranty provision, incorporated in sales contract, that buyer was entitled only to repair and replacement of defective parts. The Uniform Commercial Code expressly declares in UCC § 1-102(1) that it is to be liberally construed, and it also recognizes in Official Comment 1 to UCC § 2-719 that the very essence of a sales contract is that minimum adequate remedies at least be available. In present case, however, limited remedy of warranty in sales contract failed to achieve its essential purpose, since even after numerous attempts at repairs, vehicle purchased by buyer did not operate as new automobile should operate. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

Official Comment in connection with UCC § 1-102(3) regarding variance by agreement notes the purpose to preserve freedom of contract and allow for the evolutionary growth of commercial practices; but it also notes that whether such variance by agreement may affect third parties depends on more specific provisions of

UCC. *Herington Livestock Auction Co. v. Verschoor*, 179 N.W.2d 491 (Iowa 1970).

Because Code is becoming truly national law of commerce and therefore appropriate source of federal law, "official comments", although not binding on federal court, are powerful dicta. In *re Yale Express Sys.*, 370 F.2d 433, 3 U.C.C. Rep. Serv. 1007 (2d Cir. N.Y. 1966), appeal after remand, 384 F.2d 990 (2d Cir. N.Y. 1967), (superseded by statute as stated in *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 793 F.2d 1380 (5th Cir. Tex. 1986).

The official comments to the Code may be examined to determine the intent of the Code, but in case of conflict with the provisions of the Code, the latter prevails. *Bafle v. Remchow & Ford Motor Co.*, 58 Schuyl. L. Rec. 108 (Pa. 1962).

5. Policy of uniformity.

Virginia case law holding that extrinsic evidence may not be received to explain or supplement a written contract unless the court finds the writing is ambiguous has been changed by the UCC provision that the Code shall be liberally construed and applied to promote its underlying purposes and policies which include the continued expansion of commercial practices through custom, usage and agreement of the parties, and a finding of ambiguity is not necessary for the admission of extrinsic evidence about the usages of the trade and the parties' course of dealing. *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. Va. 1971).

Policy of uniformity utilized by court in adhering to Pennsylvania statute of limitations construction in Ohio case of first impression. *Val Decker Packing Co. v. Corn Prods. Sales Co.*, 23 Ohio Misc. 162, 411 F.2d 850 (6th Cir. Ohio 1969).

In matter of first impression in state, where there is authority in other jurisdictions, court will look to comments and examples of drafters of legislation as guide to "promote its underlying purposes and policies". In *re Rivet*, 299 F. Supp. 374 (E.D. Mich. 1969).

In *Franklin Nat. Bank v. Eurez Constr. Corp.* (1969) 60 Misc 2d 499, 301 NYS2d 845, 6 UCCRS 634, directive of Code that it be liberally construed to promote its purposes and policies, one of which is "to make uniform the law among the various

jurisdictions", was utilized by court in relying on cases from other jurisdictions holding that one who is not holder in due course but takes accommodation paper for value before it is due may enforce it against the accommodation maker, and that want of consideration is no defense to accommodation maker. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 60 Misc. 2d 499 (1969).

Because policy of Code is uniformity, sister-state interpretations are more than mere persuasive authority. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

6. Effect of agreements.

Warranties of §§ 75-3-414, 4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-103; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

Portions of Uniform Commercial Code relating to course of dealings or trade usage were not intended to be applied in manner to defeat Code's statute of frauds requirements and, at best, evidence of custom or usage in trade could be used to explain ambiguous portions of an agreement; thus, potato farmer could not introduce evidence of usage or course of dealings within trade to substantiate oral agreement with potato buyer. *Dangerfield v. Markel*, 222 N.W.2d 373 (N.D. 1974).

Obligations of reasonableness and care may not be disclaimed by agreement, but the parties may agree to the standards to be applied if they are not manifestly unreasonable. *Steelman v. Associates Dist. Corp.*, 121 Ga. App. 649, 175 S.E.2d 62 (1970).

7. —Particular agreements.

Both UCC § 1-102(3) and § 4-103(a) prevented a bank from contracting away its obligation to use ordinary care in the handling of depositors' funds. *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

Bank's conduct in blindly treating commercial paper made payable to its order as bearer paper, for sole reason that both drawer and bearer were known to bank, was manifestly unreasonable, and bank could not establish reasonableness of its conduct on any theory of implied contract in light of UCC § 1-102(3) and § 4-103(a), which prevent banks from contracting away their obligation to use ordinary care in handling depositors' funds. *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

Provisions of Act may be varied by agreement only when it is not otherwise expressly provided in Act; and any agreement concerning passage of title, whether oral or written, is subject to provision in § 2-401 limiting retention of title by seller in goods delivered to buyer to reservation of security interest. *First Nat'l Bank v. Smoker*, 153 Ind. App. 71, 286 N.E.2d 203, 287 N.E.2d 788 (3d Dist. 1972).

The UCC recognizes that there may be times when parties to an instrument may choose to alter the general provisions of the UCC to meet their particular purposes. *Etelson v. Suburban Trust Co.*, 263 Md. 376, 283 A.2d 408, 9 U.C.C. Rep. Serv. 1371 (1971) (further holding that individual indorsers on a corporate note who consented to any modification of the terms of the note or the release or exchange of any collateral without notice by the lenders, limited the protection to which they might have otherwise been entitled under the UCC.)

RESEARCH REFERENCES

ALR. Custom or usage as affecting time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality. 52 A.L.R.2d 925.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 6, 19.

15A Am. Jur. 2d, Commercial Code §§ 1, 2, 15, 17, 30.

73 Am. Jur. 2d, Statutes §§ 72 et seq., 145, 153, 154, 179 et seq.

Instruction to jury; right to vary code provisions by agreement, 6 Am. Jur. Pl & Pr Forms (Rev ed), Bank Deposits and Collections, Form 4:33.

Instruction to jury; liberal administration of remedies, 6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Form 2:951.

Variation by agreement, 18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:11 et seq.

CJS. 82 C.J.S., Statutes § 309.

Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December 1979.

§ 75-1-103. Supplementary general principles of law applicable.

Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

SOURCES: Codes, 1942, § 41A:1-103; Laws, 1966, ch. 316, § 1-103, eff March 31, 1968.

Cross References — Statute of frauds, see §§ 15-3-1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Agency.
3. Contracts.
4. —Parol evidence rule.
5. Contribution and indemnity.
6. Equity.
7. —Constructive trust.
8. —Estoppel and waiver.
9. —Subrogation.
10. —Unjust enrichment.
11. Law merchant; commercial paper.
12. —Sales.
13. —Secured transactions.
14. Statute of limitations.
15. Torts.

1. In general.

Under principle that pre-UCC law is applicable unless displaced by particular provisions of Code, UCC statute of frauds, rather than general statute of frauds, applies to alleged oral agreement and subsequent confirmatory letter, where general statute of frauds and UCC provision are in conflict and mandate different results. *H & W Indus., Inc. v. Formosa Plastics Corp., USA*, 860 F.2d 172 (5th Cir. 1988), reh'g denied, 863 F.2d 882 (5th Cir. 1988).

Finding no UCC Article 2 guidance to determining lessor's measure of recovery for lessee's continued use of leased copier after revocation, court would turn to doc-

trine of quantum meruit, which was not replaced by UCC. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Nowhere does the Uniform Commercial Code state in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the Code. They start with § 1-103, providing that common-law rules of negligence still apply. Section 3-419(3) limits recovery against collecting banks for conversion only if they acted in good faith and followed "reasonable commercial standards." Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrongdoing, but only if the payor is a holder in due course or paid "in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." A bank is prohibited from disclaiming "responsibility for its own lack of good faith or failure to exercise ordinary care" under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank's lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrongdoing, back to the bank under § 4-406(3). *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

Since the Uniform Commercial Code does not deal with the attributes of ownership of a joint tenant in investment securities, the court under UCC § 1-103 may apply the applicable common-law principles that govern joint tenancies. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

Under UCC § 1-103, the provisions of the Uniform Commercial Code do not totally preempt the fields of law in which they speak. Rather, they are supplemented by all principles of law and equity that they do not specifically displace. *S.S. Kresge Co. v. Port of Longview*, 18 Wash. App. 805, 573 P.2d 1336 (1977), review granted, 90 Wash. 2d 1004 (1978).

UCC § 1-103 is to be viewed as a general adoption of commonlaw principles to commercial transactions, where the Code

provisions do not apply to replace them. *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782 (1972).

UCC § 1-103 explicitly provides that previously recognized principles of law and equity should supplement statute in those areas where Code is silent. *Muir v. Jefferson Credit Corp.*, 108 N.J. Super. 586, 262 A.2d 33 (L. Div. 1970).

The instant section affords a basis for regarding the Code as being supplemented by existing law outside the Code unless displaced by provisions of the Code itself. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

The provisions of this section superimpose a general requirement of fundamental integrity on commercial transactions regulated by the Uniform Commercial Code. *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846 (3d Cir. Pa. 1964).

2. Agency.

Although written notice of termination of authority to execute instruments would be desirable and even though checking account agreement between corporation and bank required revocation of signatory authority to be in form of written corporate resolution, controverted question of fact as to whether bank received oral notice of withdrawal of signatory authorization presented material issue of fact which would ordinarily preclude summary judgment, since under UCC § 4-103, no agreement can disclaim bank's responsibility for its own lack of good faith or failure to exercise ordinary care, and since, under UCC § 1-103, general rule of principal and agent that notice of termination of agent's authority can be given orally was applicable in absence of specific UCC provision on point. *First Piedmont Bank & Trust Co. v. Doyle*, 97 Idaho 700, 551 P.2d 1336 (1976), overruled on other grounds, 101 Idaho 852, 623 P.2d 464 (1980).

Case law rule that, if bank knows that deposits by debtor in his own name are in fact held by him in fiduciary capacity, then bank may not apply such funds to individual indebtedness of debtor, was not nullified by adoption of Uniform Commercial Code. *South Cent. Livestock Dealers, Inc. v. Security State Bank*, 551 F.2d 1346 (5th Cir. Tex. 1977).

The rules of law governing the ratification of the acts of an agent are not altered by the Code. In *re Eton Furn. Co.*, 286 F.2d 93 (3d Cir. Pa. 1961).

Whether a person is the agent of the seller so that he has authority to bind the seller by a warranty, charge the seller with notice of a particular purpose for which the goods are desired by the buyer, or charge the seller with notice of non-conformity of the goods, is a question of fact to be determined by the jury when the evidence is conflicting. *Marble Card Elec. Corp. v. Maxwell Dynamometer Co.*, 10 Chest. Co. 145 (Pa. 1961).

3. Contracts.

In an action arising out of an accommodation endorsement by a decedent on a negotiable instrument which represented a consolidation and renewal of two outstanding notes owed by his son, the finding of the chancellor that the decedent, although in poor health and suffering from very poor vision, had been competent when he endorsed the note two weeks before his death was supported by the evidence and was free from manifest error. *Wilson v. Planters Bank*, 383 So. 2d 1089 (Miss. 1980).

An infant may not disaffirm a contract for necessities (UCC § 1-103, successor provision to *Pers Prop L* § 83). Even here, the phrase "necessaries" does not possess a fixed interpretation, but must be measured against both the infant's standard of living and the ability and willingness of his guardian, if he has one, to supply the needed services or articles. *Fisher v. Cattani*, 53 Misc. 2d 221 (1966).

A person is bound by a contract which he signs without reading it when there is no evidence that he could not have done so had he chosen. *Garner v. Tomcavage*, 34 Northumb. Legal J. 18 (Pa. 1962).

The Code does not change the fundamental principle of contract law that where the parties have merely made a tentative agreement and in fact have not agreed upon any contract there is no binding obligation which the court can enforce. *Arcuri v. Weiss*, 198 Pa. Super. 506, 184 A.2d 24 (1962).

4. —Parol evidence rule.

Since it was well established prior to enactment of Uniform Commercial Code

that if fraud were alleged with respect to formation of written contract, parol evidence rule did not bar consideration of contemporaneous oral agreement, and since UCC § 1-103 expressly provides that common-law principles of fraud and misrepresentation supplement Uniform Commercial Code's provisions, courts have continued to recognize pre-UCC fraud exception to parol evidence rule after adoption of parol evidence rule set forth in UCC § 2-202. Thus, in action by buyer of front-end loader to recover damages caused by fraudulent misrepresentations of seller's employee, chancellor was required to consider testimony by buyer-even though parties' written contract specifically declared that it was complete and exclusive statement of terms of their agreement (see UCC § 2-202(b))—that loader, although represented as being 1973 model, was in fact manufactured in 1968. *Franklin v. Lovitt Equip. Co.*, 420 So. 2d 1370 (Miss. 1982).

Under Pennsylvania law where parties, without any fraud or mistake, have deliberately put their engagements in writing, the writing is not only the best, but the only, evidence of their agreement. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

As provided in § 1-103, it was settled law in Pennsylvania prior to enactment of the Uniform Commercial Code that where fraud, accident, or mistake are alleged with respect to the execution of a written contract, prior oral agreements between the parties are admissible. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

In action to determine priority of security interests of bank and seller of hardware store, where evidence showed that seller's security interest in purchaser's collateral was perfected by filing on July 20, 1972, and that bank's interest in same collateral was perfected by filing on November 2, 1972; that bank, by subordination agreement entered into on July 12, 1972, had subordinated its claim against purchaser to claim of seller; and that on December 11, 1973, rider to subordination agreement executed by bank, seller, and

purchaser provided that agreement should apply only to first \$15,000 of purchaser's indebtedness to seller and that priority of claims concerning remainder of such indebtedness should be determined in accordance with UCC Article 9, (1) provisions of UCC Article 1 applied to case, since subordination agreement and rider related to transactions covered by Uniform Commercial Code and rider specifically referred to Article 9; (2) under UCC § 1-103, dealing with application of supplementary principles of law and equity, non-UCC parol evidence rule applied to case; (3) under UCC § 1-205(4), non-UCC parol evidence rule barred parol evidence by bank that rider was intended to grant bank priority as to claims in excess of first \$15,000 of purchaser's indebtedness to seller, since such evidence was totally inconsistent with unambiguous terms of rider which were controlling; and (4) even if seller's security interest should fail to meet test for special priority under UCC § 9-312(3), seller's interest would still prevail under first-to-file rule of UCC § 9-312(5). *Peoples Bank & Trust v. Reiff*, 256 N.W.2d 336 (N.D. 1977).

5. Contribution and indemnity.

In action for seller's breach of contract to sell and install at buyer's lumber plant two "super drying kilns" and two lumber-handling systems, where (1) contract contained performance guarantee that super kilns would reduce drying schedules for buyer's lumber by 50 per cent and that if they did not do so, seller would provide adequate production capacity equal to that of four conventional dry kilns at no additional cost to buyer, (2) buyer paid down payment of \$24,000, which was accepted by seller, (3) seller repudiated contract because it could not comply with performance guarantee, and (4) buyer thereafter purchased four conventional dry kilns and also a lumber "stacker-unstacker" from another seller, court held (1) that contract's performance guarantee was sufficiently definite and certain, (2) that because contract was breached by seller before installation of super kilns, liquidated damages provision of performance guarantee was inapplicable to measure buyer's damages and district court should have measured such dam-

ages under UCC §§ 2-712 and 2-713, (3) that regardless of whether district court, on remand of case, should apply cover provisions of UCC § 2-712 or contract-market price damages rule of UCC § 2-713 to case, court should base either cost of cover or market price of dry kilns on installed cost of conventional dry kilns with holding capacity twice that of the super kilns contracted for, since parties intended, by their performance guarantee, that super kilns' productivity was to be equivalent of conventional dry kilns with twice the holding capacity of such kilns, (4) that under UCC § 2-711(1), buyer was entitled to recover its down payment, (5) that since the Uniform Commercial Code did not provide remedy for seller's recovery of value of equipment shipped by seller to buyer before seller's breach of contract, UCC § 1-103 was applicable and seller, under common-law and equitable principles, was entitled to recover value of equipment still in buyer's possession, together with fair value of equipment that buyer had disposed of, and (6) that district court should compute under UCC § 2-713 damages caused buyer by seller's failure to deliver and install the lumber-handling systems. *Mann & Parker Lumber Co. v. Wel-Dri*, 579 F.2d 973 (6th Cir. Tenn. 1978).

Under UCC § 1-103, general law on contribution and indemnity continues to supplement provisions of UCC and was applicable in truck owner's action for breach of warranty against dealer and manufacturer of truck to recover amount paid out in settlement of lawsuits arising out of collision between automobile and truck. *Dodge Trucks, Inc. v. Wilson*, 140 Ga. App. 743, 231 S.E.2d 818 (1976), aff'd, 238 Ga. 636, 235 S.E.2d 142 (1977).

By its terms, UCC § 1-103 permits reference to general equity principles only if they are not "displaced by the particular provisions of this Act;" the "Act" is the entire Code. *Bowling Green, Inc. v. State St. Bank & Trust Co.*, 307 F. Supp. 648 (D. Mass. 1969), aff'd, 425 F.2d 81 (1st Cir. Mass. 1970), but see, *Maine Family Fed. Credit Union v. Sun Life Assurance Co.*, 727 A.2d 335 (Me. 1999).

6. Equity.

Notwithstanding Idaho statutory and common-law principles concerning gifts

and the creation of joint tenancies, transfers of investment securities are governed by Article 8 of the Idaho Uniform Commercial Code (UCC §§ 8-101 et seq.). However, where Article 8 is silent as to the applicable law, the Idaho court's disposition of a transfer of such securities, under Idaho UCC § 1-103, is governed by principles of law and equity that supplement the provisions of the Idaho Uniform Commercial Code. *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

Equitable principles continued to apply to permit a seller to recover from a third party the sales price of automobiles as represented by checks issued by the purchaser with every intention that they would be paid upon presentment, and this despite the seller's loss of the right of rescission, where it was the act of the third party which rendered the purchaser's checks worthless to that party's financial advantage. *Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc.*, 387 S.W.2d 17 (Ky. 1965).

7. —Constructive trust.

Where (1) plaintiff and his wife purchased used mobile home, (2) plaintiff's father-in-law cosigned security agreement and note as accommodation maker, (3) plaintiff defaulted on payments, (4) plaintiff's father-in-law, with secured party's consent, obtained possession of home, paid off balance due on note, and made repairs on home, (5) secured party obtained repossession title in its name, released security agreement, and transferred repossession title to plaintiff's father-in-law without notifying plaintiff, who was in jail, of either the account delinquency or the subsequent transfer of title, and (6) after plaintiff's release from jail, plaintiff's father-in-law sold home with plaintiff's consent, but did not give accounting of sale or proceeds therefrom to plaintiff, court held (1) that plaintiff did not waive right to notice of disposition of home under UCC § 9-504(3), since UCC § 9-501(3)(b) specifically states that such right cannot be waived; (2) plaintiff's father-in-law, as accommodation maker of note, did not fall within scope of UCC § 9-504(5), dealing with transfers of collateral that are not sales and thus do not

require notice to debtor; (3) UCC § 9-504(5) did not contemplate complete extinguishment of plaintiff's right to home, as was done in present case by secured party's transfer of repossession title to plaintiff's father-in-law; and (4) under UCC § 9-507(1) and UCC § 1-103, plaintiff was entitled to damages for conversion of home on basis of benefit to defendant wrongdoers, rather than on basis of allowing full value of home as enhanced by wrongdoers. *Western Nat'l Bank v. Harrison*, 577 P.2d 635, 23 U.C.C. Rep. Serv. 1383 (Wyo. 1978) (stating, alternatively, that once plaintiff had established conversion of home and consequential right to nominal damages therefor, he became eligible for rule-of-thumb damages allowed by UCC § 9-507(1)).

8. —Estoppel and waiver.

Failure of customer to give prior consent, as required by Florida UCC § 5-106(2), to extension of irrevocable letter of credit did not invalidate such extension where customer acquiesced in extended letter after its issuance. In such case customer, under general principles of equity incorporated into Florida Uniform Commercial Code by Florida UCC § 1-103, was estopped from denying that it was bound by the extended letter. *Lewis State Bank v. Advance Mtg. Corp.*, 362 So. 2d 406, 25 U.C.C. Rep. Serv. 245 (Fla. App. 1978) (holding that letter of credit in suit remained irrevocable and unconditional within meaning of Florida UCC § 5-103(1)(a)).

Under Illinois law some "title" or "right" can be created by estoppel. *Avco Delta Corp. Canada v. United States*, 459 F.2d 436 (7th Cir. Ill. 1972).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. *Congress Fin.*

Corp. v. Sterling-Coin Op Mach. Corp., 456 F.2d 451 (3d Cir. Pa. 1972).

Defense of estoppel to ameliorate what would otherwise be an equitable result, a doctrine adopted and applied under New York decisional law, was properly raised as an affirmative defense in accordance with the Federal Rules, because of the directive of UCC § 1-103 for the preservation of principles of law and equity. *Congress Factors v. Malden Mills, Inc.*, 332 F. Supp. 1384 (D.N.J. 1971).

Although UCC § 1-103 allows principle of estoppel to supplement UCC provisions, grain farmer was not estopped from asserting statute of frauds, UCC § 2-201, as defense to alleged oral contract for sale of 40,000 bushels of grain where there was no evidence of fraud, positive misrepresentation or unconscionable conduct akin to fraud chargeable to farmer. *Farmers Coop. Ass'n v. Cole*, 239 N.W.2d 808 (N.D. 1976).

In action by buyer against seller arising out of nondelivery of wheat under oral sales contract, original oral contract was not rendered unenforceable by UCC § 2-201 statute of frauds, where seller admitted existence of contract. Nor was oral modification of contract as to delivery date due to unavailability of elevator space rendered unenforceable by statute of frauds requirement under UCC §§ 2-209 and 2-201 where pursuant to UCC § 1-103 and 2-209, seller waived statute of frauds defense through his course of performance under UCC § 2-208 and 1-205 in delivering 36 truckloads of wheat well after original delivery date without making timely objection. *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 552 P.2d 63 (1976).

In action by buyer to enforce oral contract for sale of 20,000 bushels of corn at \$1.22 per bushel for future delivery, seller was barred from raising defense of statute of fraud, UCC § 2-201(1) by doctrine of equitable estoppel where buyer substantially changed its position in reliance on oral contract by selling 18,000 bushels of corn to two third parties in accordance with buyer's general business practice, and where seller knew or should have known that buyer would rely on contract and would resell corn. *Farmers Elevator*

Co. v. Lyle, 90 S.D. 86, 238 N.W.2d 290 (1976).

Bank's action in converting a transaction which clearly contemplated insurance, into an assignment which would have the effect of depriving the buyer of the waiver of subrogation provision, was not "good faith" as defined by UCC. *Integrity Ins. Co. v. Davis*, 116 N.J. Super. 417, 282 A.2d 452 (1971).

No particular provision of Code displacing law of waiver, supplementary general principles of law were applicable in this regard under Code § 1-103. *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726, 4 U.C.C. Rep. Serv. 137 (1967) (premise of no Code displacement of law of waiver expressly disagreed with by *United States v. Greenwich Mill & Elevator Co.* (1968, ND Ohio) 291 F Supp 609, 17 Ohio Misc 71, 46 Ohio Ops 2d 102, 5 UCCRS 965 (applying Ohio law) and holding that Code § 9-306(2) codified doctrine of waiver).

When one of two innocent persons must suffer through the fraud of a third person the one who made it possible for the fraud to be perpetrated must bear the loss. *GMAC v. Manheim Auto Auction*, 25 Pa. D. & C.2d 179 (1961).

9. —Subrogation.

Surety's right of subrogation is not displaced by Article 9 of Code. *National Shawmut Bank v. New Amsterdam Cas. Co.*, 411 F.2d 843 (1st Cir. Mass. 1969).

Where (1) purchaser of truck, who was in default on loan made by first secured creditor, borrowed money from second secured creditor to pay off first creditor's loan, (2) first creditor's lien on truck was then discharged of record, (3) second creditor, although it obtained note and security agreement covering truck, which instruments were executed on behalf of corporation of which debtor was officer, neglected (a) to effect transfer of truck's title to debtor's corporation, (b) to perfect security interest in truck by recording its lien on vehicle's title document, and (c) to record such title document with Director of Motor Vehicles, (4) debtor's corporation became insolvent, and receiver was appointed therefor, and (5) truck was sold at judicial sale, and receiver claimed that his interest in sale proceeds had priority over

second secured creditor's lien on truck, court held (1) that under UCC § 9-301(1)(b) and (3), providing that unperfected security interest is subordinate to rights of one who becomes "lien creditor" without knowledge of such security interest and before it is perfected, receiver of debtor's corporation had apparent priority as a "lien creditor" because second creditor's unperfected lien on truck would yield to receiver's priority as "lien creditor" who had no knowledge of second creditor's lien, in absence of any evidence that creditors represented by receiver had any such knowledge themselves, (2) that despite receiver's apparent priority, the Uniform Commercial Code, under UCC § 1-103, is supplemented by principles of law and equity unless such principles are displaced by any provision of the code, (3) that no particular provision of UCC Article 9 had displaced the doctrine of equitable subrogation where such doctrine was properly invocable as a matter of substantive law, and (4) that under all circumstances of case, second creditor's contention that it was entitled to be subrogated to first creditor's recorded lien before such lien was discharged, on the ground that second creditor's money was used to pay off such prior lien, should be sustained. *Kaplan v. Walker*, 164 N.J. Super. 130, 395 A.2d 897 (App. Div. 1978).

Terms of Uniform Commercial Code do not abrogate, modify, affect or abridge performing surety's rights under equitable doctrine of subrogation, and subrogation claim thereunder does not lose its priority rank when it is not filed pursuant to requirements of Code. *Mid-Continent Cas. Co. v. First Nat'l Bank & Trust Co.*, 531 P.2d 1370 (Okla. 1975).

Doctrine of equitable subrogation in suretyship cases has not been affected by adoption of Uniform Commercial Code. In *re J.V. Gleason Co.*, 452 F.2d 1219 (8th Cir. Minn. 1971).

Silence of Uniform Commercial Code on subject of subrogation and equitable liens created thereby indicates an intentional recognition of and a desire to preserve the doctrine of equitable subrogation. In *re J.V. Gleason Co.*, 452 F.2d 1219 (8th Cir. Minn. 1971).

Where there are two security interests in the same collateral and a third person

pays the debt of the debtor to the holder of the prior interest, the third person, despite the fact that he did not take an assignment of the prior interest would, on principles of subrogation, succeed to the rights or the holder of the prior interest provided that the interest of the intervening lienor was not prejudicially affected. This principle of subrogation is not superseded by the Uniform Commercial Code which provides in the instant section that unless displaced by the particular provisions of the Code, the principles of law and equity "shall supplement its provisions" because no provision of the Code purports to affect the fundamental doctrine of subrogation. *French Lumber Co. v. Commercial Realty & Fin. Co.*, 346 Mass. 716, 195 N.E.2d 507 (1964).

10. —Unjust enrichment.

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Equitable principles, which supplement Code's provisions, demand that buyer seeking cancellation on grounds of misrepresentation should return what he has received. *Melms v. Mitchell*, 266 Or. 208, 512 P.2d 1336, 65 A.L.R.3d 376 (1973).

11. Law merchant; commercial paper.

Where third person purchased money order for \$286 from defendant bank, gave it to plaintiff to obtain release of automobile on which plaintiff had lien for towing and storage charges, immediately returned to defendant bank and ordered that payment be stopped on such money order, and was refunded purchase price

thereof, bank in action by plaintiff was liable for face amount of such order, even though money orders are not specifically provided for in the Uniform Commercial Code. Under UCC § 1-103, court would apply law-merchant principle concerning money orders and enforce meaning given by merchants to such orders when issued by bank that person who purchases money order is authorized to bind bank's credit to limit stated in order, and in present case money order issued by defendant stated that it was "not valid over \$1,000." *Mirabile v. Udoh*, 92 Misc. 2d 168, 23 U.C.C. Rep. Serv. 101 (1977) (stating that phrase "not valid over \$1,000" was concession by bank that purchaser of money order had authority to bind bank's credit to that amount).

Pre-Code rule that one who receives before maturity note signed by maker for accommodation of another is not affected by mere fact that it was made without consideration, continues under Code. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 60 Misc. 2d 499 (1969).

A provision in commercial paper for costs and expenses if "legal proceedings be instituted," is to be interpreted according to the general contract law principles as there is nothing in the Code which displaces such principles. *Bryant v. Bowles*, 108 N.H. 315, 234 A.2d 534 (1967).

Whether a note is usurious is determined by general principles and statutes and not by the Code. *Cooper v. Cherokee Village Dev. Co.*, 236 Ark. 37, 364 S.W.2d 158, 1 U.C.C. Rep. Serv. 440 (1963); *Pioneer Credit Corp. v. Radding*, 149 Conn. 157, 176 A.2d 560 (1961).

12. —Sales.

In action for breach of warranty and fraud on part of sellers in sale of bull, buyer's remedies were not limited under UCC § 719(1)(b) by paragraph in sales agreement which provided for buyers' remedy in event bull died, since (1) there was no provision that paragraph provided exclusive remedy and (2) contract clause limiting liability would not be applied in fraud action. *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974).

No particular provisions of the Uniform Commercial Code displaced statute [Massachusetts G.L. c. 259, § 6] making void

certain sales of stock not owned by sellers. *Colt v. Fradkin*, 361 Mass. 447, 281 N.E.2d 213 (1972).

The Uniform Commercial Code does not change the rule that a vendor cannot rescind and reclaim the goods as against an attachment or execution on a debt contracted subsequent to the alleged voidable sale. *In re Kravitz*, 278 F.2d 820 (3d Cir. Pa. 1960).

13. —Secured transactions.

Although principles of estoppel and good faith underlie entire UCC, including provisions of Article 9, and lack of good faith on part of secured creditor may alter priorities which would otherwise be determined by Article 9 provisions, mere fact that secured party stood to gain from debtors' wrongful conduct did not in and of itself show lack of good faith and fact that secured party authorized debtors to purchase grain on credit from third party did not constitute evidence of fraudulent scheme or conspiracy. *Central Soya Co. v. Bundrick*, 137 Ga. App. 63, 222 S.E.2d 852 (1975).

Where defendant bank made loan to debtor under name "Lee Anderson," took security agreement on new automobile which was properly filed in county clerk's office and indexed under name of "Lee Anderson," but did not examine manufacturer's statement of origin, issued earlier to James Anderson, and took no steps to assure itself that car's title papers would be issued in name of Lee Anderson, where debtor applied for and received certificate of title in name of "James L. Anderson," and where plaintiff bank also made loan to debtor, as "James L. Anderson," taking and filing security agreement covering same automobile after checking with county clerk's office and determining that no prior liens on automobile had been filed against James L. Anderson, defendant bank's failure to file its lien in name shown on certificate of title was responsible for plaintiff bank's later determination, justified by lien records of county clerk, that there was no prior lien on record against automobile owned by James L. Anderson, and thus plaintiff bank's lien was entitled to priority over defendant bank's lien, although defendant bank was guilty of no intentional wrong

and did all that was required by applicable provisions of UCC in taking and filing its security agreement. *Central Nat'l Bank & Trust Co. v. Community Bank & Trust Co.*, 528 P.2d 710 (1974).

Since Kentucky Commercial Code did not contain any provision defining the relative priorities of a creditor as against a reclaiming seller, the court would turn to relevant common law of Kentucky for the needed answer. *In re Mel Golde Shoes, Inc.*, 403 F.2d 658 (6th Cir. Ky. 1968).

The principle that a reclamation seller's interest is subordinate to that of a lien creditor who extended credit subsequent to the sale is not displaced by the particular provisions of § 2-702. *In re Kravitz*, 278 F.2d 820 (3d Cir. Pa. 1960).

14. Statute of limitations.

Since there is no special statute of limitations set forth in Commercial Code, three-year statute of limitations in Code of Civil Procedure was applicable to action for alleged conversion of negotiable instrument. *Bank of Am. Nat'l Trust & Sav. Ass'n v. Security Pac. Nat'l Bank*, 23 Cal. App. 3d 638 (5th Dist. 1972).

15. Torts.

Bank is not liable for dishonored check, under either common law negligence

theory or common law negligent misrepresentation theory, where check is presented to bank customer by buyer of customer's business, during closing held on premises of bank, bank officer present at closing asks customer to step outside room for moment, asks customer what he thinks about check, customer responds that he knows nothing about check, banker states that check looks all right, and customer does not ask banker to have check verified nor does banker volunteer to do so. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

Liability of port as bailee for common-law negligence, as codified by UCC § 7-204(1), for damage to bailor's goods caused by collapse of roof of port's warehouse was supplemented, under UCC § 1-103, by doctrine of strict vicarious liability in tort only to extent that port would be liable for acts of independent contractor over whom port had right of control. *S.S. Kresge Co. v. Port of Longview*, 18 Wash. App. 805, 573 P.2d 1336 (1977), review granted, 90 Wash. 2d 1004 (1978).

RESEARCH REFERENCES

ALR. Automobile or motorcycle as necessary for infant. 56 A.L.R.3d 1335.

What constitutes impairment of proposed intervenor's interest to support intervention as matter of right under Rule 24(a)(2) of Federal Rules of Civil Procedure in actions involving bankruptcy. 82 A.L.R. Fed. 435.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 15.

6 Am. Jur. Pl & Pr Forms (Rev) Bank Deposits and Collections, Form 4:251. (Complaint, petition, or declaration; by drawee; for amount of overdraft).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:21 et seq. (Supplementary non-code principles).

13 Am. Jur. Trials, Misrepresentation in Automobile Sales §§ 1 et seq.

37 Am. Jur. Proof of Facts 2d 739, Principal's Repudiation of Agent's Unauthorized Act.

CJS. 15A C.J.S., Common Law §§ 1 et seq.

Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L. J. 467, August, 1987.

Allen and Hillman, Evidentiary Problems In — And Solutions For — The Uniform Commercial Code. 1984 Duke L. J., February, 1984.

§ 75-1-104. Construction against implicit repeal.

This code being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if such construction can reasonably be avoided.

SOURCES: Codes, 1942, § 41A:1-104; Laws, 1966, ch. 316, § 1-104, eff March 31, 1968.

Cross References — Construction of statutes generally, see §§ 1-3-1 et seq.

RESEARCH REFERENCES

ALR. Applicability of constitutional requirement that repealing or amendatory statute refer to statute repealed or amended, to repeal or amendment by implication. 5 A.L.R.2d 1270.

Am Jur. 11 Am. Jur. 2d, Bills and Notes § 19.

15A Am. Jur. 2d, Commercial Code § 30.

73 Am. Jur. 2d, Statutes §§ 279 et seq.

CJS. 82 C.J.S., Statutes §§ 283 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-1-105. Territorial application of the code; parties' power to choose applicable law.

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement, this code applies to transactions bearing an appropriate relation to this state. Provided, however, the law of the State of Mississippi shall always govern the rights and duties of the parties in regard to disclaimers of implied warranties of merchantability or fitness, limitations of remedies for breaches of implied warranties of merchantability or fitness, or the necessity for privity of contract to maintain a civil action for breach of implied warranties of merchantability or fitness notwithstanding any agreement by the parties that the laws of some other state or nation shall govern the rights and duties of the parties.

(2) Where one of the following provisions of this code specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law (including the conflict of laws rules) so specified:

Rights of creditors against sold goods (Section 75-2-402).

Applicability of the Article on Leases (Sections 75-2A-105 and 75-2A-106).

Applicability of the Article on Bank Deposits and Collections (Section 75-4-102).

Governing law in the Article on Funds Transfers (Section 75-4A-507).

Letters of credit (Section 75-5-116).

Applicability of the Article on Investment Securities (Section 75-8-110).

Law governing perfection, the effect of perfection or nonperfection, and the priority of security interests and agricultural liens (Sections 75-9-301 through 75-9-307).

SOURCES: Codes, 1942, § 41A:1-105; Laws, 1966, ch. 316, § 1-105; Laws, 1977, ch. 452, § 1; Laws, 1991, ch. 316, § 1; Laws, 1994, ch. 445, § 2; Laws, 1996, ch. 460, § 19; Laws, 1996, ch. 468, § 53; Laws, 2001, ch. 495, § 4, eff from and after Jan. 1, 2002.

Editor's Note — Laws, 1996, ch. 460, §§ 28, 29, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Laws, 1996, ch. 468, § 72, provides as follows:

"SECTION 72. (a) This act does not affect an action or proceeding commenced before this act takes effect.

"(b) If a security interest in a security is perfected at the date this act takes effect, and the action by which the security interest was perfected would suffice to perfect a security interest under this act, no further action is required to continue perfection. If a security interest in a security is perfected at the date this act takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this act, the security interest remains perfected for a period of four (4) months after the effective date and continues perfected thereafter if appropriate action to perfect under this act is taken within that period. If a security interest is perfected at the date this act takes effect and the security interest can be perfected by filing under this act, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect."

Amendment Notes — The 2001 amendment, effective January 1, 2002, deleted the former last two paragraphs; added the present last paragraph; and substituted "Article" for "Chapter" throughout the section.

JUDICIAL DECISIONS

1. In general.
2. Choice of applicable law by agreement.
3. —Reasonable relation.
4. Choice of applicable law in absence of agreement.
5. —Appropriate relation.

1. In general.

In suit by hospital cashier who was injured while operating cash register manufactured by defendant manufacturer-seller after it had been delivered by buyer to hospital, court held, with respect to plaintiff's breach-of-implied-warranty claims, (1) that under Mississippi UCC

§ 1-105(1), which sets forth specific conflict-of-laws rule for warranty claims, Mississippi law governed the rights and duties of parties with regard to (a) disclaimers of implied warranties of merchantability or fitness, (b) limitation of remedies for breach of such warranties, and (c) necessity of privity of contract to maintain action for breach of warranty; (2) that rule of Mississippi UCC § 1-105(1), as expressly stated therein, applied notwithstanding agreement by parties that laws of another state or of foreign nation governed parties' rights and duties; (3) that under Mississippi UCC § 1-105(1), application of Mississippi substan-

tive law on privity of contract, warranty disclaimers, and limitation of remedies in warranty action was authorized only if transaction that gave rise to warranty claim bore some reasonable and appropriate relation to Mississippi; (4) that facts of case showed that transactions that gave rise to plaintiff's warranty claim did not bear any relation to Mississippi and did not warrant application of Mississippi substantive law; (5) that under conflict-of-law "center-of-gravity" doctrine, Alabama had most significant relation to transactions in suit; (6) that since Alabama's breach-of-warranty statute of limitations (see Alabama UCC § 2-725(1) and (2)) would be regarded as procedural, Mississippi's breach-of-warranty statute of limitations (see Mississippi UCC § 2-725(1) and (2)) governed case; and (7) that under Mississippi UCC § 2-725(1) and (2), plaintiff's warranty claim was barred because tender of delivery of cash register that caused plaintiff's injuries had occurred more than six years before accrual of plaintiff's cause of action. *Jackson v. National Semi-Conductor Data Checker/DTS, Inc.*, 660 F. Supp. 65 (S.D. Miss. 1986).

In action by buyer of computer system for damages for system's failure to function properly, court held (1) that parties' designation under UCC § 1-105(1) of Massachusetts law to govern any claims of breach of their sales contract was immaterial, since such claims were governed by limitation period contained in UCC § 2-725(1), which was adopted by both New York and Massachusetts; (2) that contract in suit was not one for performance of services, as alleged by the buyer, but was one for purchase of goods within meaning of UCC § 2-106(1); (3) that action for breach of contract was not timely commenced by buyer, since breach occurred in January, 1971, and buyer did not commence suit until August 14, 1975, which was more than four years after cause of action accrued; (4) that action for fraud in the inducement was timely commenced, since the applicable statute of limitations under New York law for such action is either six years from commission of the fraud, or two years from discovery; (5) that UCC § 2-725(2), which deals with

warranty that explicitly extends to future performance and provides that discovery of breach must await such performance, did not apply, since warranty under UCC § 2-725(2) must expressly refer to the future and implied warranty alleged by buyer, by its very nature, did not do so; and (6) that seller's attempts to repair computer system did not toll running of statute of limitations prescribed by UCC § 2-725(1). *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. N.Y. 1979).

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In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been perfected in several states, including New

Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such security agreements and to owe creditor over \$27 million in principal debts and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in

UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

As to sale made in Pennsylvania, Pennsylvania law is controlling as to whether there is a warranty. *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888 (E.D. Pa. 1962), *rev'd* on other grounds, 320 F.2d 130, 97 A.L.R.2d 806 (3d Cir. Pa. 1963).

The Uniform Commercial Code does not determine what law governs a claim for damages for tort. *Folk v. York-Shipley, Inc.*, 239 A.2d 236 (Del. 1968).

UCC Sec 1-105 has been cited as illustrative of the modern flexible approach to the selection of the applicable law where the question was whether the law of the state where the tort was committed should govern. *Casey v. Manson Constr. & Eng'g Co.*, 247 Or. 274, 428 P.2d 898 (1967).

2. Choice of applicable law by agreement.

The court enforced a forum-selection clause in a contract that called for the application of Louisiana law, notwithstanding the contention that the enforcement of the forum-selection clause would violate the public policy of Mississippi because it would violate the statute, as the Mississippi party to the contract assented to and agreed to sign a form contract printed by the Louisiana party to the contract and made no objections to the contract. *Tel-Com Mgt., Inc. v. Waveland Resort Inns, Inc.*, 782 So. 2d 149 (Miss. 2001).

Under Uniform Commercial Code, parties' contractual choice of law will be upheld unless transaction lacks normal connection with state whose law was selected; thus, only when it is shown that contact did not occur in normal course of transaction, but was contrived to validate parties' choice of law, will relationship be held unreasonable. *IHP Indus., Inc. v. PermAlert, Esp.*, 947 F. Supp. 257 (S.D. Miss. 1996).

It is established principle under UCC § 1-105, that parties to contract may consent, in absence of strong countervailing public policy of state, to law to be applied with respect to contract. *Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp.*, 466 F. Supp. 846 (E.D.N.Y.

1979), aff'd, 614 F.2d 1289 (2d Cir. N.Y. 1979).

Under UCC § 1-105(1), the parties are free to choose the law that they wish to govern the transaction. However, the provisions of Article 9 of the Uniform Commercial Code contain several conflict-of-law rules. Among these rules are transactions to which UCC §§ 9-102(1) and 9-103 apply. In these circumstances, regardless of UCC § 1-105(1), the law governing the transaction will be the mandatory provisions that are stated in UCC §§ 9-102(1) and 9-103. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

UCC § 1-105(1) affirmatively states the right of the parties to a multistate transaction, or a transaction involving foreign trade, to choose their own law. This right is subject to the firm rules stated in the six UCC sections referred to in UCC § 1-105(2) and is limited to jurisdictions to which the transaction bears a "reasonable relation." Under the test of what is a "reasonable relation," the law chosen is generally that of a jurisdiction wherein a sufficiently significant part of the making or performance of the contract occurred or will occur. However, an agreement as to choice of law will sometimes take effect as a shorthand expression of the intent of the parties concerning matters governed by their agreement, even though the transaction has no significant contact with the jurisdiction chosen. *National Equip. Rental, Ltd. v. Taylor*, 225 Kan. 58, 587 P.2d 870 (1978).

Where (1) Navajo Indian purchased pick-up truck from Arizona seller whose place of business was located outside boundaries of Navajo Reservation, (2) purchase price of truck was financed by installment-sale security agreement which provided that validity and construction of agreement would be governed by Arizona law and that secured party should have all rights and remedies for default provided by Arizona Uniform Commercial Code, and (3) seller, on buyer's default in making payments, effected self-help repossession of truck pursuant to UCC § 9-503 within boundaries of Navajo Reservation and without breach of the peace, under UCC § 1-105(1) parties by their

contractual choice of Arizona law to govern transaction excluded any possibility that transaction would be affected by provisions of Navajo Tribal Code which prescribed civil penalty for repossessing personal property of Navajo Indians on land subject to jurisdiction of Navajo Tribe where such repossession was not effected with written consent of purchaser at time of repossession. *Brown v. Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689, 23 U.C.C. Rep. Serv. 266 (Ct. App. 1977) (holding that since seller had right under Arizona law to do exactly what it did in effecting repossession, no liability therefor attached to seller).

Under Georgia UCC § 1-105(1), Georgia allows contracting parties to make their own choice of the applicable state law. *Crompton-Richmond Co. v. Briggs*, 560 F.2d 1195 (5th Cir. Ga. 1977).

Paragraph of contract for sale of computer core memories which provided that agreement would be construed under laws of California was valid under UCC § 1-105. *Three-Seventy Leasing Corp. v. Ampex Corp.*, 528 F.2d 993 (5th Cir. Tex. 1976).

In action by corporation headquartered in Pennsylvania, as lessee of Swiss hotel, seeking to enjoin Pennsylvania bank from honoring lessor's draft under letter of credit issued pursuant to lease agreement, Pennsylvania Uniform Commercial Code was applicable law, although each of the three parties had, by agreement, assumed obligations to the others, and each agreement specified different controlling law (i.e. lease agreement provided it would be governed by law of Switzerland, letter of credit agreement specified it would be construed in accordance with Pennsylvania law, and letter of credit itself stated that its engagement was subject to Uniform Customs and Practice for Documentary Credits), since it was clear that law of Switzerland did not apply to question whether bank should be enjoined from honoring draft and since Uniform Customs and Practice for Documentary Credits did not purport to offer rules governing issuance of injunction against honor of draft. *Intraworld Indus., Inc. v. Girard Trust Bank*, 461 Pa. 343, 336 A.2d 316 (1975).

Member of Navaho Nation residing on Navaho Reservation in New Mexico who purchased pickup truck in New Mexico and finance company that financed purchase were free under UCC § 1-105 to choose whether law of state of New Mexico or that of Navaho Tribe was applicable to transaction. *Jim v. CIT Fin. Servs. Corp.*, 87 N.M. 362, 533 P.2d 751 (1975).

Where contract between two Delaware corporations for design and construction of tanker contained provision that contract should be governed by laws of United States and State of New York, court would recognize this choice of law provision. *Falcon Tankers, Inc. v. Litton Sys.*, 300 A.2d 231 (Del. Super. 1972).

While as between themselves the parties to a security interest transaction may lawfully agree as to the governing law, where the rights of third party creditors in the property of one of the parties are in question, the law of the state of the domicile or place of business of the contracting party in question is controlling. *Industrial Packaging Prods. Co. v. Fort Pitt Packaging Int'l, Inc.*, 399 Pa. 643, 161 A.2d 19 (1960).

3. —Reasonable relation.

Contract between Illinois pipe seller and Missouri buyer, which was qualified to do business in Mississippi, bore reasonable relation to Mississippi and therefore Mississippi's conflict of law rule for warranty claims applied, requiring application of Mississippi's substantive law to implied warranty claims, notwithstanding any choice of law provision to the contrary; seller entered into contract to be performed in Mississippi, seller shipped its product to Mississippi, and seller sent field technician to aid in installation of pipes in Mississippi. *IHP Indus., Inc. v. PermAlert, Esp.*, 947 F. Supp. 257 (S.D. Miss. 1996).

UCC § 1-105(1) expressly provides that "the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties." The one requirement, however, is that the law of the state which the parties have chosen must bear a "reasonable relation" to the transaction involved. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

UCC § 1-105(1) requires a reasonable relation between the transaction and the state whose law is chosen to apply to it. *U.S. Manganese Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 576 F.2d 153 (8th Cir. Ark. 1978).

In action by English pipe manufacturer against American corporations for breach of contract for sale and distribution of plaintiff's pipes in United States, applicable law was that of England where contract contained explicit choice-of-law clause specifying that contract would be covered by English law; defendants' purchase in England of plaintiff's pipes provided "reasonable relation" between transaction and England, thus validating clause under UCC § 1-105(1). *L. Orlik Ltd. v. Helme Prods. Inc.*, 427 F. Supp. 771 (S.D.N.Y. 1977).

Reasonable relationship test was met where whiskey distributorship contracts between English exporters and New York importers provided that they were to be governed by English law and where contracts were executed in United Kingdom, exporters were incorporated in United Kingdom, performance by exporters occurred in United Kingdom, and payment was made and title to goods passed in United Kingdom. *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221 (S.D.N.Y. 1975).

Corporate notes issued by Delaware corporation which stated that they would be governed by and construed in accordance with law of New York, but which bore no reasonable relationship to New York, bore reasonable relationship to Delaware, and its law controlled whether holder was owner of negotiable instrument. Where corporate note stated that it had been made and delivered in California and would be governed by laws of California, issuance of note to holders bore reasonable relationship to California and issue of negotiability of instrument would be determined by California law. Third corporate note which was issued and paid for in New York and which incorporated agreement making note subject to laws of state of New York bore reasonable relationship to New York so as to make its laws determinative of its negotiability. *Baker v. Gotz*, 387 F. Supp. 1381 (D. Del. 1975), *aff'd*, 523 F.2d 1050 (3d Cir. Del. 1975).

Choice of law provision in brokerage agreement was valid and Usury Law of New York would be applied, where brokerage arrangements between parties bore "reasonable relationship" to New York, and "significant enough portion" of performance occurred there. *Mell v. Goodbody & Co.*, 10 Ill. App. 3d 809, 295 N.E.2d 97, 63 A.L.R.3d 335 (1st Dist. 1973).

In a diversity action concerning, among other issues, "transactions in goods" within the scope of the U.C.C.'s article on sales, which were purchased by plaintiff, a New York corporation, from defendant, an Ohio corporation, the court, pursuant to the conflict of law rules of New York, the forum state, held that since New York was "appropriately related" to the transaction herein involved and Ohio was "reasonably related" to the "transaction," Ohio law governed insofar as the parties had agreed to let the law of Ohio govern the validity, interpretation and performance of the contract. *County Asphalt, Inc. v. Lewis Welding & Eng'g Corp.*, 444 F.2d 372 (2d Cir. N.Y. 1971), cert. denied, 404 U.S. 939, 92 S. Ct. 272, 30 L. Ed. 2d 252 (1971).

Subsection (1) of this section constitutes legislative recognition of the wisdom of permitting parties to give added certainty to a contract by expressly stipulating reasonably the governing law. *Maxwell Shapiro Woolen Co. v. Amerotron Corp.*, 339 Mass. 252, 158 N.E.2d 875 (1959).

4. Choice of applicable law in absence of agreement.

Section 75-1-105 authorizes application of Mississippi substantive law on privity, disclaimers and limitations of remedies in warranty action only when transaction giving rise to warranty claim bears some reasonable and appropriate relationship to Mississippi, and in absence of such relation, application of Mississippi substantive warranty law violates constitutional guarantees. *Price v. International Tel. & Tel. Corp.*, 651 F. Supp. 706 (S.D. Miss. 1986).

In debtor's action to enjoin creditor from enforcing two security agreements against collateral therefor, where evidence showed (1) that debtor and creditor had entered into such security agreements and that one of them had been

perfected in several states, including New Jersey, (2) that second security agreement had in no way diminished validity of first security agreement, (3) that debtor's reason for seeking injunction against enforcement of such security agreements was creditor's alleged oral agreement to refrain from foreclosing on any debts due it in order to allow debtor to attain a healthy operating condition, (4) that creditor, after concluding that debtor could not attain a healthy operating condition, formally declared debtor to be in default under such security agreements and to owe creditor over \$27 million in principal debt, and (5) that creditor had then accelerated maturity of all of debtor's term obligations and demanded payment of all principal and interest on debtor's demand obligations, court held (1) that debtor's claim of alleged oral agreement to refrain from foreclosure was unsupported by the evidence, (2) that under (a) UCC § 1-105(1), dealing with power of parties to choose law applicable to their transactions, (b) UCC § 9-102(1), which intends that substantive law of place where collateral is located governs without regard to possible contracts in other jurisdictions, and (c) UCC § 9-103, which lays down numerous choice-of-law rules regarding creation, perfection, and priorities in multistate security-agreement transactions, law of New Jersey governed security agreements in suit, (3) that security interests created by security agreements in suit were valid, (4) that debtor had failed to show any reason for granting injunctive relief against their enforcement, and (5) that on debtor's default, creditor under UCC § 9-501(1), as adopted in New Jersey, had right to reduce its claim to judgment and to foreclose on the collateral. *Doyle v. Northrop Corp.*, 455 F. Supp. 1318 (D.N.J. 1978).

In action by Rhode Island bank to recover on 2 checks drawn on Massachusetts bank by Massachusetts corporation which had stopped payment, Massachusetts law applied, absent any evidence that parties agreed that a particular state's law would apply. *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

In determining what law governs, traditional contract conflict rules must give

way to the requirements of the UCC, as interpreted, though by way of dictum by the Pennsylvania Supreme Court as adopting the "grouping of contacts" rule. *Tucker v. Capitol Mach., Inc.*, 307 F. Supp. 291 (M.D. Pa. 1969).

Where contract for construction of a boat was made in New York, and payment and delivery were to be made in that state, the New York version of the UCC was applicable to the transaction. *Silver v. Sloop Silver Cloud*, 259 F. Supp. 187 (S.D.N.Y. 1966).

Diversity action based on breach of warranty brought against grenade manufacturer by army enlisted man; enlisted man was Georgia citizen, was injured in Georgia, brought suit in Georgia federal district court against defendants alleged to be doing business in Georgia pursuant to Georgia statute concerning jurisdiction over non-residents; held, Georgia law applies to warranty question according to conflicts rule stated in UCC § 1-105. *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 38 A.L.R.3d 1229 (5th Cir. Ga. 1969), reh'g denied, 424 F.2d 549, 38 A.L.R.3d 1244 (5th Cir. Ga. 1970).

Arkansas law governs the enforcement of a conditional sales contract executed in that state in connection with the purchase of an automobile there, where the contract provides that the seller's Arkansas office is the only designated place of payment; and the fact that at the time of the contract's execution the vendee was a resident of Tennessee and the contract was assigned to a Tennessee bank is immaterial in the absence of an agreement between the parties that Tennessee law would govern. *Lyles v. Union Planters Nat'l Bank*, 239 Ark. 738, 393 S.W.2d 867 (1965).

The fact that a buyer went to another state merely to take possession of a truck was only incidental to the transaction involving the vehicle's sale and purchase where both buyer and seller were residents of Wyoming and the truck was brought there by the purchaser, and Wyoming law applied to the transaction between the parties. *Park County Implement Co. v. Craig*, 397 P.2d 800 (Wyo. 1964).

Where contracts for the sublease of lands and the conditional sale of a road-

side diner located in New Hampshire were entered into in Massachusetts by residents of that state, they are to be interpreted and enforced in accordance with Massachusetts law. *Conte v. Styli*, 26 Mass. App. Dec. 73 (1963).

The application of Pennsylvania law was warranted where Delaware residents purchased a boat in Delaware, agreeing to pay the remainder of the purchase price in monthly instalments, and gave what amounted to a purchase money security interest to a Pennsylvania company, the assignee of an agreement executed by the buyers and sellers, called a Pennsylvania equipment lease, and agreement was not filed anywhere and did not contain a provision as to the application of the law of any specific state, but called for performance in Pennsylvania, and after repossession in Delaware, the boat was brought to Pennsylvania and sold. *Atlas Credit Corp. v. Dolbow*, 193 Pa. Super. 649, 165 A.2d 704 (1960).

5. —Appropriate relation.

Where no appropriate relation to Mississippi exists in case, center of gravity doctrine applies, and § 75-1-105 requires application of significant contacts analysis, and 1978 amendment to § 75-1-105 did not abrogate this requirement. *Price v. International Tel. & Tel. Corp.*, 651 F. Supp. 706 (S.D. Miss. 1986).

In wrongful death action involving claims based on breach of both express warranties and implied warranty of merchantability attaching to defendant's sale of radial tires to plaintiff and her deceased husband, court held (1) that under UCC § 1-105(1), since significant part of transaction, including sale, service, and use of the tires, had occurred in Florida, plaintiff's cause of action arose in Florida and was guaranteed by Florida Wrongful Death Act, (2) that plaintiffs' theory of recovery was governed by Florida's interpretation of Florida Uniform Commercial Code provisions governing actions for breach of express and implied warranties, and (3) that under Florida law, contributory negligence, assumption of the risk, and misuse were available defenses to action for breach of warranty. *Westerman v. Sears, Roebuck & Co.*, 577 F.2d 873 (5th Cir. Fla. 1978).

In action by employees under third-party-beneficiary-of-warranty provisions in Alabama version of UCC § 2-318 for breach of warranties made in connection with sale of sandblasting hoods and respirators, evidence that such items were sold to Alabama company for resale in Alabama, that items were to be used in Alabama, and that warranties made in connection with items were to be performed in Alabama was sufficient to establish appropriate relationship necessary under UCC § 1-105(1) to apply Alabama law to controversy. *Simmons v. American Mut. Liab. Ins. Co.*, 433 F. Supp. 747 (S.D. Ala. 1976), *aff'd sub nom. Love v. American Mut. Liab. Ins. Co.*, 560 F.2d 1021 (5th Cir. Ala. 1977), *aff'd*, 560 F.2d 1022 (5th Cir. Ala. 1977).

In diversity action in which damages were sought for destruction of logging machine on theory of breach of implied warranties that machine was safe and proper for intended use and was of good and merchantable quality, where plaintiff was Pennsylvania corporation that purchased machine from Georgia distributor, delivery was made in Georgia, warranty repairs and servicing were performed in Georgia, and machine was used solely in Georgia by one of plaintiff's corporate divisions until it was destroyed by fire caused by defect in machine, (1) since entire transaction was centered in Georgia and did not bear sufficiently appropriate relation to Pennsylvania within meaning of Pennsylvania UCC § 1-105(1), Georgia law would be applied to case and not law of Pennsylvania; and (2) under Georgia law, in absence of privity, consumer could not recover from manufacturer for breach of implied warranty if consumer had not purchased goods directly from manufacturer. *Armstrong Cork Co. v. Drott Mfg. Co.*, 433 F. Supp. 413 (E.D. Pa. 1977).

Under UCC § 1-105(1) providing that law of forum (i.e., Texas) should govern cause of action based on breach of contract and warranty if disputed transaction bore "appropriate relation to this state," Oklahoma, and not Texas, law would be applied where contracts for sale of railroad tank cars were executed in Oklahoma, cars were manufactured in Ohio, and de-

livered in Pennsylvania, Ohio and Texas, where at time of performance under contract neither party had its principal place of business in Texas, and where only other link between forum state and transactions was that portion of repairs to tank cars occurred in Texas. *Continental Oil Co. v. General Am. Transp. Corp.*, 409 F. Supp. 288 (S.D. Tex. 1976).

In action by manufacturer to recover termination charges on valves which were either completed or partially completed pursuant to two purchase orders placed by buyer, under UCC § 1-105 transaction bore appropriate relation to forum state where buyer was forum state corporation located within forum. *Crane Co. v. Roberts Supply Co.*, 196 Neb. 67, 241 N.W.2d 516 (1976).

In diversity action by Florida carpet dealer against Pennsylvania manufacturer for damages arising out of manufacturer's alleged breach of express and implied warranties in connection with sale of defective carpet, federal district court correctly applied Florida law; transaction had "appropriate relation" to Florida under UCC § 1-105(1) where, *inter alia*, manufacturer and dealer both knew that carpet was to be installed in Florida and where alleged injury occurred solely in Florida. *Aldon Indus., Inc. v. Don Myers & Assocs.*, 517 F.2d 188 (5th Cir. Fla. 1975).

Where contract for sale of used automobile was formed in Florida and was to be performed in Ohio, where there was no specific agreement between parties respecting which state's law should govern transaction, but contract of sale noted, "Not tax, out of state," and where, furthermore, automobile and certificate of title were to be delivered in Ohio and automobile was to be driven, serviced and maintained in Ohio, transaction bore "an appropriate relation" to Ohio, and therefore Ohio law was applicable with respect to buyer's action against seller for rescission of contract. *Lloyd v. Classic Motor Coaches, Inc.*, 74 Ohio Op. 2d 493, 388 F. Supp. 785 (N.D. Ohio 1974).

Fact that injury occurred in New Hampshire gives that state appropriate and significant relationship to transaction so that, in absence of express declaration of applicable choice of law, New Hampshire

law was applicable. *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970).

Oklahoma Code Comment to UCC § 1-105 indicates that Code provision providing that UCC applies to transactions bearing an "appropriate relation" to Oklahoma is new, and probably changes law in Oklahoma. *Williams v. Texas Kenworth Co.*, 307 F. Supp. 748 (W.D. Okla. 1969).

"Appropriate relation" means same thing as more common phrase "significant contacts"; where dump trucks in question were located in Colorado at time of transaction, where seller's place of business was in Colorado and sales agreement was reached there, and where only payment by mail and later delivery of trucks took place in Oregon, under Oregon decisions, Colorado law must be applied. *GECC v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Or. 1969).

The concept of appropriate relationship should be applied even before the effective date of the Code as that rule is more flexible and better adapted to deal with modern problems. *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wash. 2d 893, 425 P.2d 623 (1967).

In a case involving the automobile guest statute and a question of conflict of laws the Wisconsin court observed that this section recognizes an "appropriate relations" test for determining applicable law and that the official comments on the UCC refer to a transaction's "significant context" as being factors in the choice of applicable law. *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

In a case where the issue was as to whether plaintiff had been guilty of a breach of contract in making instalment payments on the purchase of an airplane

so as to give the seller a right to repossess the plane, the question as to whether Massachusetts law applied to the transaction was to be determined under subsection (1) of § 1-105 of the instant chapter, and not under subsection (2) of said section and the reference therein to §§ 9-102 and 9-103 applicable to secured transactions because the issues in such case involved the duties of the parties under the primary obligation, and because the validity of perfection of the security interest was not involved. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

Where a written agreement bore an appropriate relation to Massachusetts so as to be governed by Massachusetts law, under the instant section, an oral modification of such contract would similarly be governed by Massachusetts law in the absence of proof as to where the oral modification was made and in the absence of proof that the oral modification did not bear an appropriate relation to Massachusetts. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

Where a contract for the purchase of an airplane was executed in Massachusetts between a Connecticut individual and a Massachusetts corporation having a principal place of business in Massachusetts, and the plane was delivered in Massachusetts, the transaction bore an appropriate relation to Massachusetts within the meaning of the instant section, and in the absence of an agreement of the parties that Connecticut law should apply, the law of Massachusetts would govern the transaction. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

RESEARCH REFERENCES

ALR. Conflict of laws as to conditional sales. 13 A.L.R.2d 1312.

Conflict of laws as to elements and measure of damages recoverable for breach of contract. 50 A.L.R.2d 227.

What law governs liability of manufacturer or seller for injury caused by product sold. 76 A.L.R.2d 130.

What constitutes "reasonable" or "appropriate" relation to a transaction within the meaning of Uniform Commercial Code § 1-105(1). 63 A.L.R.3d 341.

Validity and effect of stipulation in contract to effect that it shall be governed by law of particular state which is neither place where contract is made nor place

where it is to be performed. 16 A.L.R.4th 967.

Unconscionability, under UCC § 2-302 or § 2-719(3), of disclaimer of warranties or limitation or exclusion of damages in contract subject to UCC Article 2 (Sales). 38 A.L.R.4th 25.

Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew. 45 A.L.R.4th 777.

Am Jur. 4 Am. Jur. 2d, Alteration of Instruments § 2.

15A Am. Jur. 2d, Commercial Code § 11.

16 Am. Jur. 2d, Conflict of Laws §§ 2, 55.

38 Am. Jur. 2d, Guaranty § 8.

43 Am. Jur. 2d, Insurance § 335.

Answer; defense; choice of law clause void; no reasonable relation to designated

state, 6 Am. Jur. Pl & Pr Forms, (Rev) General Provisions, Form 1:1.

5 Am. Jur. Legal Forms 2d, Conflict of Laws §§ 65:11 et seq. (contractual provisions specifying governing law).

Choice of law, 18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:31 et seq.

3 Am. Jur. Proof of Facts, Conflict of Laws, Proof Nos. 1, 2 (testimony as to laws of foreign jurisdiction).

21 Am. Jur. Proof of Facts 2d, Law of Foreign Jurisdiction, §§ 19 et seq. (proof of law of foreign country).

4 Am Law Prod Liab 3d, What Law Governs § 46:20.

CJS. 17 C.J.S., Contracts §§ 13 et seq.

Law Reviews. McMurtray, A Constitutional Analysis of the Mississippi Commercial Code's Conflict of Laws Provision. 53 Miss. L. J. 619, December, 1983.

§ 75-1-106. Remedies to be liberally administered.

(1) The remedies provided by this code shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but neither consequential or special nor penal damages may be had except as specifically provided in this code or by other rule of law.

(2) Any right or obligation declared by this code is enforceable by action unless the provision declaring it specifies a different and limited effect.

SOURCES: Codes, 1942, § 41A:1-106; Laws, 1966, ch. 316, § 1-106, eff March 31, 1968.

Cross References — Liberal construction of code, see § 75-1-102.

Supplementary general principles of law applicable, see § 75-1-103.

Obligation of good faith, see § 75-1-203.

Remedies respecting sales, see § 75-2-701 et seq.

Incidental damages in case of resale by seller, see § 75-2-706.

Recovery of incidental or consequential damages by buyer, see § 75-2-712.

Specific performance of sale contract, see § 75-2-716.

JUDICIAL DECISIONS

1. In general.

Goal of cover remedy is to place buyer only in as good a position as he would have occupied had seller performed. *Terex Corp. v. Ingalls Shipbuilding, Inc.*, 671 So. 2d 1316 (Miss. 1996).

The breach of a contract governed by the UCC, just as the breach of any other

contract, in rare instances, may be attended by such conduct as to authorize the awarding an aggrieved party punitive damages in addition to damages for the contract's breach; however, facts in present case did not justify punitive damage award. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

In suit by buyer, who had purchased two irrevocable letters of credit from bank in favor of seller, to enjoin bank from paying any further drafts that seller might present against such letters and to recover damages for drafts that bank had wrongfully paid to seller, buyer did not establish right to injunctive relief by showing lack of adequate remedy at law. Although UCC Article 5 does not expressly provide measure of damages for wrongful honor of draft presented against letter of credit, UCC § 1-106(1) states that remedies provided by UCC shall be liberally administered to end that aggrieved party may be put in as good a position as if other party had fully performed. UCC § 1-106(1) is a general restatement of the common-law theory of contract damages. In present case, buyer's damages for bank's wrongful honoring of seller's prior drafts would be amount of money that would put buyer in as good a position as if bank had fully performed or, in other words, the total of the two debits made against buyer's account as a result of the two drafts that seller had presented to bank and bank had wrongfully paid. *Interco, Inc. v. First Nat'l Bank*, 560 F.2d 480, 22 U.C.C. Rep. Serv. 472 (1st Cir. Mass. 1977) (construing Massachusetts law, but refusing to be definitive as to exact measure of buyer's damages).

Although UCC does not explicitly allow punitive damages for commercially unreasonable sale, if that right exists outside Code, it is retained or permitted through UCC § 1-106, and since UCC permits recovery of damages in action for conversion of repossessed property, punitive damages are recoverable in such action where secured party's acts are wanton, malicious, and intentional; thus, evidence that secured party permitted third person to borrow collateral belonging to debtor prior to default in order that third party could open competing business, that bank did not give proper notice of sale and on sale date did not even attempt sale, that secured party retained collateral after default for several months without crediting it against debtor's note, and that final sale was made to third person for price less than one fourth of stipulated value of property at time of sale, was sufficient to

support award of punitive damages. *Davidson v. First Bank & Trust Co.*, 609 P.2d 1259 (Okla. 1976).

In action by purchaser of new automobile against dealer seeking revocation of acceptance and damages, contract provision between dealer and purchaser to effect that there were no warranties express or implied made by either dealer or manufacturer, other than manufacturer's warranty against defective materials, although sufficient to exclude all warranties by dealer except implied warranty of merchantability, did not eliminate implied warranty of merchantability in manner required by UCC § 2-316, and evidence that automobile battery was defective as result of poor materials or poor workmanship was sufficient to establish breach of warranty of merchantability; however, there was no evidence that such nonconformity substantially impaired value of car to purchaser as required by UCC § 2-608 before he could revoke his acceptance of automobile and recover price paid; thus, purchaser's remedy was action for damages and, since purchaser failed to present evidence to support award based on proper measure of damages, i.e., value of automobile in its non-conforming condition at time and place of acceptance, purchaser was not entitled to recover damages. *Bill McDavid Oldsmobile, Inc. v. Mulcahy*, 533 S.W.2d 160 (Tex. Civ. App. 1976).

That, absent contractual or statutory exclusion, manufacturer of defective product might properly be held accountable for any damages to buyer which flowed naturally from manufacturer's breach of warranty comported fully with purposes of UCC to put aggrieved party in as good position as if other party had fully performed. *Council Bros. v. Ray Burner Co.*, 473 F.2d 400 (5th Cir. Fla. 1973).

Under UCC buyer cannot claim punitive damages on account of alleged fraud pertaining to sale of chattels. *Waters v. Trenckmann*, 503 P.2d 1187 (Wyo. 1972).

Party aggrieved by breach of contract is entitled to be put in as good position as if other party had fully performed, and this includes right to recover for loss of prospective profits resulting from breach, which profits may be determined on basis

of combination of past earnings records and expert testimony of president of aggrieved party. *Matsushita Elec. Corp. of Am. v. Sonus Corp.*, 362 Mass. 246, 284 N.E.2d 880 (1972).

Attorneys' fees incurred in action to recover loss of profits and incidental damages upon buyer's repudiation of contract are not in nature of protective expenses contemplated by Code. *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

The purpose of this act, to be liberally construed, is specified as the stipulation, clarification and modernization of the law governing commercial transactions to per-

mit the continued expansion of commercial practices through custom, usage and agreement of the parties; and the statute mandates a liberal administration to the end that an aggrieved party may be put in as good a position as if the other party had fully performed without consequential, special, or penal damages unless specifically provided for. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

The instant section merely restates the doctrine that damages are limited to just compensation for the loss sustained by reason of the breach. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

RESEARCH REFERENCES

ALR. Actual damages as necessary predicate to exemplary damages. 17 A.L.R.2d 527.

Recovery of exemplary or punitive damages from municipal corporation. 19 A.L.R.2d 903.

Power of court of equity to award exemplary or punitive damages. 48 A.L.R.2d 947.

Action or claim for punitive damages as surviving death of wronged person. 63 A.L.R.2d 1327.

Right of principal to recover punitive damages for agent's or broker's breach of duty. 67 A.L.R.2d 952.

Sufficiency of showing of actual damages to support award of punitive damages — modern cases. 40 A.L.R.4th 11.

Punitive damages for interference with contract or business relationship. 44 A.L.R.4th 1078.

Standard of proof as to conduct underlying punitive damage awards — modern status. 58 A.L.R.4th 878.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 24.

16 Am. Jur. 2d, Conflict of Laws §§ 1 et seq.

22 Am. Jur. 2d, Damages §§ 23, 24, 28 et seq.

73 Am. Jur. 2d, Statutes §§ 311 et seq.

Instruction to jury; liberal administration of remedies, 6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:951.

CJS. 1A C.J.S., Actions §§ 10, 22, 23.

Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

§ 75-1-107. Waiver or renunciation of claim or right after breach.

Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

SOURCES: Codes, 1942, § 41A:1-107; Laws, 1966, ch. 316, § 1-107, eff March 31, 1968.

Cross References — Obligation of good faith, see § 75-1-203.

Statute of frauds, see § 75-2-201.

Modification, rescission, and waiver, see § 75-2-209.

Contractual modification or limitation of remedy, see § 75-2-719.

JUDICIAL DECISIONS

1. In general.

In action for breach of contract to construct mechanical loading platforms for use in distribution center building, letter sent to defendant after it became clear that defendant would not perform which cancelled contract "without charge" could not as matter of law amount to waiver or renunciation of claim arising out of breach under UCC §§ 1-107 and 2-720; under UCC § 1-205, meaning to be given phrase

"without charge" would require consideration of any course of dealing between parties and any applicable trade usage. *NCR v. UNARCO Indus., Inc.*, 490 F.2d 285 (7th Cir. Ill. 1974).

Where there was no written waiver, there was consequently no basis for discharge of breached contracts under UCC § 1-107. *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782 (1972).

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Accord and Satisfaction §§ 14, 26-28, 57.

15A Am. Jur. 2d, Commercial Code § 4.

17 Am. Jur. 2d, Contracts §§ 655 et seq.

28 Am. Jur. 2d, Estoppel and Waiver §§ 201 et seq.

66 Am. Jur. 2d, Release §§ 6 et seq.

6 Am. Jur. Pl & Pr Forms, (Rev), General Provisions, Form 1:4 (Answer; defense; waiver of claim or right after breach of contract).

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:8 (Instruction to jury;

effect of waiver or renunciation, without consideration, of claim or right after breach of contract).

8 Am. Jur. Legal Forms 2d, Estoppel and Waiver § 102:42 (waiver limited to particular breach).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:41 et seq. (Waiver or renunciation after breach).

CJS. 17B C.J.S., Contracts §§ 557-560.

§ 75-1-108. Severability.

If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

SOURCES: Codes, 1942, § 41A:1-108; Laws, 1966, ch. 316, § 1-108, eff March 31, 1968.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 31.

16 Am. Jur. 2d, Constitutional Law §§ 134 et seq.

73 Am. Jur. 2d, Statutes §§ 243, 269, 270.

§ 75-1-109. Section captions.

Section captions are parts of this code.

SOURCES: Codes, 1942, § 41A:1-109; Laws, 1966, ch. 316, § 1-109, eff March 31, 1968.

Cross References — Interpretation of section captions in cumulative supplement, see § 75-1-110.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 21. 73 Am. Jur. 2d, Statutes §§ 45, 109.

§ 75-1-110. Section captions in cumulative supplement.

It is the intent of the Legislature that where section captions appear in the 1977 Cumulative Supplement to Title 75, Chapters 1 through 11, Mississippi Code of 1972, they are to be given the same interpretation as that intended by section 75-1-109, Mississippi Code of 1972.

SOURCES: Laws, 1978, ch. 401, § 9, eff from and after April 1, 1978.

Cross References — Section captions in Uniform Commercial Code, generally, see § 75-1-109.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code § 21. 73 Am. Jur. 2d, Statutes §§ 45, 109.

PART 2.

GENERAL DEFINITIONS AND PRINCIPLES OF INTERPRETATION.

SEC.

- | | |
|-----------|--|
| 75-1-201. | General definitions. |
| 75-1-202. | Prima facie evidence by third party documents. |
| 75-1-203. | Obligation of good faith. |
| 75-1-204. | Time; reasonable time; "seasonably." |
| 75-1-205. | Course of dealing and usage of trade. |
| 75-1-206. | Statute of fraud for kinds of personal property not otherwise covered. |
| 75-1-207. | Performance or acceptance under reservation of rights. |
| 75-1-208. | Option to accelerate at will. |

§ 75-1-201. General definitions.

Subject to additional definitions contained in the subsequent chapters of this code which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in this code:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this code (Sections 75-1-205 and 75-2-208). Whether an agreement has legal consequences is determined by the provisions of this code, if applicable; otherwise by the law of contracts (Section 75-1-103). (Compare "Contract.")

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in the ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Article 2 may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

(10) "Conspicuous": A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court.

(11) "Contract" means the total legal obligation which results from the parties' agreement as affected by this code and any other applicable rules of law. (Compare "Agreement.")

(12) "Creditor" includes a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the

benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-action or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel paper, or certificated securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers. To be a document of title a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securities of which any unit is, by nature or usage of trade, the equivalent of any other like unit. Goods which are not fungible shall be deemed fungible for the purposes of this code to the extent that under a particular agreement or document unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

(20) "Holder," with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder," with respect to a document of title, means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

(21) To "honor" is to pay or to accept and pay, or where a credit so engages to purchase or discount a draft complying with the terms of the credit.

(22) "Insolvency proceedings" includes any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due or is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by a domestic or foreign government and includes a monetary unit of account established by an intergovernmental organization or by agreement between two (2) or more nations.

(25) A person has "notice" of a fact when

(a) He has actual knowledge of it; or

(b) He has received a notice or notification of it; or

(c) From all the facts and circumstances known to him at the time in question he has reason to know that it exists.

A person "knows" or has "knowledge" of a fact when he has actual knowledge of it. "Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. The time and circumstances under which a notice or notification may cease to be effective are not determined by this code.

(26) A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it. A person "receives" a notice or notification when:

(a) It comes to his attention; or

(b) It is duly delivered at the place of business through which the contract was made or at any other place held out by him as the place for receipt of such communications.

(27) Notice, knowledge or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his regular duties or unless he has reason to know of the transaction and that the transaction would be materially affected by the information.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, or any other legal or commercial entity.

(29) "Party," as distinct from "third party," means a person who has engaged in a transaction or made an agreement within this code.

(30) "Person" includes an individual or an organization (see Section 75-1-102).

(31) "Presumption" or "presumed" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift or any other voluntary transaction creating an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(35) "Representative" includes an agent, an officer of a corporation or association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another.

(36) "Rights" includes remedies.

(37) “Security interest” means an interest in personal property or fixtures which secures payment or performance of an obligation.

(a) The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 75-2-401 is not a “security interest,” but a buyer may also acquire “security interest,” by complying with Article 9. Except as otherwise provided in Section 75-2-505, the right of a seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods is not a “security interest,” but a seller or lessor may also acquire a “security interest” by complying with Article 9. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (Section 75-2-401) is limited in effect to a reservation of a security interest.

(b) Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

(i) The original term of the lease is equal to or greater than the remaining economic life of the goods,

(ii) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,

(iii) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or

(iv) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(c) A transaction does not create a security interest merely because it provides that:

(i) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(ii) The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(iii) The lessee has an option to renew the lease or to become the owner of the goods,

(iv) The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(v) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) For purposes of this subsection (37):

(i) Additional consideration is not nominal if

1. When the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or

2. When the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(ii) "Reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the fact and circumstances at the time the transaction is entered into; and

(iii) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(38) "Send" in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and in the case of an instrument to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances. The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending.

(39) "Signed" includes any symbol executed or adopted by a party with present intention to authenticate a writing.

(40) "Surety" includes guarantor.

(41) "Telegram" includes a message transmitted by radio, teletype, cable, any mechanical method of transmission, or the like.

(42) "Term" means that portion of an agreement which relates to a particular matter.

(43) "Unauthorized" signature means one made without actual, implied or apparent authority and includes a forgery.

(44) "Value," except as otherwise provided with respect to negotiable instruments and bank collections (Sections 75-3-303, 75-4-208 and 75-4-209), a person gives "value" for rights if he acquires them:

(a) In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or

(b) As security for or in total or partial satisfaction of a preexisting claim; or

(c) By accepting delivery pursuant to a preexisting contract for purchase; or

(d) Generally, in return for any consideration sufficient to support a simple contract.

(45) “Warehouse receipt” means a receipt issued by a person engaged in the business of storing goods for hire.

(46) “Written” or “writing” includes printing, typewriting, or any other intentional reduction to tangible form.

SOURCES: Codes, 1942, § 41A:1-201; Laws, 1966, ch. 316, § 1-201; Laws, 1977, ch. 452, § 2; Laws, 1990, ch. 384, § 45; Laws, 1992, ch. 420, § 69; Laws, 1994, ch. 445, § 3; Laws, 2001, ch. 495, § 5, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, rewrote (9); inserted “security interest” in (32); rewrote (37)(a); and made minor punctuation changes throughout.

Cross References — When holder takes commercial instrument for value, see § 75-3-303.

Application of definition of “Burden of establishing” a fact, defined in this section, see § 75-4A-105.

Application of rules applicable to receipt of notice stated in this section to determination of time payment order is received, see § 75-4A-106.

Documents of title, see § 75-7-101 et seq.

Assignments for benefit of creditors, see §§ 85-1-1 et seq.

JUDICIAL DECISIONS

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| 1. Action. | 27. Purchaser. |
| 2. Agreement. | 28. Representative. |
| 3. Burden of establishing. | 29. Rights. |
| 4. Buyer in ordinary course of business. | 30. Security interests. |
| 5. Conspicuous. | 31. Send. |
| 6. Contract. | 32. Signature. |
| 7. Creditor. | 33. Surety. |
| 8. Delivery. | 34. Unauthorized signature or indorsement. |
| 9. Document of title. | 35. Value. |
| 10. Fault. | 36. Warehouse receipt. |
| 11. Fungible. | 37. Writing. |
| 12. Genuine. | |
| 13. Good faith. | 1. Action. |
| 14. Holder. | Although UCC § 1-201 defines “action” to include “any other proceedings in which rights are determined,” a full reading of the section requires the conclusion that the term is expressly limited to judicial proceedings; thus, arbitration proceedings were not barred by statute of limitations applicable to “actions.” <i>Har-Mar, Inc. v. Thorsen & Thorshov, Inc.</i> , 300 Minn. 149, 218 N.W.2d 751 (1974). |
| 15. To honor. | 2. Agreement. |
| 16. Insolvency proceedings. | Option granted to debtor to repurchase leased equipment at end of lease term was |
| 17. Insolvent. | |
| 18. Money. | |
| 19. Notice. | |
| 20. Notifying or giving notice. | |
| 21. Notice received by organization. | |
| 22. Organization. | |
| 23. Party. | |
| 24. Person. | |
| 25. Presumption or presumed. | |
| 26. Purchase. | |

not "true lease," but "lease intended for security," where terms of agreement provided for repurchase of equipment at nominal sum, and where the debtor was required to acquire replacement equipment upon the condition of obsolescence or nonusefulness of original equipment. *American Gen. Aircraft Corp. v. Washington County Economic Dev. Dist.*, 190 B.R. 275 (Bankr. N.D. Miss. 1995).

A lease agreement which provides the lessee, upon compliance with the terms of the lease, with an option to purchase the entire leased premises for a nominal consideration makes the lease one intended for security; in order to perfect a security interest in such an arrangement, appropriate financing statements must be filed. *Peoples Bank & Trust Co. v. Applewhite* (In re 20th Century Enters., Inc.), 152 B.R. 119 (Bankr. N.D. Miss. 1992).

Agreement between debtor and supplier of gasoline dispensing equipment and fuel was true consignment agreement, rather than security agreement, since supplier retained sole control over setting retail prices, debtor received commission rather than profit, and debtor was obligated to pay for gasoline when it was sold rather than when it was delivered. *In re Sullivan*, 103 B.R. 792 (Bankr. N.D. Miss. 1989).

Transaction involving truck was a true lease and not a sale in which "lease" was intended as security, where lease contained no language which would extend in any way possessory rights of lessee beyond stated term of lease. *Equilease Corp. v. Loague*, 25 B.R. 940 (Bankr. N.D. Miss. 1982).

Where depositor allegedly entered into oral agreement with bank concerning certain restrictions on his accounts and, pursuant to such agreement, sent letter to bank directing it not to pay any instruments drawn on his accounts unless instruments were on "printed checks of the bank", and where bank merely acknowledged "receipt" of customer's letter, such "receipt" could not be legally interpreted as general, unlimited lifetime "agreement," but at best was receipt of notice of stop payment and, in accord with UCC § 4-403(b) unless renewed in writing, was effective for only six months; stop pay-

ment order was not extended beyond statutory limitation by virtue of alleged "oral agreement" simultaneously made with written stop payment order. *Dinerman v. National Bank of N. Am.*, 89 Misc. 2d 164 (1977).

Under the Uniform Commercial Code, practical business people are not expected to govern their actions with reference to nice legal formalisms. Thus, when there is a basic agreement, however manifested and whether or not precise moment of such agreement can be determined, failure of parties to articulate agreement in precise legal language, with every difficulty and contingency considered and resolved, will not prevent formation of contract. However, if there is no basic agreement, the code will not imply one. And without an agreement, there can be no contract and without a contract, there can be no breach. This principle is explicitly recognized by UCC § 1-201(3) and (11), and UCC § 2-204(1) and (2). *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 41 N.Y.2d 972, 363 N.E.2d 701 (1977).

Plaintiffs who had deposited one million dollars in United States treasury bills with clerk of tax court in order to stay assessment and collection of tax deficiency were not entitled to damages or interest on bills after they remained interest-free in treasury for one year following their maturity on theory that implied security agreement existed between parties under UCC § 1-201(3) and (37) and that federal government thus had duty to reinvest bills after their maturity or to notify plaintiffs of such maturity. Even assuming existence of implied security agreement between parties, duty of holder under UCC § 9-207(1) to preserve collateral does not include duty to make collateral produce income, and no decrease in bills' value was even remotely possible. *Cleveland Chair Co. v. United States*, 557 F.2d 244 (Ct. Cl. 1977).

Under UCC §§ 2-204(1) and 1-201(3), buyer was not justified in terminating orders of submarine valves for alleged failure to meet delivery dates specified in contracts, notwithstanding alleged promise by seller to meet or improve upon delivery dates originally requested by

buyer, where buyer requested certain delivery dates when it placed orders, seller clearly and unequivocally rejected buyer's requested dates and promised delivery at later dates, buyer merely appealed to seller to conform to requested dates and later appealed to seller to expedite one shipment, and buyer gave no notice to seller that seller breached contract by failing to meet required delivery dates. *Crane Co. v. Roberts Supply Co.*, 196 Neb. 67, 241 N.W.2d 516 (1976).

Where letter sent by creditor to debtor set forth terms of loan agreement and letter was signed "agreed" by debtor, letter was "agreement" for repayment of the loan as the term "agreement" is defined in this section. In re Carmichael Enters., Inc., 334 F. Supp. 94 (N.D. Ga. 1971), aff'd, 460 F.2d 1405 (5th Cir. Ga. 1972).

Prior course of dealing between bank and decedent's son, including decedent's signing of hypothecation agreement from containing language to effect that securities in question would be collateral for present or future advances, provided ample evidence of agreement that stock which decedent had pledged to bank would serve as collateral for continuing advances by bank to decedent's son. *Beyer's Estate v. Bank of Pa.*, 449 Pa. 24, 295 A.2d 280 (1972).

3. Burden of establishing.

In adopting UCC § 1-201(8), Florida legislature apparently intended to establish burden of ultimate persuasion by preponderance of evidence. *Transammonia Export Corp. v. Conserv, Inc.*, 554 F.2d 719 (5th Cir. Fla. 1977).

A defendant does not meet the burden of establishing that a note signed by him in blank was completed improperly as to amount when other documents relevant to the same transaction show that the amount was authorized. *Century Appliance Co. v. Groff*, 56 Lanc. L. Rev. 67A (Pa) (loan note left blank so that interest charge could be computed; application for loan showed principal and borrower's coupon book which was accepted by borrower showed debt of amount of note).

4. Buyer in ordinary course of business.

Where automobile dealer financed his used car inventory through floor plan ar-

rangement with finance company and, under side arrangement with second automobile dealer, satisfied his obligations to finance company by assigning used cars to second dealer, who would then issue its note to finance company in release of first dealer's note, but such cars were frequently left on first dealer's lot and sold by him on commission basis, and where first automobile dealer then entered into agreement with credit corporation to finance his new car inventory and executed security agreement in favor of credit corporation covering his inventory, including, inter alia, his used car inventory: (1) Credit corporation acquired perfected security interest in first dealer's used car inventory; (2) security interest was not waived by clause in security agreement providing that private sale of chattel to dealer in such types of chattels for amount originally paid by dealer for such chattel or at lesser fair price would be "commercially reasonable disposition thereof," nor was it waived by fact that credit corporation treated dealer's used car business as completely separate from his new car business which credit corporation was financing; (3) sales of used cars to second dealer, made at arm's length, without fraud and at fair price, were sales in ordinary course of business, and, hence, second dealer acquired title to such cars free of security interest. *Weidinger Chevrolet, Inc. v. Universal C.I.T. Credit Corp.*, 501 F.2d 459 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1033, 95 S. Ct. 516, 42 L. Ed. 2d 309 (1974).

Buyer who purchased three mobile homes from mobile home dealer was not buyer in "the ordinary course of business" and was not acting "in good faith and without knowledge" when he purchased mobile homes where buyer was fully aware that secured party had floor planned and financed homes and held security interest in each home and where buyer bought three homes from dealer because he had ascertained by his own investigation that he was buying them at unusually low price. *Rex Fin. Corp. v. Marshall*, 406 F. Supp. 567 (W.D. Ark. 1976).

Transaction on auction lot of third party in state in which neither buyer nor seller

was doing business cannot be held to be transaction in "ordinary course of business." *Rhode Island Hosp. Trust Co. v. Leo's Used Car Exch., Inc.*, 314 F. Supp. 254 (D. Mass. 1970).

One who qualifies as "buyer in ordinary course" must so qualify as to entire transaction; transaction cannot be "fractionalized" so as to make it part good and part bad. *GECC v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Or. 1969).

In marital property-division proceeding, trial court had authority under UCC § 9-311, providing that debtor's rights in collateral may be voluntarily or involuntarily transferred by judicial process, to direct husband to transfer title to bonds, which had been pledged as security for loan, to wife. However, any title that was involuntarily transferred by judicial order would be subject, under UCC § 9-306(2), to security interest created by the pledge, since wife, as party to suit in which such transfer was made, was not buyer in ordinary course of business under UCC §§ 1-201(9) and 9-307(1) who could take collateral (bonds) free of pledgee's security interest therein. *Goetz v. Goetz*, 567 S.W.2d 892 (Tex. Civ. App. 1978).

A buyer takes free of a security interest in goods created by a seller who is in the business of selling goods of that kind, even if the interest is perfected, if the buyer merely knows that there is a security interest which covers the goods, but takes subject to the interest if he knows, in addition, that the sale is in violation of some term in the security agreement not waived by the words or conduct of the secured party (Uniform Commercial Code, § 1-201(9); § 9-307(1)), although it is not incumbent upon the buyer to make a search for any possible security interests; and, a buyer who takes free of a perfected security interest takes free of an unperfected one as well. *European-American Bank & Trust Co. v. Sheriff of the County of Nassau*, 97 Misc. 2d 549 (1978).

In replevin action, where (1) plaintiff truck dealer "dropshipped" two of its trucks to another dealer for purpose of resale, (2) second dealer sold trucks to defendant cartage company but failed to give defendant full set of title papers, and (3) second dealer thereafter went out of

business without paying plaintiff for trucks, plaintiff was not entitled to replevy trucks from defendant, who was buyer in ordinary course of business under UCC § 1-201(9) and § 2-403(2), since it was plaintiff which placed trucks into stream of commerce, being well aware that second dealer intended to sell them, and waited two and a half months before attempting to collect payment from second dealer. *Coffman Truck Sales v. Sackley Cartage Co.*, 58 Ill. App. 3d 68, 373 N.E.2d 1026, 23 U.C.C. Rep. Serv. 1160 (2d Dist. 1978) (holding that under circumstances of case, defendant consumer should not bear loss, even though defendant was commercial corporation).

Under UCC § 9-307(1) and § 1-201(9), buyer of collateral in ordinary course of business took free of security interest therein where secured party did not know that debtor was in business of selling goods of that kind, even though security interest was perfected by proper execution and filing of financing statement. *Antigo Co-op Credit Union v. Miller*, 86 Wis. 2d 90, 271 N.W.2d 642, 25 U.C.C. Rep. Serv. 326 (1978) (holding that secured party could not obtain possession of collateral from buyer in replevin action).

Where savings and loan association entered into floor-plan agreement with mobile-home dealer under which association would pay manufacturer for each home delivered to dealer, retain invoice and certificate of origin of each delivered unit, and dealer would execute demand note and security interest in delivered unit to association which it would hold until it received payment from dealer; where buyers of mobile home from dealer subsequently executed installment contract reciting payment of specified down payment, delivery and acceptance of home, and granting by buyers of security interest therein; and where dealer assigned such contract to corporation that assigned it to defendant bank, and money paid for contract by defendant bank was transmitted to dealer who breached his obligation to savings and loan association and absconded, in action by subrogee of rights of savings and loan association against defendant bank to determine priority of security interests in such home,

(1) buyers of home were good-faith purchasers in ordinary course of business under UCC § 1-201(9) who took home under UCC § 9-307(1) free of subrogee's security interest therein; (2) defendant bank's security interest in home therefore had priority over subrogee's security interest; and (3) subrogee's security interest attached to proceeds of sale in hands of absconding dealer. *Integrity Ins. Co. v. Marine Midland Bank-Western*, 90 Misc. 2d 868 (1977).

In bank's suit to have security interest in used-car dealer's inventory declared to be first and prior security interest as against interests of three persons to whom such inventory was transferred, where evidence showed that bank's security interest was perfected by filing, covered future advances, and gave bank security interest in all present and after-acquired property and proceeds; that one transferee took trust receipts and titles to specific vehicles to secure loans made to dealer and entered into security agreement granting security interest in vehicles identified in trust receipts, which agreement was filed after filing of bank's security agreement; that second transferee took trust receipts as security for loans made to dealer, but did not enter into security agreement with dealer; and that third transferee's purchase for resale of over half of dealer's inventory may have been financed by first transferee, (1) under UCC § 9-110, description of collateral in bank's security agreement included all of dealer's inventory and proceeds therefrom; (2) under UCC § 9-205, alleged failure of bank to supervise dealer's inventory properly could not constitute basis for denying equitable relief to bank; (3) security interest of first transferee was junior to bank's security interest because it was perfected after perfection of bank's interest; (4) security interest of second transferee was junior to bank's security interest because it was never perfected; and (5) security interest of third transferee was also subject to bank's security interest because such transferee was bulk purchaser under UCC § 1-201(9) and not buyer in ordinary course of business under UCC § 9-307(1). *Community Bank v. Jones*, 278 Or. 647, 566 P.2d 470 (1977).

Where buyers purchased automobiles in good faith, without knowledge that sale was in violation of secured party's security interest in automobile dealer's inventory, from dealer who was in business of selling automobiles, for present value, i.e., cash or present exchange of other property, under UCC § 9-307(1) such buyers took free of secured party's security interest. *Cunningham v. Camelot Motors, Inc.*, 138 N.J. Super. 489, 351 A.2d 402 (1975).

First buyer of wrecker truck entrusted truck to dealer under UCC § 2-403 so as to allow dealer to pass title to second buyer who was a "buyer in ordinary course of business" under UCC § 1-201 and who took possession of truck and extracted from dealer a transfer of registration and warranty of title, where first buyer left truck with dealer or dealer's apparent agent after paying for it without taking possession. *Simson v. Moon*, 137 Ga. App. 82, 222 S.E.2d 873 (1975), cause dismissed, 236 Ga. 786, 225 S.E.2d 314 (1976).

In action by bank against purchaser of sail boat for conversion of bank's security interest in boat, evidence was sufficient to support finding that seller was dealer in boats where loan application showed that seller used business name, seller's wife said he was in business of selling boats using that name, bank knew he had boats at another location, seller held himself out to general public as dealer at boat show and represented to witness that he was dealer, seller received proceeds in checks made out to business name, order form of boat manufacturer showed seller's business as salesman, and manufacturer honored sale of boat by performing warranty work for purchaser; thus, purchaser was buyer in ordinary course of business pursuant to UCC § 1-201(9) and was entitled to protection of UCC § 9-307(1), which defeated bank's claim. *Kaw Valley State Bank v. Stanley*, 514 S.W.2d 42, 73 A.L.R.3d 333 (App. 1974).

Buyer of tractors was not entitled to protection from manufacturer's security interest in equipment under UCC § 9-307, where buyer, who was experienced tractor dealer with knowledge of manufacturer's practice of "floor-planning" its equipment and who purchased equipment

for considerably less than its value, made no investigation of prior security interest, acquiesced in falsification of retail order form, and misrepresented particulars of transaction, did not qualify as good faith buyer in ordinary course of business under UCC §§ 1-201(9) and 1-201(19). *International Harvester Co. v. Glendenning*, 505 S.W.2d 320, 87 A.L.R.3d 1 (Tex. Civ. App. 1974).

Where mobile home buyers signed agreement to purchase mobile home from dealer, but dealer, unable to deliver specified mobile home because it was damaged by rain, delivered substitute mobile home, which was subject to security interest held by corporation that financed dealer's inventory, buyers were buyers of substituted mobile home in ordinary course of business under UCC § 1-201(9) and were protected under UCC § 9-307(1) against enforcement of corporation's security interest. *Black v. Schenectady Dist. Corp.*, 31 Conn. Supp. 521, 324 A.2d 921 (1974).

Where automobile dealer, who was indebted to purchaser for \$10,000, gave purchaser check for \$5,000 in partial satisfaction of such debt, and purchaser indorsed check back to dealer in payment for automobile, when dealer executed and delivered check to purchaser, it did not alter fact that dealer was still indebted to purchaser for \$10,000 and when purchaser indorsed check back to dealer in payment for automobile, transaction constituted transfer of automobile for or in partial satisfaction of money debt and purchaser was not, therefore, "buyer in ordinary course of business" within meaning of UCC § 1-201(9), whether or not he acted in good faith and whether or not at time he received check he intended to exchange it for automobile. *Chrysler Credit Corp. v. Malone*, 502 S.W.2d 910 (Tex. Civ. App. 1973).

Evidence supported finding that automobile leasing company was in business of selling used automobiles and that defendant, who had purchased 10 automobiles from leasing company over period of years, was buyer in ordinary course of business who was entitled to take automobile free of security interest created by leasing company. *American Nat'l Bank &*

Trust Co. v. Mar-K-Z Motors & Leasing Co., 11 Ill. App. 3d 1046, 298 N.E.2d 209 (1st Dist. 1973), *aff'd*, 57 Ill. 2d 29, 309 N.E.2d 567 (1974).

Where president and principal shareholder of automobile dealership purchases car from his own company, that sale will be considered to be sale "in ordinary course of business" if it is similar in all material respects to sale to any other retail customer; and where that is the case, lien held by bank which has security agreement covering dealership's inventory is released by sale, and purchase money security interest prevails. *Crystal State Bank v. Columbia Heights State Bank*, 295 Minn. 181, 203 N.W.2d 389 (1973).

Pawnbroker could not have been buyer in ordinary course of business as defined in UCC § 1-201(9) where pledgor who pledged property to it was not "person in business of selling goods of that kind." *Kimbrell's Furn. Co. v. Friedman*, 261 S.C. 172, 198 S.E.2d 803 (1973).

Judgment creditor who bid in at farm auction sale conducted with consent of secured party, debtors, and judgment creditor was not buyer in "ordinary course of business." *South Omaha Prod. Credit Ass'n v. Tyson's, Inc.*, 189 Neb. 702, 204 N.W.2d 806 (1973).

Where vendee testified that at time he agreed to purchase automobile from vendor he knew vendor had obtained vehicle from another dealer, but had no knowledge vendor had not made payment therefor, and vendor testified that vendee did not know of agreed arrangement between vendor and other dealer that title papers to vehicle would accompany draft issued in payment therefor, vendee had no knowledge of arrangement between vendor and other dealer concerning payment for automobile such as would destroy his buyer in ordinary course of business status. *Couch v. Cockroft*, 490 S.W.2d 713 (Tenn. Ct. App. 1972).

Failure of purchaser of automobile to obtain from seller certificate of title or other instrument showing compliance with Motor Vehicle Title and Registration laws does not in and of itself deny the purchaser status of buyer in ordinary course of business. *Couch v. Cockroft*, 490 S.W.2d 713 (Tenn. Ct. App. 1972).

Where plaintiff sold two television sets and purchaser quickly resold them to defendant pawnshop and retail business, and any security interest in sets retained by plaintiff was never recorded and defendant had no knowledge of such interest, defendant, as transferee of goods in which plaintiff had security interest, could find no protection in UCC from plaintiff's claim for conversion under UCC § 9-307, notwithstanding that subsection (a) of that section provides that a buyer in ordinary course of business takes free of a security interest, since UCC § 1-201(9) in defining "buyer in ordinary course of business" specifically excludes pawnbrokers from that class, and moreover requires that the transferor must be "in the business of selling" consumer goods such as those in question, and the record failed to sustain the conclusion that the purchaser was in the business of selling television sets. *White-Sellie's Jewelry Co. v. Goodyear Tire & Rubber Co.*, 477 S.W.2d 658 (Tex. Civ. App. 1972).

Where creditor received only a security interest for money debt, it was not a buyer in the ordinary course of business. *International Harvester Credit Corp. v. Commercial Credit Equip. Corp.*, 125 Ga. App. 477, 188 S.E.2d 110 (1972).

One who buys boat from seller who is not in boat-selling business cannot qualify as "buyer in ordinary course of business". *Security Pac. Nat'l Bank v. Goodman*, 24 Cal. App. 3d 131 (2d Dist. 1972).

A buyer in the ordinary course of business who takes free of a known and perfected security interest under UCC § 9-307(1) may be defined as one who purchases merchandise in the ordinary course of affairs from a merchant in the business of vending items of that nature within UCC § 1-201(9). *Newton-Waltham Bank & Trust Co. v. Bergen Motors, Inc.*, 68 Misc. 2d 228 (1971), *aff'd*, 75 Misc. 2d 103, 347 N.Y.S.2d 568 (1972).

Where automobile dealer sold two used cars to used car dealer but instructed him not to dispose of them until latter's check cleared the bank, which transaction constituted an entrustment, and second dealer violated instructions and conveyed the cars to a third dealer in a transaction wherein the value of the cars was applied

in partial satisfaction of second dealer's pre-existing and running account, third dealer was not a buyer in the ordinary course of business within the code definition of the term which excludes a transaction by which payment is credited in total or partial satisfaction of a money debt and thus he did not take free of the instruction not to sell. *Sherman v. Roger Kresge, Inc.*, 67 Misc. 2d 178 (1971), *aff'd*, 40 A.D.2d 766, 336 N.Y.S.2d 1015 (3d Dep't 1972).

Creditor to whom used car is sold to satisfy antecedent indebtedness is not "buyer in ordinary course of business." *Osborn v. First Nat'l Bank*, 472 P.2d 440 (Okla. 1970).

Auto wholesaler who purchases used autos from auto leasing or rental company does not qualify as "buyer in ordinary course of business." *Hempstead Bank v. Andy's Car Rental Sys.*, 35 A.D.2d 35 (2d Dep't 1970).

One who bought used car from one in business of selling used cars was "buyer in ordinary course of business." *Godfrey v. Gilsdorf*, 86 Nev. 714, 476 P.2d 3 (1970).

Where person purchases automobile in good faith and without knowledge of any title defect or security interest of third party from used car dealer who has been entrusted with its possession, he is "buyer in the ordinary course of business," even though sale was made without transfer of certificate of title. *Medico Leasing Co. v. Smith*, 457 P.2d 548 (Okla. 1969), but see, *Mitchell Coach Mfg. Co. v. Stephens*, 19 F. Supp. 2d 1227 (N.D. Okla. 1998).

Sale of Studebaker automobile by automobile repair business was not in ordinary course of business within Code § 1-201(9) where seller was not Studebaker dealer, did not have car dealers' license, and had never before sold Studebaker cars. *National Bank of Commerce v. First Nat'l Bank & Trust Co.*, 446 P.2d 277, 30 A.L.R.3d 1 (Okla. 1968).

In selling automobiles for another, auctioneer was simply acting as vendor's agent and was not buyer in ordinary course under Code § 1-201(9). *Commercial Credit Corp. v. Joplin Auto. Auction Co.*, 430 S.W.2d 440 (Mo. Ct. App. 1968).

Where plaintiff bought truck from a merchant in the ordinary course of business, without knowledge of a security

agreement entered into by the seller and later assigned to a bank, in repossessing the truck after the sale, bank was liable for conversion and damages. *Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338 (1968).

The fact that title has not yet been transferred as between the dealer and the consumer does not prevent the latter from being regarded as a buyer in the ordinary course of business, insofar as the secured creditor of the dealer is concerned, where the transaction between the dealer and the consumer is ordinary or typical in the trade. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

An automobile buyer who makes a purchase on a printed form contract, knowingly signs a retail payment obligation, and trades in an old car must be deemed a buyer in the ordinary course of business without regard to the technicalities of when title is to pass pursuant to a collateral oral agreement. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

A licensed automobile wrecker and junk dealer who purchased a two-year-old station wagon from a thief for \$900 by placing \$300 down, and who sold the vehicle for \$1200 that same day, although he never obtained a bill of sale or registration certificate, was liable to the two owners, since the car had not been entrusted to a merchant who dealt in used cars and the defendant had not demonstrated that he was a "buyer in ordinary course of business" or that he was a "good faith purchaser for value". *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

One who in good faith and without knowledge that the sale to him was in violation of the security interest of another bought an automobile from a person in the business of selling automobiles was a "buyer in the ordinary course of business." *National Shawmut Bank v. Jones*, 108 N.H. 386, 236 A.2d 484 (1967).

One who purchases an automobile from a person who is not engaged in the business of selling automobiles cannot be a buyer in the ordinary course. *First Nat'l Bank v. Stamper*, 93 N.J. Super. 150, 225 A.2d 162 (1966).

Whether a buyer buys in the ordinary course of business is determined by the

circumstances as of the date of the purchase and the buyer's subsequent conduct does not effect his status if in fact he acted in good faith and without knowledge of an outstanding interest. *C. Jon Dev. Corp. v. Pand-Rorsche Corp.*, 69 Ill. App. 2d 469, 217 N.E.2d 416 (1st Dist. 1966).

One who conducts an automobile auction and trading business and purchases a substantially new car for resale many miles away from the place of business of the sellers and who has had experience with foreign security interests in automobiles, and makes such a purchase without any inquiry as to the possible existence of a security interest, cannot be regarded as a buyer in the ordinary course of business. *Al Maroone Ford, Inc. v. Manheim Auto Auction, Inc.*, 205 Pa. Super. 154, 208 A.2d 290 (1965).

A discount house which purchased garden supplies from a dealer with knowledge of the provision in a trust receipt retained by the manufacturer that the goods were only to be resold to ultimate consumers was not a "buyer in ordinary course of business." *O.M. Scott Credit Corp. v. Apex Inc.*, 97 R.I. 442, 198 A.2d 673 (1964).

One who purchased a used truck from a person in the business of selling used cars and trucks is a "buyer in the ordinary course of business" within the meaning of this section of the Pennsylvania Uniform Commercial Code, where the truck in question was entrusted to the possession of the seller by a third person for the purpose of selling it without any restrictions upon its sale that were evident to the buyer. *Gricar v. Bairhalter*, 11 Pa. D. & C.2d 723 (1958).

5. Conspicuous.

The disclaimer of warranty on the label of a can of highly volatile wall tile adhesive, written in small print, in lower case except for the word "WARRANTY", , and without a border, is ineffective and does not constitute an affirmative defense to an action based on a fire in plaintiffs' home allegedly caused by the adhesive since such disclaimer is not so "conspicuous" that "a reasonable person against whom it is to operate ought to have noticed it" (Uniform Commercial Code, § 2-316, subd [2]; § 1-201, subd [10]); capital let-

ters, large print, contrasting type or color and black borders are proper methods of making a message "conspicuous" in a form or label. *Victor v. Mammana*, 101 Misc. 2d 954 (1979).

The decision on whether a disclaimer of warranty is sufficiently "conspicuous" (Uniform Commercial Code, § 2-316, subd [2]) is to be made by the court (Uniform Commercial Code, § 1-201, subd [10]) and is not a question of fact for the jury at the time of trial and the court on a motion for summary judgment may, therefore, properly determine that the disclaimer of warranty on a can of highly volatile wall tile adhesive is an insufficient affirmative defense as a matter of law in an action based upon a fire in plaintiffs' home allegedly caused by the adhesive; in addition, even if the disclaimer is deemed "conspicuous", it is nonetheless an insufficient affirmative defense since a disclaimer is not effective against strangers to the contract who never saw it and defendant manufacturer failed to come forward with any evidence to rebut plaintiffs' assertions that they were unfamiliar with the can of adhesive left in their home and had never read the label. *Victor v. Mammana*, 101 Misc. 2d 954 (1979).

Where a seller of goods purports to exclude warranties by way of a writing, the disclaimer must be conspicuous (Uniform Commercial Code, § 2-316(2)), that is, the disclaimer must be so written that it calls the buyer's attention to the exclusion (Uniform Commercial Code, § 1-201(10); § 2-316(3), par [a]); language in the body of a form is conspicuous if it is in larger or contrasting type or color; the issue of conspicuousness is to be determined by the court. *Basic Adhesives, Inc. v. Robert Matzkin Co.*, 101 Misc. 2d 283 (1979), *aff'd* as modified.

Requirement of UCC § 2-316(2) and § 1-201(10) that language in warranty disclaimer be conspicuous was not satisfied where provisions of disclaimer were printed in type which was no larger than any other type on the entire page and actually was smaller than some of such other type. *Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp.*, 62 A.D.2d 982 (2d Dep't 1978).

Where (1) disclaimer of both express warranties and implied warranties of merchantability and fitness for particular purpose, which was inserted in lease of electronic equipment, called lessee's attention, on face of lease immediately above lessee's signature, to fact that reverse side of lease contained additional terms, (2) reverse side of lease contained such disclaimer, which was printed in capital letters, and (3) remainder of text on reverse side of lease did not contain another sentence in capital letters, court held (1) that under express terms of UCC § 1-201(10), determination of whether disclaimer was conspicuous or not was to be made by trial court and not jury, (2) that disclaimer was conspicuous, within meaning of UCC § 1-201(10), because it written so that reasonable person against whom it was to operate should have noticed its provisions, and (3) that as a result, disclaimer complied with UCC § 2-316(2) and effectively prevented implied warranties of merchantability and fitness for particular purpose from attaching to leased equipment. *Todd Equip. Leasing Co. v. Milligan*, 395 A.2d 818 (Me. 1978).

Disclaimer in seller's acknowledgment of buyer's purchase order was "conspicuous" within meaning of UCC § 1-201(10) where (1) it was on front side of acknowledgment, (2) was in large and readable type, (3) contained simple, direct, and easily understood language, (4) was typed in capital letters, (5) specifically mentioned "merchantability," and (6) person against whom disclaimer operated was a sophisticated business entity. *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537 (D. Mass. 1977).

Disclaimer of implied warranties of merchantability and fitness contained in seller's offer satisfied requirements of UCC § 2-316(2) and therefore was effective according to its terms, notwithstanding exclusionary provision was in standard print without indented margins, contrast print or other conspicuous aspect, where buyer was sophisticated business buyer experienced in commercial dealings, where buyer attached seller's offer, including the exclusionary provision, to its purchase order separately initialed by buyer, along with rider stating

additional terms and changing or deleting certain provisions which had been unacceptable to buyer, which were actions of buyer in equal bargaining position with seller and raised inference that change in specific terms resulted from detailed review of "terms and conditions" of seller's offer, where buyer stated that he knew of warranty paragraphs, had read them, and was familiar with what they contained, and where provision in question was one of only 14 separate sections on single page, was only section dealing with warranty obligations, and was bold titled "WARRANTY OF MATERIAL AND WORKMANSHIP." *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364 (E.D. Mich. 1977).

Question whether provision purporting to disclaim implied warranty of merchantability was "conspicuous" within meaning of UCC § 2-316(2) and UCC § 1-201(10) is question of law for court, and if purported disclaimer is part of record on appeal, appellate court is in as good position as trial court to determine such question. *Pearson v. Franklin Lab., Inc.*, 254 N.W.2d 133 (S.D. 1977).

In action for damages by cattle ranchers against manufacturer of cattle vaccine for breach of implied warranty of fitness of vaccine for purpose for which it was to be used, purported disclaimer of liability that appeared on last page of pamphlet accompanying each bottle of such vaccine in which defendant stated that since it had no control over conditions under which vaccine was used, it could not accept responsibility for results following its use was not "conspicuous" within meaning of UCC § 2-316(2) and § 1-201(10), where such disclaimer was printed in same size of type, and on same page, as other language in pamphlet that extolled vaccine's effectiveness. Such disclaimer was also ineffective under UCC § 2-316(3)(a) because of ambiguity, since it could be interpreted as disclaiming liability for (1) failure of vaccine to prevent disease it was intended to prevent, (2) illnesses caused by vaccine itself, or (3) both such possibilities. *Pearson v. Franklin Lab., Inc.*, 254 N.W.2d 133 (S.D. 1977).

Provision on face of one page contract for sale of cabbage seed disclaiming war-

ranties, express or implied, of merchantability and fitness for purpose and limiting seller's liability for breach of warranty or contract to purchase price of seeds, which was set off from other provisions on form and appeared in boldface print, was conspicuous within meaning of UCC § 1-201(10) and was effective to disclaim implied warranty of merchantability under UCC § 2-316(2). *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), review allowed, 289 N.C. 296, 222 S.E.2d 695 (1976), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976).

Attempted disclaimer of implied warranties was inoperative under UCC § 2-316(2) where purported disclaimer was not "conspicuous," as defined in UCC § 1-201(10); conditional sales contract in question was seven legal-sized, double-spaced, typed pages in length and attempted disclaimer was buried in text of lengthy paragraph and was not "in larger or other contrasting type or color." *Cooley v. Salopian Indus., Ltd.*, 383 F. Supp. 1114 (D.C.S.C. 1974).

In action by buyers of mobile home against seller to recover damages for breach of warranties, trial court erred in granting seller's motion for summary judgment, notwithstanding contract of sale contained disclaimer provision which stated "buyer is buying the trailer 'as is' and no representations or statements have been made by seller except as herein stated, so that no warranty, express or implied, arises apart from this writing," where purported disclaimer provision was written in same size and color type as balance of contract and was not otherwise distinguishable from balance of contract: (1) purported disclaimer was not "conspicuous" as defined in UCC § 1-201(10); (2) although subsection (3)(a) of UCC § 2-316, which specifies that words such as "as is" and "with all faults" can be used to exclude implied warranties, contains no requirement that such disclaimer be set forth in conspicuous manner, UCC contemplates that seller can disclaim implied warranties only if buyer reasonably understands this is being done and, in order for unsophisticated buyer to be forewarned, drafters of code intended disclaimer, however written, to be set forth in

conspicuous manner, and, thus, "conspicuous" requirement of subsection (2) was applicable to "as is" disclaimer prescribed by subsection (3)(a) of UCC § 2-316. *Osborne v. Genevie*, 289 So. 2d 21 (Fla. App. 1974).

To be effective, clause limiting remedies pursuant to UCC § 2-719 must be "by a writing and conspicuous;" however, language in contract between buyer and seller of turbine generator was sufficiently conspicuous to bind buyer (and to exclude implied warranties of merchantability and fitness for purpose) where (1) limiting language was located on first page of contractual document titled "General Conditions"; (2) all of the type indicating such contractual conditions was large and readable (there was no fine print); (3) limiting language was simple, direct, and easily understood; (4) there was printed heading in capital letters which read: "Limitation of Liability"; (5) "person" against whom limiting language was to operate was prominent, sophisticated corporate entity. *Avenell v. Westinghouse Elec. Corp.*, 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

In action against car dealer and manufacturer brought by buyer when engine failed to perform properly, statement by manufacturer warranting car to be free from defects in material and workmanship under normal use and service constituted express warranty under UCC § 2-313 and exclusion of, *inter alia*, implied warranty of fitness for particular purpose was ineffective where exclusions were not at any time called to buyer's attention and were not sufficiently conspicuous under UCC § 1-201(10); while implied warranty of merchantability under UCC § 2-314 and implied warranty of fitness for particular purpose under UCC § 2-315 may both attend sale of automobile, where neither dealer nor manufacturer knew that buyer intended to use car for occasional drag racing prior to or at time of original sale, no issue was created as to implied warranty of fitness for particular purpose, either in connection with original car purchase or subsequent motor replacement. *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396 (Iowa 1974).

Summary judgment was granted to seller for entire amount due in payment

for certain air conditioning/heating units which allegedly did not comply with express warranties contained in advertising brochure, where front page of sales contract contained boldface disclaimer "Of Warranties, Express or Implied, of Merchantability or Fitness" not discussed by said contract, and where same page contained large bold print warning buyer to read contract. *Pennsylvania Gas Co. v. Secord Bros.*, 73 Misc. 2d 1031 (1973), *aff'd*, 44 A.D.2d 906, 357 N.Y.S.2d 702 (4th Dep't 1974).

Printed portion of retail instalment contract purporting to exclude warranties specifically mentioned "merchantability," was of contrasting type and plainly visible, and was thus "conspicuous" within meaning of UCC, so that instrument contained valid exclusion of implied warranties of merchantability and of fitness. *Pennsylvania Gas Co. v. Secord Bros.*, 73 Misc. 2d 1031 (1973), *aff'd*, 44 A.D.2d 906, 357 N.Y.S.2d 702 (4th Dep't 1974).

Where both front and back page of lease agreement contained statement in bold capitalized lettering, "LESSOR MAKES NO EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS WITH RESPECT TO SUCH LEASED PROPERTY AND HEREBY DISCLAIMS THE SAME," which appeared not more than two inches above signature of officer who signed lease on behalf of defendant, disclaimer was sufficiently conspicuous, as defined in UCC § 1-201(10), and was properly worded so as to effectively exclude such warranties under UCC § 2-316. *Quality Acceptance Corp. v. Million & Albers, Inc.*, 367 F. Supp. 771 (D. Wyo. 1973).

Seller of fabric was liable to buyer for breach of express warranties of merchantability and fitness for particular purpose, notwithstanding seller's invoice contained statement "No refunds after 5 days. Check goods before cutting," where buyer's purchase order stated that fabric was to be used for swimwear and that all "colors, prints and bonding processes must meet swimwear specifications," where buyer's order was based on sample supplied by seller and, although another fabric was substituted for sample fabric, such modification was initiated by seller, where sell-

er's salesman assured buyer that substituted fabric would meet swimwear specifications, where fabric supplied and subsequently manufactured into swimsuits was defective and failed to meet minimum performance standards for colorfastness, and where buyer notified seller within 12 to 20 days after receipt of fabric that it had received substantial number of complaints with respect to colorfastness: (1) seller's invoice and shipment of goods did not constitute both acceptance and counteroffer under UCC § 2-207, binding buyer to terms of invoice, since language used did not clearly condition acceptance on additional terms nor were such terms conspicuous as defined by UCC § 1-201(10); (2) express warranties of merchantability and fitness for particular purpose were established under UCC § 2-313 based on buyer's order form, representations of seller's salesman and samples supplied by seller; (3) there was no showing that warranties of merchantability and fitness had been excluded or modified under UCC § 2-316; and (4) buyer, having given reasonable notice to seller under UCC § 2-607, was entitled to damages for credits issued to customers (including profits lost and costs of production for returns and allowances) plus cost of production of unsaleable swimsuits under UCC §§ 2-714 and 2-715, and to deduct such damages from purchase price under UCC § 2-717. *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973).

Court could properly have found that purported exclusion or disclaimer of warranties which was located at extreme bottom of reverse or second page of contract, which page did not require nor contemplate signature by purchaser, was not sufficiently conspicuous to meet requirements of UCC; and, therefore, jury could have properly found that existence of implied warranty of fitness was not excluded by written contract executed by parties. *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 657, 294 N.E.2d 617 (1973).

Line of print on face of stock certificate referring to transfer restrictions described on reverse side of certificate did not stand out and could not be considered conspicuous. *Ling & Co. v. Trinity Sav. & Loan*

Ass'n, 482 S.W.2d 841, 53 A.L.R.3d 1265 (Tex. 1972).

Disclaimer of express or implied warranties was not conspicuous where paragraph containing disclaimer was on reverse side of the sales contract, the paragraph was the tenth paragraph of twelve paragraphs single spaced on the reverse side of the contract, it was almost at the bottom of the page, the print was only slightly larger than the other print on the page, had only a slight slant when compared to the other print on the page, and was of the same color, though perhaps a shade darker. *Salov v. Don Allen Chevrolet Co.*, 55 Pa. D. & C.2d 180 (1971).

Where exclusionary language was not in "larger or other contrasting type or color" and was on back of instrument with nothing on front, except some words in ordinary type, to direct attention to it, exclusion was not "conspicuous" even though heading "warranty and agreement" was in large bold-face type. *Massey-Ferguson, Inc. v. Utley*, 439 S.W.2d 57 (Ky. 1969).

Exclusion of warranty of fitness, appearing in only print in paragraph form just before space for writing order, met Code "conspicuousness" requirement. *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17 (4th Dep't 1969), appeal denied, 26 N.Y.2d 610 (1970).

An attempted disclaimer is ineffective as a matter of law and fails of its purpose when it is in the body of an instrument and in type of the same size and color as other provisions. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), but see, *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Whether a warranty is conspicuous is for decision by the court. *Marion Power Shovel Co. v. Huntsman*, 246 Ark. 152, 437 S.W.2d 784 (1969).

Where a contract was in the form of a purchase order which was on a pad of paper containing several copies separated by carbon paper, and the front of the order called attention in boldface printing to terms and conditions "stated in this order" but did not point out that there were terms and conditions set forth on the

reverse side of the order, an exclusion of warranties on the reverse side of the order, although printed in an adequate size and type, were not conspicuous, within the meaning of § 2-316(2) read with § 1-201(10) so as to make the exclusion effective, because of the failure of the provisions on the front of the order to make adequate reference to the provisions on the back thereof. *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967).

Section 2-316(2) relative to the exclusion of warranties by a conspicuous writing must be read with § 1-201(10) which sets forth the test of what is conspicuous as being whether "a reasonable person against whom...[the disclaimer] is to operate ought to have noticed it". *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967).

Under § 2-316(2) when read with the last sentence of § 1-201(10), it is a question of law for the court whether a provision excluding warranties is conspicuous. *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967).

Words in the same color and size as the other type of a contract are not conspicuous. *S.F.C. Acceptance Corp. v. Ferree*, 39 Pa. D. & C.2d 225 (1966).

A disclaimer of warranties set out in the body of a sales contract in type no larger than that in which the remainder of the instrument is printed is not "conspicuous" within the meaning of subsec (10) of this section and will not serve to exclude the implied warranty of merchantability of the equipment sold, particularly where the disclaimer failed to mention merchantability. *S.F.C. Acceptance Corp. v. Ferree*, 39 Pa. D. & C.2d 225 (1966).

The test of conspicuousness is whether attention can reasonably be expected to be called to it. *Sarnecki v. Al Johns Pontiac*, 56 Luz. Legal Reg. Rep. 293 (Pa. 1966).

A new car warranty appearing on page 3 of the "owner's booklet" which limited seller's liability to replacement of defective parts, and was expressly stated to be in lieu of all other warranties, was not so conspicuous as to exclude an implied warranty of merchantability or fitness, even though it was printed in type which contrasted slightly with that used in the

remainder of the booklet. *Sarnecki v. Al Johns Pontiac*, 56 Luz. Legal Reg. Rep. 293 (Pa. 1966).

Where the provisions of a contract relied on as disclaiming implied warranties were in the same color and size of type as that used for other provisions of the contract, such provisions were not conspicuous and failed in its purpose as a disclaimer. *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. Minn. 1964).

6. Contract.

Under the Uniform Commercial Code, practical business people are not expected to govern their actions with reference to nice legal formalisms. Thus, when there is a basic agreement, however manifested and whether or not precise moment of such agreement can be determined, failure of parties to articulate agreement in precise legal language, with every difficulty and contingency considered and resolved, will not prevent formation of contract. However, if there is no basic agreement, the code will not imply one. And without an agreement, there can be no contract and without a contract, there can be no breach. This principle is explicitly recognized by UCC § 1-201(3) and (11), and UCC § 2-204(1) and (2). *Kleinschmidt Div. of SCM Corp. v. Futuronic Corp.*, 41 N.Y.2d 972, 363 N.E.2d 701 (1977).

Under the objective theory of mutual assent followed in all jurisdictions, a contracting party is bound by the apparent intention he outwardly manifests to the other contracting party, and to the extent that his real, secret intention differs therefrom, it is entirely immaterial, and thus where the express language of a contract for the sale of a boat, failed to manifest an intention to make the sale conditioned on a survey of the boat, and the buyer failed to present evidence that the condition of a survey was implied under any section of the UCC or in the general law of contracts, an agreement between the parties was exclusive of a condition precedent for a survey of the boat. *Cohn v. Fisher*, 118 N.J. Super. 286, 287 A.2d 222 (L. Div. 1972).

"Contract" as defined in UCC § 1-201(11) results when parol evidence of parties is considered as to one remaining

term in dispute. *Kohlmeyer & Co. v. Bowen*, 126 Ga. App. 700, 192 S.E.2d 400 (1972).

Even in the absence of a written agreement with respect to every term of a contract, great weight attaches to the course of dealing of the parties, and where it appears from the conduct of the parties that their mode of calculating price, although not accepted formally by signature of a written instrument, was adhered to by both parties during an extensive course of dealing, during which the purchaser received, accepted, and paid for over \$800,000 worth of merchandise, this course of dealing must be held applicable and governing with respect to remaining merchandise which was received, accepted, but not paid for. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 236 F. Supp. 879 (W.D. Pa. 1965), vacated on other grounds, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

In a case where the issue is as to whether a buyer was in default under a contract of sale so as to give the seller a right to repossess the article sold, such issue involved the duties of the parties under the primary obligation and neither the validity nor the perfection of a security interest, as defined in the instant section, is involved. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

7. Creditor.

Purpose of Florida UCC bulk-transfer statutes (Florida UCC §§ 6-101 et seq.) is to protect ordinary trade creditors who have right to expect that their bills will be paid from assets of an ongoing business. Thus, although definition of creditor in Florida UCC § 1-201(12) is broad, legislature did not intend to include within protection of bulk-transfer statutes stockholder who dissented to bulk sale of his corporation's assets. Furthermore, since under Florida UCC § 6-109, only creditors holding claims based on transactions occurring before a bulk transfer occurs are protected, stockholder who objected to bulk sale of his corporation's assets occupied status of stockholder, and not creditor, until such sale was closed and therefore could not be a bulk-transfer creditor.

Brown v. Superior Pontiac-GMC, Inc., 352 So. 2d 576 (Fla. App. 1977).

UCC § 1-201(12) defines creditor as including general as well as secured creditor and this definition is controlling as to Art 2 provision relating to consignment sales and rights of creditors. *American Nat'l Bank v. First Nat'l Bank*, 28 Colo. App. 486, 476 P.2d 304 (1970).

Creditor as defined by Code § 1-201(12) means "an unsecured creditor" thus referring to persons holding liquidated claims rather than to assertions of potential liability for breach of contract. *Aluminum Shapes, Inc. v. K-A-Liquidating Co.*, 290 F. Supp. 356 (W.D. Pa. 1968).

Paragraph (12) of the instant section was referred to in a case involving the rights of creditors of a person to whom goods were delivered on sale or return under § 2-326, in connection with the proposition that it was conceded that if the creditors had rights under § 2-326, the assignee for the benefit of the person's creditors could establish the claims. *GE Co. v. Pettingell Supply Co.*, 347 Mass. 631, 199 N.E.2d 326 (1964).

8. Delivery.

Where holder of promissory notes delivers such notes to bank with instructions that bank sell interests therein and issue certificates of participation in notes, there has been constructive delivery of such notes with bank acting as agent of original holder and making constructive delivery to purchasers to extent of their interests in notes. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979).

Since UCC § 1-201(14) defines "delivery" as "voluntary transfer of possession" but does not specify whether it may be actual or constructive, court adopted former New York Negotiable Instruments Law, which defined "delivery" as "transfer of possession, actual or constructive, from one person to another," in light of general case-law agreement that because Uniform Commercial Code did not prescribe any new definition of the term, former definition of "delivery" should be deemed to continue. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F.

Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979).

Seller neither tendered delivery nor delivered concrete forms to buyer pursuant to UCC §§ 1-201(14), 2-301 and 2-503(1), and seller breached express warranties under UCC § 2-313 that forms were free from incumbrance and that seller would warrant and defend against demands of all other persons, where third party claimed storage lien on forms, refused to allow buyer to take possession, and seller was unsuccessful in securing release from third party of his claimed lien. *Goosic Constr. Co. v. City Nat'l Bank*, 196 Neb. 86, 241 N.W.2d 521 (1976).

Trial court erred in finding that there was no valid transfer of corporate stock from share holder to his sons where testimony at trial supported conclusion that valid transfer took place and where plaintiffs did not challenge fact that father gave sons stock certificates, but only claimed that his action did not constitute delivery; fact that father had access to vault where certificates were kept after transfer did preclude effective transfer between parties to transaction. *Brener v. Industrial Steel Container Co.*, 303 Minn. 275, 228 N.W.2d 115 (1975).

Evidence that mortgagor, after signing mortgage documents, transferred them to her ex-husband who placed them in escrow was sufficient evidence from which jury could find "delivery" of documents to escrow agent within Code § 1-201(14). *Heller v. Levine*, 7 Ariz. App. 231, 437 P.2d 983 (1968).

The established definition of the term "delivery" would prevail, since the Uniform Commercial Code did not prescribe any new definition for the term. *Snyder v. Town Hill Motors, Inc.*, 193 Pa. Super. 578, 165 A.2d 293 (1960).

9. Document of title.

Drafts marked "non-negotiable", which were issued to elevator company as seller-bailee by buyer and which evidenced sale of beans, constituted "documents of title" under UCC § 1-201(15) where drafts were addressed to bailee and purported to cover goods in bailee's possession, which were fungible portion of identifiable mass, and where such drafts were treated as "documents of title" by parties themselves and

were customarily so used in bean business in general. *Midland Bean Co. v. Farmers State Bank*, 37 Colo. App. 452, 552 P.2d 317 (1976).

A motor vehicle certificate of title or manufacturer's or importer's certificate of origin is not "document" within meaning of UCC § 1-201(15), and security interest in motor vehicle can be perfected only by complying with procedure set forth in Certificate of Title Act. *Levin v. Nielsen*, 37 Ohio App. 2d 29, 306 N.E.2d 173 (1973).

Warehouse receipt is document of title. *Lofton v. Mooney*, 452 S.W.2d 617 (Ky. 1970).

A forged delivery order is neither a "document of title" nor a warehouse receipt under the provisions of this section because it cannot be said to have been issued in the regular course of business or financing, nor can it be treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the good it covers. *David Crystal, Inc. v. Cunard S.S. Co.*, 223 F. Supp. 273 (S.D.N.Y. 1963), aff'd, 339 F.2d 295 (2d Cir. N.Y. 1964), cert. denied, 380 U.S. 976, 85 S. Ct. 1339, 14 L. Ed. 2d 271 (1965), cert. denied, 380 U.S. 976, 85 S. Ct. 1340, 14 L. Ed. 2d 271 (1965).

10. Fault.

In a diversity action by a surety to recover funds paid out by it under a bond, it was held that the defendant employer corporation was not liable under U.C.C. where an employee, entrusted with the responsibility of handling securities, caused unauthorized issuance of corporate stock and made several unauthorized entries on defendant's transfer books for his own independent purpose and not for the benefit of the defendant. *Hartford Accident & Indem. Co. v. Lisky*, 323 F. Supp. 103 (N.D. Ill. 1971).

11. Fungible.

Sugar in 100 pound bags fell within definition of fungible, UCC § 1-201(17); therefore, when delivery was tendered to warehousemen on behalf of buyer under UCC § 2-503(4), buyer acquired insurable interest in goods, title to goods, and at same time buyer bore risk of loss with respect to those goods, not withstanding

warehousemen's failure to segregate sugar. *Henry Heide, Inc. v. Atlantic Mut. Ins. Co.*, 80 Misc. 2d 485 (1975).

12. Genuine.

Even though stock certificates were admittedly issued without authority and were not manually signed and did not bear a transfer agent's counter signature to the facsimile signatures, the certificates were neither forged nor counterfeit and thus were genuine within the definition of Code § 1-201(18). *Dempsey-Tegeler & Co. v. Otis Oil & Gas Corp.*, 293 F. Supp. 1383 (D. Colo. 1968).

13. Good faith.

Duty of good faith and fair dealing between bank and borrower arose from Uniform Commercial Code (UCC), which applied to note that borrower had given to bank as part of deed of trust transaction. *Merchants & Planters Bank v. Williamson*, 691 So. 2d 398 (Miss. 1997).

In an action by the owner of a valuable painting to recover the painting or its value, the defense of equitable estoppel, which provides that an owner may be estopped from setting up his own title and the lack of title in the vendor as against a bona fide purchaser for value where the owner has clothed the vendor with possession and other indicia of title, is not available to an art dealer who purchased the painting from a delicatessen employee who was not the owner and had no authority to dispose of it although he had obtained the painting from a person who rightfully had possession of it pursuant to an agreement with the true owner since the owner had consigned the painting for display only and conferred no other indicia of ownership; moreover, the owner's conduct did not in any way contribute to the deception practiced on the purchaser, and the purchaser was not a purchaser in good faith since he made no inquiry or investigation as to the true ownership of the painting. *Porter v. Wertz*, 68 A.D.2d 141 (1st Dep't 1979), *aff'd*, 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981).

In an action by the owners of a valuable painting to recover the painting or its value, the defense of statutory estoppel (Uniform Commercial Code, § 2-403, subd [2], which provides that any entrust-

ing of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business) is not available to an art dealer who purchased the painting from a delicatessen employee who was not the owner of the painting and had no authority from the owner to dispose of it although he had obtained the painting from a person who rightfully had possession of it, since the art dealer was not a buyer in the ordinary course of business, defined as a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind (Uniform Commercial Code, § 1-201, subd [9]), inasmuch as the person from whom the dealer bought the painting was not an art dealer and never held himself out to be one and the dealer was not a person in good faith because he made no effort to verify whether the seller was the owner or authorized by the owner to sell the painting. *Porter v. Wertz*, 68 A.D.2d 141 (1st Dep't 1979), *aff'd*, 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981).

Where there was no reason for brokerage firm to suspect that delivery agent had any interest in securities delivered for principals' accounts, brokerage firm acted honestly in fact and therefore met good faith requirement of UCC § 1-201, subd 19, in crediting shares to principals' accounts rather than making payment to agent. *Colonial Sec., Inc. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 461 F. Supp. 1159 (S.D.N.Y. 1978).

Where guarantor of promissory note attempts to assert defense of fraud in inducement, rights of purchasers of limited interest in note cannot be defeated on ground that they breached duty to inquire and thus failed to act in good faith because circumstances of which holders had knowledge did not rise to level indicating that failure to inquire revealed deliberate desire to evade knowledge. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108 (S.D.N.Y. 1978), *remanded*, 607 F.2d 994 (2d Cir. N.Y. 1979).

The Uniform Commercial Code, in defining "good faith" as "honesty in fact in the conduct or transaction concerned" (UCC § 1-201(19), adopted a subjective standard for the good-faith test in UCC Article 3, which standard was generally applicable under the former Negotiable Instruments Law. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979).

"Good faith" is defined by UCC § 1-201(19) as "honesty in fact in the conduct or transaction concerned." Thus, a determination of whether a depository bank acted in good faith in waiving its normal five-day waiting period and extending immediate credit on a check deposited with it involves a subjective inquiry as to whether the bank, at the time it extended such credit, had knowledge of facts suggesting that the check would eventually be dishonored. In such a case, however, whether or not the bank's conduct conformed to a "standard of reasonableness" is immaterial, since the drafters of the Uniform Commercial Code expressly rejected the idea of including a concept of objective commercial reasonableness in the meaning of "good faith." *Frantz v. First Nat'l Bank*, 584 P.2d 1125 (Alaska 1978).

In action by debtor against bank and its loan officer for conversion, trespass, false imprisonment, and malicious prosecution, where evidence showed that bank, which had made loan to debtor that was secured by automobile purchased with loan's proceeds, (1) had concluded, even before due date of first installment payment on loan, that debtor had falsified loan application, (2) that as a result, bank had declared loan to be in default, accelerated the debt obligation, and entered on debtor's property to repossess automobile, all without notice to debtor, (3) that bank's loan officer had asked debtor to come to officer's office to discuss the matter, (4) that when debtor arrived at bank, he was met by two FBI agents who interviewed him, and (5) that as a result of such interview, debtor was indicted, tried, and acquitted on federal charges of supplying false information to bank to obtain loan, it was error for trial court to grant summary judgment in favor

of bank and loan officer on conversion and trespass claim, since issue of fact existed as to whether bank had acted in good faith under UCC § 1-208 and § 1-201(19) in deeming itself to be insecure with regard to debtor's obligation. *Ginn v. Citizens & S. Nat'l Bank*, 145 Ga. App. 175, 243 S.E.2d 528 (1978).

"Good faith" under UCC § 1-201(19) requires honesty of intent in conduct or transaction concerned, rather than diligence or nonnegligence. *Wendling v. Cundall*, 568 P.2d 888, 23 U.C.C. Rep. Serv. 13 (Wyo. 1977) (action to recover under contract for exchange of realty in which court stated that definition of good faith in UCC § 1-201(19) applies to most commercial transactions outside the Uniform Commercial Code that are conducted by persons who owe no fiduciary or other special obligation to each other).

In replevin action by buyer against seller to obtain possession of supposedly used Ferrari sports car of limited availability that seller ordered for buyer from another dealer, where car on seller's receipt thereof proved to be virtually new racing vehicle, not intended for highway use, that seller wished to retain for himself, and where parties were shown to have modified in writing prior oral agreement trial court, in finding absence of good faith by seller, did not err in employing unconscionability concept of UCC § 2-302 in interpreting contract, since court's statement as to unconscionability was only dictum. *Baker v. Ratzlaff*, 1 Kan. App. 2d 285, 564 P.2d 153 (1977).

Where contract for sale of popcorn provided that buyer was to pay for shipments of popcorn when delivered and seller repudiated contract after delivering two shipments to buyer's processing plant (for which shipments seller did not demand on-the-spot payment and buyer did not offer to pay at such place, since it customarily paid its obligations from its business office in another city), seller breached his obligation of good faith under UCC § 1-203 in performance of contract, as "good faith" is defined by UCC § 1-201(19), by failing to demand payment after delivery of each shipment and by hastily reselling undelivered part of popcorn crop to another buyer at nearly twice the contract

price; trial court, in finding absence of good faith by seller, did not err in employing unconscionability concept of UCC § 2-302 in interpreting contract, since court's statement as to unconscionability was only dictum. *Baker v. Ratzlaff*, 1 Kan. App. 2d 285, 564 P.2d 153 (1977).

Bank that took drafts drawn under letter of credit did not take drafts in good faith as defined by UCC § 1-201(19) and without notice, as defined in UCC § 1-201(25), of defenses against them, and thus bank did not qualify as holder in due course under UCC § 3-302(1), where, prior to time bank took draft, attorney gave bank notice by letter that letters of credit were issued pursuant to specific terms and conditions, conditions were explained, and letter warned that conditions had not and would not be fulfilled in foreseeable future; this constituted notice that any certification by beneficiary of letters of credit that payment was due thereunder might well be fraudulent; moreover, bank, having made substantial loans to beneficiary, could not have been unaware of beneficiary's severe financial difficulties. *Shaffer v. Brooklyn Park Garden Apts.*, 311 Minn. 452, 250 N.W.2d 172 (1977).

Although buyer agreed to purchase from seller one "used" racing automobile, and such automobile was delivered with odometer registering 427 miles, seller refused to deliver automobile on grounds that such automobile was not, in fact, "used" but could be regarded by the parties as a new car; seller's conduct in claiming that since such car was "new" it was not what buyer had ordered did not meet standards of good faith imposed by UCC § 1-201(19) and UCC § 2-103(1)(b); and when car was identified to contract buyer had right of replevin under UCC § 2-716(3), since he was unable to effect cover and there was no other way for him to protect himself against loss of this deposit on car. *Tatum v. Richter*, 280 Md. 332, 373 A.2d 923 (1977).

"Good faith" under UCC § 1-201(19) requires honesty of intent rather than absence of circumstances that would put ordinarily prudent holder of instrument on inquiry as to defenses to instrument. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

"Honesty-in-fact" definition of good faith in UCC § 1-201(19) is to be distinguished from definition of good faith in UCC § 2-103(1)(b), since latter definition includes not only honesty in fact but also observance of reasonable commercial standards of fair dealing in trade. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (3) where bank indorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, bank in accepting buyer's cashier's checks and dealing with proceeds thereof did not violate good faith requirement of UCC § 3-302(1)(b)-and thus was holder in due course as to such checks and not liable to buyer for fraud and conversion in sale transaction-because (1) checks were valid cashier's checks that showed no sign of alteration or irregularity; (2) although transaction was restructured from what buyer had expected by bank's not becoming party to sale contract, buyer accepted such risk by turning over cashier's checks to owner-seller; (3) there was nothing inherently irregular or suspicious in bank's method of handling such checks and proceeds thereof; (4) bank was not aware of understanding between buyer and owner-seller and did not sign sale contract because bank had nothing to sell; and (5) both trial court's findings and record on appeal did not support buyer's contention that bank had failed to comply with definition of good faith in UCC § 1-201(19) by not being honest in fact in its conduct in sale transaction. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

Notwithstanding subsequent purchaser did not know that intermediate seller's title was voidable due to intermediate seller's obtaining truck on basis of check which was dishonored, subsequent purchaser did not have good title against original seller by status of "good faith purchaser for value" under UCC §§ 1-201(19), 1-201(44) and 2-403, where subsequent purchaser knew that intermediate seller was sophisticated about value of automotive equipment, subsequent purchaser had just received three dishonored checks from intermediate seller, subsequent purchaser had no reason to believe that intermediate seller would give equipment worth \$13,500 or more to settle debt of \$9,100, and subsequent purchaser let intermediate seller retain possession of truck. *Graves Motors, Inc. v. Docar Sales, Inc.*, 414 F. Supp. 717 (E.D. La. 1976).

In action by bank against makers of several notes pledged by third party as collateral for loan, trial court properly found that bank had taken notes in good faith and without notice of makers' alleged defenses, pursuant to UCC § 3-302(1) and definitions contained in UCC § 1-201, subsecs. (19), (25) and (27), where officers and employees of bank who handled the transaction testified that they had no knowledge or information concerning any defenses, and described in detail the investigation which they made and information which they gathered to satisfy themselves that notes were valid and that parties with whom they dealt were reliable; where trial court's findings described in some detail the investigations and inquiries made by bank; where trial court found those investigations were reasonable under the circumstances, and that the bank lacked knowledge to know or believe that alleged defenses existed; and where facts found by trial court established that the bank had no connection with transactions for which notes were given. *Security Pac. Nat'l Bank v. Chess*, 58 Cal. App. 3d 555 (2d Dist. 1976).

Buyer of tractors was not entitled to protection from manufacturer's security interest in equipment under UCC § 9-307, where buyer, who was experienced tractor dealer with knowledge of manufacturer's practice of "floor-planning" its

equipment and who purchased equipment for considerably less than its value, made no investigation of prior security interest, acquiesced in falsification of retail order form, and misrepresented particulars of transaction, did not qualify as good faith buyer in ordinary course of business under UCC §§ 1-201(9) and 1-201(19). *International Harvester Co. v. Glendenning*, 505 S.W.2d 320, 87 A.L.R.3d 1 (Tex. Civ. App. 1974).

Test for "good faith" was not diligence or negligence and it was immaterial that defendant may have had notice of such facts as would put a reasonable prudent person on inquiry, unless defendant had actual knowledge of facts and circumstances that amounted to bad faith. *Richardson Co. v. First Nat'l Bank*, 504 S.W.2d 812 (Tex. Civ. App. 1974), *ref. n.r.e.* (Apr. 3, 1974).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of \$300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of \$300 should bear signature of two specified signatories, one-year statute of limitations contained in UCC § 4-406(4) attached to each separate check bearing unauthorized signature, and new one-year period began to run with each subsequent check at moment it was made available to customer. *Neo-Tech Sys. v. Provident Bank*, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

History of Code makes it rather clear that reasonable conduct standard was intentionally omitted from good faith requirement. *Von Gohren v. Pacific Nat'l Bank*, 8 Wash. App. 245, 505 P.2d 467 (1973).

Where record contained no evidence tending to show that collecting bank in accepting forged check for deposit and permitting withdrawal of funds from fictitious account connived with forger or had any reason to believe that check was not genuine, there was no evidence tending to establish bank's lack of good faith, even if such conduct constituted failure to exercise ordinary care or even gross negli-

gence. *Aetna Life & Cas. Co. v. Hampton State Bank*, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

Nothing in Code definition of "good faith" suggests that, in addition to being honest, holder of negotiable instrument must exercise due care to be in good faith; and bank did act in good faith, and was holder in due course, although it failed to exercise ordinary care by violating its own rule of management when its teller cashed checks in question without managerial approval. *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

Definition of "good faith" as used in § 3-302(1) does not require that, in addition to being honest, holder must exercise due care. *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

When the UCC intends to apply a concept of "good faith" beyond its definition in UCC § 1-201, subd 19 as "honesty in fact", a broader definition is provided, e.g. UCC § 2-103, subd 1(b), which adds the words "observance of reasonable commercial standards of fair dealing in the trade" to the definition of "good faith" as between merchants. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

The phrase "in good faith", as used in UCC § 4-404 refers to the general definition of good faith contained in UCC § 1-201, subd. 19. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

Drawee bank's payment of 14-month-old check without making inquiry of drawer was in good faith under UCC § 1-201, subd 19 and thus permissible under UCC § 4-404 where good faith of drawee bank was not disputed. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 72 Misc. 2d 614 (1973), rev'd on other grounds, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

Code definition of "good faith" established subjective standards, that is, whether particular purchaser believed he was in good faith, not whether anyone else would have held same belief. *Balon v. Cadillac Auto. Co.*, 113 N.H. 108, 303 A.2d 194 (1973).

Requirements for establishing one's self as "good faith" buyer vary depending on commercial status of purchaser; and individual who purchases tractor for his own personal use is not held to same degree of sophistication in ascertaining existence of security interest on that tractor as is merchant who regularly deals in business of buying and selling tractors. *Swift v. J.I. Case Co.*, 266 So. 2d 379 (Fla. App. 1972), cert. denied, 271 So. 2d 147 (Fla. 1972).

The burden resting on a party to prove that it took a check in good faith and without notice of any defense is met if the trier of fact is persuaded that the existence of these facts is more probable than their nonexistence under UCC § 1-201(8). *Oklahoma Nat'l Bank v. Equitable Credit Fin. Co.*, 489 P.2d 1331 (Okla. 1971).

Bank's action in converting a transaction which clearly contemplated insurance, into an assignment which would have the effect of depriving the buyer of the waiver of subrogation provision, was not "good faith" as defined by UCC. *Integrity Ins. Co. v. Davis*, 116 N.J. Super. 417, 282 A.2d 452 (1971).

In a change from the NIL, the UCC test of good faith and notice is whether, from all the circumstances and facts known at the time, there was actual knowledge. *Suit & Wells Equip. Co. v. Citizens Nat'l Bank*, 263 Md. 133, 282 A.2d 109 (1971).

Owner of leased equipment did not show lack of "good faith", where owner failed, before trial, to specifically claim security interest rather than proceeding under general terms of lease; held, record does not indicate that owner thus had any intention to mislead attaching creditor. *Stanley v. Fabricators, Inc.*, 459 P.2d 467 (Alaska 1969).

To succinct Code definition of "good faith" as "honesty in fact", drafters of Code in Official Comment added that phrase "means at least what is here stated"; held, in short, "good faith" as used in Code stands for "honesty" and perhaps more. *Star Credit Corp. v. Molina*, 59 Misc. 2d 290 (1969).

The mere fact a holder bank permitted its depositor to draw checks against uncollected funds represented by drafts at a time when its account was otherwise low was not itself evidence that the bank had

failed to act in good faith. *F & M Nat'l Bank v. Boardwalk Nat'l Bank*, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

A buyer who acquires property from one who has a voidable title must show that he was a "good faith purchaser for value", which requires "honesty in fact and the observance of reasonable commercial standards of fair dealing". *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

The holder of a forged check who took it in good faith and for value without notice of any infirmity in the instrument or defect in the title of the person negotiating it cannot be held to act in bad faith in presenting it to the drawee bank for payment. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. Okla. 1964).

The "good faith" concept of the Negotiable Instruments Act is not substantially changed by the Uniform Commercial Code, and, although this section of the Code defines good faith as being honesty in fact, the failure of the holder to make inquiry of the payee or the maker of a note as to the satisfactory completion of the contract giving rise to the obligation will not constitute a lack of good faith in the absence of evidence that such failure is a divergence from common banking or commercial practice. *First Nat'l Bank v. Anderson*, 7 Pa. D. & C.2d 661 (1956).

14. Holder.

Under UCC § 1-201(20), "holder" means a person who is in possession of an instrument, such as a note. *Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378 (Tex. 1978) (holding that affidavit that plaintiff was "sole owner and holder" of note sued on was uncontroverted and properly supported judgment on note).

In order to show right to summary judgment in suit on promissory note in which the defendant has made a general denial, the plaintiff must establish that he is the present legal owner or holder of such note. Under UCC § 1-201(20), a "holder" is the person in possession of a note drawn, issued, or indorsed to him, or to his order or to bearer, or in blank. And under UCC § 3-301, even if the holder is not the

owner of the note, he may still enforce payment thereof in his own name. *Taylor v. Fred Clark Felt Co.*, 567 S.W.2d 863 (Tex. Civ. App. 1978), ref. n.r.e (Oct. 25, 1978).

Under definition of holder in UCC § 1-201(20), use of term "holder" with reference to note means "holder in possession" of such note. *Lazidis v. Goidl*, 564 S.W.2d 453 (Tex. Civ. App. 1978) (holding that plaintiff was holder of note in suit, although plaintiff's agent had physical possession of note).

The assignee of a collateral interest in the proceeds of promissory notes, who is in possession of the notes, which, however, were never indorsed over to its order, is not a holder of the notes and, therefore, has no status to effect an acceleration of payment under a clause therein authorizing such an acceleration at the option of the holder of the notes. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Where (1) debtor sold corporate stock on July 25, 1974 to defendants for \$180,000, and defendants executed promissory notes under pledge agreement securing payment of stock's purchase price and delivered notes to escrowee, which also received the purchased stock, (2) debtor on March 19, 1975, with knowledge and consent of defendants and escrowee, assigned notes to creditor as collateral to secure payment of prior \$60,000 debt, indorsed them to creditor's order, and delivered them to creditor which retained possession of them until August 24, 1976, a date following date on which debtor had fully debt due creditor, (3) on November 5, 1975, when defendants still owed debtor \$135,000 on notes and notes were still in creditor's possession as collateral for payment of \$28,000 balance then owed by debtor to creditor, debtor entered into agreement with plaintiff law firm and its client under which payments on prior debt owed by debtor to such client were extended, prospective lawsuit was settled, sums thus due to client were collateralized by assignment of debtor's interest in stock-payment notes, and notes themselves and pledge agreement securing them were also assigned to plaintiff on behalf of its client, subject to prior collateral assignment in favor of debtor's first

creditor, (4) first creditor on August 24, 1976 acknowledged to escrowee that debtor had fully discharged debt due it, delivered stock-payment notes in suit to plaintiff law firm, but never indorsed notes to plaintiff's order, (5) on August 25, 1976, plaintiff, defendants (purchasers of debtor's stock), debtor, and escrowee executed written acknowledgements of debtor's assignment of notes and pledge agreement to plaintiff, and plaintiff requested that it be paid next installment on notes, which was due on October 1, 1976, (5) on April 5, 1976, IRS assessed delinquent income-tax liability against debtor and filed notice of tax lien on August 4, 1976, (6) on October 1, 1976, escrowee paid installment payment due on notes to IRS, and (7) on October 5, 1976, plaintiff after due notice declared default on notes (because of failure to receive October 1, 1976 installment payment thereon) and under acceleration clause in notes demanded full payment thereof, court held (1) that plaintiff, as nominee for its client, acquired valid collateral assignment of proceeds of notes to extent that proceeds were not required to satisfy first creditor's prior security interest therein, (2) that under UCC § 3-202(3), debtor's indorsement and negotiation of notes to first creditor merely created partial assignment of notes' proceeds and did not divest debtor of ultimate right to all proceeds not required to satisfy debt owed to first creditor, (3) that debtor's remaining interest in notes' proceeds was the interest that debtor had assigned plaintiff as collateral on November 5, 1975, and that such assignment, under UCC § 9-204(1), gave plaintiff valid security interest in debtor's residuary interest in notes' proceeds, (4) that plaintiff's security interest in notes' proceeds was not perfected until August 24, 1976, when it became perfected under UCC § 9-305 by possession of notes following first creditor's delivery thereof to plaintiff, (5) that IRS tax lien was not superior to plaintiff's perfected security interest in notes, since neither plaintiff nor its client had received any notice of such lien until September 20, 1976, and (6) that neither plaintiff nor its client could accelerate unpaid balance due on notes, since plaintiff, as nominee for its

client, was merely holder of security interest in notes and was not "holder" of notes within meaning of UCC § 1-201(20) because of first creditor's failure to indorse them to plaintiff's order. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849, 25 U.C.C. Rep. Serv. 276 (1978) (holding that plaintiff was entitled to receive, on behalf of its client, all installment payments due on notes, commencing with installment due on October 1, 1976).

The Uniform Commercial Code, under UCC § 8-105(1), treats investment securities as negotiable instruments. The code also, in UCC § 1-201(20), defines a "holder" as one who is "in possession" of an investment security that is drawn, issued, or indorsed to him or to his order, or to bearer or in blank. Under the code's definition of a holder, therefore, possession is a significant factor, and the possessor of an instrument is a "holder" without regard to the legality or propriety of his possession. *Stewart Becker, Ltd. v. Horowitz*, 94 Misc. 2d 766 (1978).

In action on note, plaintiff, who had merely attached photocopy of note to complaint and incorporated it therein by reference, failed to establish for summary judgment purposes that she was holder of instrument. This requirement could have been established by showing, in accordance with definition of "holder" in UCC § 1-201(20), that plaintiff was in possession of instrument and that it had been issued or indorsed to her, or to her order, or to bearer or in blank. This requirement must be satisfied to protect maker from possibility of multiple judgments against her on same instrument through no fault of her own. *Liles v. Myers*, 38 N.C. App. 525, 248 S.E.2d 385 (1978).

Under UCC § 3-301, "ownership" of notes is not indispensable to "holdership." In *re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978) (holding that original payees of two notes were holders under UCC § 1-201(20) because they still had possession of notes).

Where bank prior to death of husband drew check at husband's request that was chargeable to joint account of husband and wife, made payable to another bank, and intended to be used in business transaction, and where because of husband's

death check was never used in such transaction but was returned to drawer bank, indorsed "not used for the purpose intended," and placed in account of wife and wife's brother because wife had closed out joint account of husband and wife, (1) fact that check was not made payable to deceased husband or otherwise indorsed to him prevented him from qualifying as holder thereof under UCC § 1-201(20); (2) payee bank also did not qualify as holder because it never obtained possession of such check; and (3) husband's estate acquired no right to funds represented by such check because such funds never lost their character as jointly held funds of husband and wife. In re Estate of Silvian, 347 So. 2d 632 (Fla. Dist. Ct. App. 4th Dist. 1977).

In suit to recover on two promissory notes in plaintiff's possession, plaintiff was not "holder" of notes within meaning of UCC § 1-201(20) where notes were not drawn, issued, or indorsed to her or to her order, or to bearer or in blank, and trial court erred in according plaintiff rights of holder under UCC § 3-301. *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

Where creditor bank, on date loan was due and after being informed by debtor that debtor would default, set off credit balances in debtor's accounts against amount of debt; where remittance check of debtor's customer, pursuant to prior agreement between debtor and bank, was taken by bank from debtor's post-office lockbox and indorsed and deposited in debtor's account; where after depositing such check, bank then exercised alleged right of setoff against it; and where customer then issued stop-payment order on check and bank sued customer for payment thereof, alleging that it had acquired holder-in-due-course status as to such check and that its right to receive payment was not affected by debtor's alleged failure to discharge contractual obligations to customer, (1) bank acted prematurely in setting off deposits in debtor's accounts on date loan was due; (2) although such premature setoff arguably became operative on following day, it did not determine issue as to whether bank was entitled to payment on check; (3)

bank was mere holder of check under UCC § 1-201(20) and not holder in due course under UCC § 3-302(1), since it did not give value for check under UCC § 3-303(b) and UCC § 4-208(1); (4) failure to give value stemmed from fact that bank, after customer issued stop-payment order on check, reversed its provisional credit of check to debtor's account and thus reinstated that part of debtor's obligation against which such credit was set off; and (5) since bank did not give value for check and thus was not holder in due course, it could not recover on check. *Marine Midland Bank-New York v. Graybar Elec. Co.*, 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

Possessor of promissory notes, which were made payable to payee with name different from name of possessor and which were unendorsed by named payee, was entitled to recover on notes pursuant to UCC § 3-301, even though possessor was not a holder under UCC § 1-201(20), where evidence at trial established that name of payee was former name of possessor. *Lawson v. Finance Am. Private Brands, Inc.*, 537 S.W.2d 483 (Tex. Civ. App. 1976).

Document purporting to transfer and assign promissory note which was never attached to note did not serve as effective endorsement of note under UCC § 3-202(2); since note was not issued or endorsed to assignee, assignee was not holder of note as defined in UCC § 1-201(20) and, not being holder, assignee could not possibly be holder in due course and assignment of note was therefore subject to defense of failure of consideration. *Billas v. Dwyer*, 140 Ga. App. 774, 232 S.E.2d 102 (1976).

Payee had no interest in cashier's check which had been typed and signed but which was cancelled when bank learned that drawer company was being placed in bankruptcy since, under UCC § 3-409, check itself did not operate as assignment of funds and payee, who never took possession of check, could not qualify as holder under UCC § 1-201(2). *Rex Smith Propane, Inc. v. National Bank of Commerce*, 372 F. Supp. 499 (N.D. Tex. 1974).

Assignee of promissory note qualified as "holder" under UCC § 1-201(20), but pro-

vision that judgment could be confessed "at any time hereafter" rendered note non-negotiable under UCC § 3-112(d) and outside scope of Code. *Shatz v. Dunn*, 18 Ill. App. 3d 390, 309 N.E.2d 702 (5th Dist. 1974).

Plaintiff-assignee of facsimile copy of promissory note was entitled to maintain action on note against defendant-maker, although plaintiff did not have possession of note, where bank that held note returned it to maker, though it had not been paid, and then subsequently prepared facsimile and assigned it to plaintiff. Plaintiff was not holder of note under UCC § 1-201(20), since he was never in possession of note, but he was transferee of note, though bank did not deliver it to him, and, as such, he could maintain action on note since maker had possession of note and note was in evidence. *Scheid v. Shields*, 269 Or. 236, 524 P.2d 1209 (1974).

Where person who presented check to collecting bank did not have authority to negotiate check, collecting bank could not become holder of check based upon unauthorized endorsement, and hence could not become holder in due course. *Thieme v. Seattle-First Nat'l Bank*, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Presenting bank could not become holder of cashier's check based upon unauthorized indorsement of one claiming to be agent of payee. *Thieme v. Seattle-First Nat'l Bank*, 7 Wash. App. 845, 502 P.2d 1240 (1972).

As a holder within the meaning of UCC § 1-201 subd 20, an escrow agent established a prima facie case on maker's dishonored check under UCC 3-307, subd 2, and it was no defense either that escrow agent could not himself sue on the check, or that the principal had failed to perform under the escrow agreement, where maker had prevented principal's performance, and where escrow agent, who had acknowledged the receipt of cash, could sue on check as trustee for principal, or as promisee of third party beneficiary contract under CPLR § 1004. *Helman v. Dixon*, 71 Misc. 2d 1057 (1972).

An escrow agent to whom a house buyer delivered a check to secure principal's performance of repairs to new house under escrow agreement was a "holder" un-

der UCC § 1-201 subd 20 and entitled to sue on subsequently dishonored check under CPLR 1004 not only as the promisee of a third party beneficiary contract, but also as trustee for principal. *Helman v. Dixon*, 71 Misc. 2d 1057 (1972).

Draft payable to two payees was deposited by one payee without endorsement of other; held, bank did not become "holder" of draft and thus could not become holder in due course. *Federal Deposit Ins. Corp. v. Marine Nat'l Bank*, 431 F.2d 341 (5th Cir. Fla. 1970).

UCC § 1-201(20) codifies pre-Code law that one in possession is "holder" of check. *Investment Serv. Co. v. Martin Bros. Container & Timber Prods. Corp.*, 255 Or. 192, 465 P.2d 868 (1970).

Plaintiff was asked by subcontractor to discount note; note was made out payable to subcontractor; plaintiff endorsed note over to plaintiff's bank and executed promissory note to order of bank to secure bank against loss; plaintiff gave subcontractor part of amount of note; held, plaintiff was "holder" of note. *O.P. Ganjo, Inc. v. Tri-Urban Realty Co.*, 108 N.J. Super. 517, 261 A.2d 722 (L. Div. 1969).

Where, at time of transaction allegedly constituting payment of note, there had been no indorsement of note to finance company which had already taken note as collateral, finance company was not "holder" of note since note had not been "drawn, issued or indorsed to him or to his order or to bearer or in blank"; therefore finance company could not be holder in due course of note. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969).

Where a promissory note is made payable to one named therein as attorney for plaintiffs but not endorsed to them by the attorney, plaintiffs may enforce payment as holders of the note. *Bennett v. Cannon*, 114 Ga. App. 479, 151 S.E.2d 828 (1966).

One who obtained possession of a negotiable bill of lading is not a holder with power to divert it in the absence of an actual endorsement of the bill to it. *Koreska v. United Cargo Corp.*, 23 A.D.2d 37 (1st Dep't 1965).

A bank which accepts a check for collection and, for that purpose, acts as its depositor's agent is also a holder of the

check, and the fact that it does not own the item is immaterial insofar as its status as a holder is concerned. *Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n*, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

Indorsee who surrendered possession of dishonored checks to his indorser cannot be regarded as a "holder" of the instruments. *Dluge v. Robinson*, 204 Pa. Super. 404, 204 A.2d 279 (1964).

A bank accepting a check from the payee for a deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor is a holder of a check, taking for value, and entitled to recover from the drawer thereon. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

The freedom from the defense of prior equities afforded to a holder in due course is an extraordinary protection, which, although having its origin in the law of merchant, is closely akin to similar protection given in other types of cases by courts of equity; and running through all the authorities dealing with holders in due course is a principle, not always stated, that he who seeks the protection given one in that position must have dealt fairly and honestly in acquiring the instrument in controversy and in regard to the rights of all prior parties, this is, the kind of good faith which the law demands, and the principle is closely analogous to the equitable doctrine of clean hands. *Norman v. World Wide Distribs., Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963).

15. To honor.

"To honor," as used in UCC § 1-201(21), is a term of art and means to pay. *Wiley v. Peoples Bank & Trust Co.*, 438 F.2d 513 (5th Cir. 1971), on remand, 462 F.2d 179 (5th Cir. 1972).

16. Insolvency proceedings.

A Chapter XI proceeding is, of course, designed and intended to rehabilitate the estate of the debtor and hence clearly comes within the UCC § 1-201(22) definition of "insolvency proceedings." *Morrison Steel Co. v. Gurtman*, 113 N.J. Super. 474, 274 A.2d 306 (App. Div. 1971).

17. Insolvent.

Where seller sought to reclaim goods it had shipped to buyer more than ten days before buyer filed petition for bankruptcy, mere fact that buyer gave seller two checks which were returned for insufficient funds (NSF) did not make buyer "insolvent" as defined by UCC § 1-201(23) nor did the two NSF checks constitute a misrepresentation of solvency "in writing" within three months of buyer's receipt of shipment, entitling seller to reclaim goods under UCC § 2-702(2), where there was evidence to show that seller did not rely upon NSF checks as representations of solvency, but relied primarily, if not entirely, upon representation that payment for shipment would be made out of special escrow account. *In re Creative Bldgs., Inc.*, 498 F.2d 1 (7th Cir. Ill. 1974).

Where the sellers of automobiles to a buyer who disposed of them through an auction company later found the checks received by them from the buyer in payment for the cars were dishonored because of the auction company's actions in stopping payments on checks previously delivered to the buyer and by withholding from him the proceeds derived from the sales of the sellers' cars, the sellers had a right of reclamation of their property had it remained in the buyer's hands either under § 2-702 or § 2-507 since the auction company's action had in effect rendered the car buyer insolvent, and although the cars had been resold at auction the sellers' rights survived the resale and, on equitable principles, attached to the proceeds of the sales in the hands of the auction company. *Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc.*, 387 S.W.2d 17 (Ky. 1965).

18. Money.

Federal reserve notes are money and therefore not within the scope of Article 3 of the Uniform Commercial Code. *Commonwealth v. Saville*, 353 Mass. 458, 233 N.E.2d 9 (1968).

United States coins having a numismatic value in excess of the value expressed on their face and pledged as collateral to secure a bank loan are to be considered as "goods" within the meaning of the UCC, and not solely as a medium of exchange. *In re Midas Coin Co.*, 264 F.

Supp. 193 (E.D. Mo. 1967), *aff'd*, 387 F.2d 118 (8th Cir. Mo. 1968).

19. Notice.

In action for alleged breach by defendant airport board of one-year written agreement under which plaintiff was to serve as "fixed-base" operator of airport in return for use of airport terminal and other facilities, where (1) prior to end of agreement's one-year term, plaintiff attended board meeting at which board approved motion not to renew parties' agreement; and (2) during plaintiff's subsequent out-of-state absence, board sent (a) certified letter containing notice of agreement's termination to plaintiff's business address, and (b) hand-delivered letter containing similar notice that was not accepted by employee at plaintiff's business office, court held, on granting board's motion for summary judgment, (1) that agreement in suit could be described as either "lease of real property" or "contract for services"; (2) that although neither type of contract was explicitly covered by Uniform Commercial Code, code nevertheless constituted persuasive authority with respect to agreements like that in suit; (3) that as a result, provisions of UCC § 75-1-201(26) and (27), which deal with giving of notice, and provisions of UCC § 75-1-201(38), which define term "send," would be applied by analogy; (4) that under such provisions, fact that plaintiff was given copy of board meeting minutes that authorized termination of his contract was sufficient to terminate such agreement, even if court should adopt "actual-delivery-to-person" test urged by plaintiff; (5) that (a) mailing of registered letter to plaintiff's business address was proper "sending" under UCC § 75-1-201(38), (b) act of mailing was "giving of notice" under UCC § 75-1-201(26), and (c) deposit of notice for delivery was proper "receipt" of notification under UCC § 75-1-201(26)(a); (6) that hand delivery of second letter containing notice of plaintiff's termination, which was left on desk of plaintiff's employee over her protest, constituted proper "giving" and "receipt" of notice under UCC § 75-1-201(26) and also proper "sending" under UCC § 75-1-201(38); and (7) that because plaintiff's termination was authorized by board and

notice of termination was properly given, board was not liable for breach of contract. *Logan v. Corinth-Alcorn County Joint Airport Bd.*, 665 F. Supp. 506 (N.D. Miss. 1987).

Account debtor did not receive sufficient notice of assignment of account and therefore was authorized to continue making payments to assignor, under § 75-9-318(3), where account debtor, who was farmer, was shown letter describing assignment while out in rice field without his reading glasses, and he signed it with understanding that it was routine account verification, where account debtor was not given copy of letter, where letter neither explicitly stated that account had been assigned nor identified which of account debtor's corporate accounts with assignor was involved, and where, over course of one year or more, account debtor's corporations paid over \$50,000 to assignor by checks made payable solely to assignor, and assignee never complained during this period about way payments were made. *Warrington v. Dawson*, 798 F.2d 1533 (5th Cir. 1986).

Under UCC § 9-504(3), requiring that notice of intended sale of collateral must be "sent" to debtor, and § 1-201(38), defining word "send," notification of the sale must be in writing. Such written notice will be sufficient under UCC § 9-504(3) if it is either personally delivered to the debtor or sent by mail to the debtor's address. In the latter case, whether or not the debtor receives it will not defeat its sufficiency. *McKee v. Mississippi Bank & Trust Co.*, 366 So. 2d 234 (Miss. 1979).

Under UCC §§ 8-304 and 1-201(25), either actual or constructive notice will prevent one from obtaining the status of a bona fide purchaser. *Oscar Gruss & Son v. First State Bank*, 582 F.2d 424 (7th Cir. Ill. 1978).

Absent actual knowledge or reason to know (see UCC § 1-201(25)), a depository bank has no affirmative duty to inquire whether a defense exists against a check deposited with it. *Frantz v. First Nat'l Bank*, 584 P.2d 1125 (Alaska 1978).

UCC § 9-401(2) requires knowledge of contents of the improperly filed financing statement-not knowledge of contents of creditor's security agreement with debtor.

Furthermore, under UCC § 1-201(25)(a), such knowledge must be actual knowledge. In *re County Green Ltd. Partnership*, 438 F. Supp. 693 (W.D. Va. 1977).

In action by cashing bank to recover on check on which payment was subsequently stopped, where check was made payable to named payee as payment for cattle-feeding contract between payee and drawer, another bank holding perfected security interests in all of payee's property called in secured loan to payee and directed payee to turn in all proceeds on payee's accounts receivable and not to pay any of payee's general creditors, payee cashed check in suit at still another bank and paid off certain general creditors, drawer of check stopped payment thereon at request of secured bank, and handwritten part of check stated that it was drawn for \$13,430 but check imprinter inadvertently entered "\$3,430" on check, cashing bank was holder in due course and entitled to recover under UCC § 3-302(1)(c) because (1) it had no notice under UCC § 1-201(25) of secured bank's claim to check's proceeds from mere publication in biweekly reporting service 17 months previously of secured bank's filing of security agreements on payee's property, even though cashing bank did subscribe to such reporting service; (2) check was negotiable on its face, since it was indorsed by payee and payee's indorsement was not restrictive; (3) statement by payee's wife to officer of cashing bank that check was being cashed to prevent secured bank from "grabbing it" occurred after check was cashed and thus was irrelevant under UCC § 3-304(6) to issue of notice; and (4) cashing bank took check in good faith under UCC § 3-302(1)(b), despite \$10,000 error on face of check, since cashing bank had contacted drawee bank to ascertain correct amount of check and to discover whether sufficient funds were on deposit to cover it. *McCook County Nat'l Bank v. Compton*, 558 F.2d 871 (8th Cir. S.D. 1977), cert. denied, 434 U.S. 905, 98 S. Ct. 302, 54 L. Ed. 2d 191 (1977).

Letter by stockholder's attorney several months after discovery that stock was missing from safe deposit box requesting that stockholder be advised in writing whether issuer showed any change in

ownership status of stock did not constitute implied notice as defined under UCC § 1-201(25) that stock had been lost, apparently destroyed or wrongfully taken; thus, stockholder was precluded from taking any action against issuer under UCC § 8-405 when issue subsequently registered transfer of stock before receiving any such notice that stock had been lost, apparently destroyed or wrongfully taken. *Exxon Corp. v. Raetzer*, 533 S.W.2d 842 (Tex. Civ. App. 1976), writ ref'd n.r.e., (June 9, 1976).

Subsequent creditor had actual knowledge under UCC §§ 9-401(2) and 1-201(25) of contents of improperly filed financing statement, and thus financing was effective against subsequent creditor, where subsequent creditor was aware at time that debtor came to it for loan that, except for about \$13,000, all of debtor's \$160,000 net worth was pledged for two prior bank loans and that pledge covered debtor's equipment. *Enark Indus., Inc. v. Bush*, 86 Misc. 2d 985 (1976).

Allegations that company which was transferred in exchange for note had never made profit was not sufficient to establish that transfer of note was not for value within meaning of UCC § 3-302, since no facts were alleged relating to worth of company's assets, and allegations that holder of note required payment of substantial portion of note by transferor if maker defaulted, and further required that transferor's terms of transfer be concealed from maker, were insufficient to show that holder had "notice of fraud" within meaning of UCC § 1-201(25). *Ritz v. Karstenson*, 39 Ill. App. 3d 877, 350 N.E.2d 870 (2d Dist. 1976).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific war-

ranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

In action by bank against makers of several notes pledged by third party as collateral for loan, trial court properly found that bank had taken notes in good faith and without notice of makers' alleged defenses, pursuant to UCC § 3-302(1) and definitions contained in UCC § 1-201, subsecs. (19), (25) and (27), where officers and employee of bank who handled the transaction testified that they had no knowledge or information concerning any defenses, and described in detail the investigation which they made and information which they gathered to satisfy themselves that notes were valid and that parties with whom they dealt were reliable; where trial court's findings described in some detail the investigations and inquiries made by bank; where trial court found those investigations were reasonable under the circumstances, and that the bank lacked knowledge to know or believe that alleged defenses existed; and where facts found by trial court established that the bank had no connection with transactions for which notes were given. *Security Pac. Nat'l Bank v. Chess*, 58 Cal. App. 3d 555 (2d Dist. 1976).

Government's perfected tax lien had priority over bank's security interest in funds due taxpayer on construction project where bank failed to perfect its security interest by filing financing statement with secretary of state of taxpayer's home state, as well as with county in which taxpayer had its place of business, as required by UCC § 9-401(1) and where government did not have notice or knowledge of bank's interest in property. *United States v. Ed Lusk Constr. Co.*, 504 F.2d 328 (10th Cir. Okla. 1974).

Where trier of fact conceivable could find that purchaser of securities had constructive knowledge of adverse claim as contemplated by § 1-201(25)(c), by reason of substantial discount at which bonds were being offered, negligence of broker in failing to discover adverse claim to bonds could well be found to be proximate cause of injury to purchaser, which relied on

broker's verification in deciding to purchase bonds. *Miriani v. Rodman & Renshaw, Inc.*, 358 F. Supp. 1011 (N.D. Ill. 1973).

"Reason to know" method of notice is objective one, and would not require that taker have actual knowledge of adverse claim in order to be charged with notice of such claim, but would premise notice upon reasonable commercial standards. *Von Gohren v. Pacific Nat'l Bank*, 8 Wash. App. 245, 505 P.2d 467 (1973).

Secured creditor with security interest in crops grown during 1971 on two tracts of land, one owned by debtor and other leased by him, took priority over purported attaching creditor, claiming under writ of attachment issued November 11, 1971, with respect to proceeds from sale of crops, notwithstanding security agreement covering both tracts of land was not filed until November 12, 1971: (1) With respect to "leased" tract, where original financing statement covering crops growing or to be grown thereon was filed on July 5, 1966, security agreement covering 1971 crops on both "leased" and "owned" tracts was executed on February 18, 1971, and continuation statement was filed on June 28, 1971, security interest was perfected by filing of continuation statement prior to issuance of attaching creditor's purported attachment and levy thereunder, and took priority over any rights acquired by attaching creditor; (2) with respect to "owned" land, although secured party's security interest was not perfected by filing as of time of levy under attaching creditor's purported attachment, evidence showed that attaching creditor either had actual notice of secured party's interest in crops or could be charged with actual knowledge or duty to secure knowledge of secured party's interest, and, thus, secured party's unperfected security interest took priority over rights of attaching creditor. *Gulf Oil Co. United States v. First Nat'l Bank*, 503 S.W.2d 300 (Tex. Civ. App. 1973).

UCC § 6-104(3) [Repealed] does not render transfer ineffective unless transferee was shown to have had actual knowledge that list of creditors was incomplete; thus, in action by transferor's customs bond surety against transferee in

bulk to recover customs duties assessed against transferor and paid by surety, transferee was not personally liable, although neither surety nor United States were on list of creditors and no notice was given them, where transferee did not have actual knowledge or surety's claim; fact that transferor was partly engaged in importing and transferee had constructive knowledge that some import duty might be due to United States did not render transfer ineffective. *Federal Ins. Co. v. Pipeco Steel Corp.*, 125 N.J. Super. 563, 312 A.2d 510 (App. Div. 1973).

In an action brought to recover for injuries sustained by plaintiff as a result of the unauthorized registration of stock owned by her in the two defendant companies, plaintiff notified each corporate issuer within a reasonable time after she had noticed that her shares had been transferred as a result of forgery as provided by UCC 8-404, where it appeared that plaintiff was a 94-year-old woman who, while a guest in a home, had allowed one of her hosts, whom she trusted, to handle her affairs over a 2 year period, and in light of plaintiff's reliance on the perpetrator of the acts which deprived her of title to her securities and in light of her own age and decrepitude, plaintiff could not be charged with unreasonable action in not checking her accounts from time to time and consequently plaintiff did not have required statutory notice of host's dishonesty until she left his residence. *Weller v. AT & T*, 290 A.2d 842 (Del. 1972).

Notice that is received has been "sent", even though notice is not written. *Crest Inv. Trust, Inc. v. Alatzas*, 264 Md. 571, 287 A.2d 261 (1972).

Intendment of UCC notice definition would seem to be an attempt to prevent those dealing in the commercial world from obtaining various rights when, from a reasonable inquiry into the true facts, that person would have discovered a fact which prevented him from obtaining the rights which he was seeking. *Winter & Hirsch, Inc. v. Passarelli*, 122 Ill. App. 2d 372, 259 N.E.2d 312 (1st Dist. 1970).

Common carrier who transported trailer coach sold in Virginia to Oklahoma was deemed to have notice, under Code § 1-201(25), of Virginia perfected security

interest in coach, effective in Oklahoma under Code § 9-103(1). *National Trailer Convoy Co. v. Mount Vernon Nat'l Bank & Trust Co.*, 420 P.2d 889 (Okla. 1966).

The filing of a lease contract, providing for a lien upon personal property of the lessee, in the real estate records, does not constitute notice of the existence of a lien as to personal property, for actual notice is required under the Uniform Commercial Code. In *re King Furn. City, Inc.*, 240 F. Supp. 453 (E.D. Ark. 1965).

The insertion in a conditional sales contract of the purchaser's name as "Excel Department Stores" instead of its correct corporate title of "Excel Stores, Inc." is a minor error not seriously misleading and does not affect the validity of the instrument. In *re Excel Stores, Inc.*, 341 F.2d 961 (2d Cir. Conn. 1965).

Evidence that seller's representatives had participated in attempts to make helicopter perform in an expected manner established that the seller had notice of breach of implied warranty of fitness. *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. Minn. 1964).

Evidence indicating that a credit equipment company financed the sale of machinery from the manufacturer to the seller, as well as the sale from the seller to the ultimate purchaser, is not sufficient to demand a finding that the credit equipment company had such a relationship with the manufacturer or seller as to impute to it knowledge of any defects or nondeliveries, and the fact that the credit equipment company was merely the financing agency which happened to have financed both transactions was not inconsistent with good faith. *Commercial Credit Equip. Corp. v. Reeves*, 110 Ga. App. 701, 139 S.E.2d 784 (1964).

20. Notifying or giving notice.

In action for alleged breach by defendant airport board of one-year written agreement under which plaintiff was to serve as "fixed-base" operator of airport in return for use of airport terminal and other facilities, where (1) prior to end of agreement's one-year term, plaintiff attended board meeting at which board approved motion not to renew parties' agreement; and (2) during plaintiff's subsequent out-of-state absence, board

sent (a) certified letter containing notice of agreement's termination to plaintiff's business address, and (b) hand-delivered letter containing similar notice that was not accepted by employee at plaintiff's business office, court held, on granting board's motion for summary judgment, (1) that agreement in suit could be described as either "lease of real property" or "contract for services"; (2) that although neither type of contract was explicitly covered by Uniform Commercial Code, code nevertheless constituted persuasive authority with respect to agreements like that in suit; (3) that as a result, provisions of UCC § 75-1-201(26) and (27), which deal with giving of notice, and provisions of UCC § 75-1-201(38), which define term "send," would be applied by analogy; (4) that under such provisions, fact that plaintiff was given copy of board meeting minutes that authorized termination of his contract was sufficient to terminate such agreement, even if court should adopt "actual-delivery-to-person" test urged by plaintiff; (5) that (a) mailing of registered letter to plaintiff's business address was proper "sending" under UCC § 75-1-201(38), (b) act of mailing was "giving of notice" under UCC § 75-1-201(26), and (c) deposit of notice for delivery was proper "receipt" of notification under UCC § 75-1-201(26)(a); (6) that hand delivery of second letter containing notice of plaintiff's termination, which was left on desk of plaintiff's employee over her protest, constituted proper "giving" and "receipt" of notice under UCC § 75-1-201(26) and also proper "sending" under UCC § 75-1-201(38); and (7) that because plaintiff's termination was authorized by board and notice of termination was properly given, board was not liable for breach of contract. *Logan v. Corinth-Alcorn County Joint Airport Bd.*, 665 F. Supp. 506 (N.D. Miss. 1987).

UCC §§ 2-201(2) and 1-201(26) do not prescribe any particular method for proving the receipt of a confirmatory writing. However, to prove such receipt, the sending merchant can rely on the presumption that a correctly addressed letter, which was properly mailed and was not returned undelivered to the sender, was delivered to the addressee. *Perdue Farms, Inc. v.*

Motts, Inc., 459 F. Supp. 7 (N.D. Miss. 1978).

Where (1) certified letters were mailed to debtor and each guarantor advising them that collateral had been repossessed, that they had right of redemption, and that if such right were not exercised by specified date, collateral would be sold, and (2) where such letters were followed by other letters informing debtor and guarantors that collateral had been advertised for sale, court held that such notice of sale of collateral was commercially reasonable and sufficient under UCC § 9-504(3) and UCC § 1-201(26). *Cessna Fin. Corp. v. Meyer*, 575 P.2d 1048 (Utah 1978).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, under UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

Notice of assignment which was sent by registered mail and received by account debtor at its shipping dock was sufficient, although it never reached account debtor's accounting department. *Ertel v. Radio Corp. of Am.*, 261 Ind. 573, 307 N.E.2d 471 (1974), on remand, 171 Ind. App. 51, 354 N.E.2d 783 (1976).

Where debtor assigned accounts receivable to secure payment of note at maturity, and creditor notified account debtor by letter of assignment, account debtor was under duty to pay over to secured party amount due to debtor and was liable to secured party for payments subsequently made to debtor. *Moab Nat'l Bank v. Keystone-Wallace Resources*, 30 Utah 2d 330, 517 P.2d 1020 (1973).

Notification by certified mail is reasonable, and actual knowledge by the person

notified is unnecessary. *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964), but see, *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

21. Notice received by organization.

In action for alleged breach by defendant airport board of one-year written agreement under which plaintiff was to serve as "fixed-base" operator of airport in return for use of airport terminal and other facilities, where (1) prior to end of agreement's one-year term, plaintiff attended board meeting at which board approved motion not to renew parties' agreement; and (2) during plaintiff's subsequent out-of-state absence, board sent (a) certified letter containing notice of agreement's termination to plaintiff's business address, and (b) hand-delivered letter containing similar notice that was not accepted by employee at plaintiff's business office, court held, on granting board's motion for summary judgment, (1) that agreement in suit could be described as either "lease of real property" or "contract for services"; (2) that although neither type of contract was explicitly covered by Uniform Commercial Code, code nevertheless constituted persuasive authority with respect to agreements like that in suit; (3) that as a result, provisions of UCC § 75-1-201(26) and (27), which deal with giving of notice, and provisions of UCC § 75-1-201(38), which define term "send," would be applied by analogy; (4) that under such provisions, fact that plaintiff was given copy of board meeting minutes that authorized termination of his contract was sufficient to terminate such agreement, even if court should adopt "actual-delivery-to-person" test urged by plaintiff; (5) that (a) mailing of registered letter to plaintiff's business address was proper "sending" under UCC § 75-1-201(38), (b) act of mailing was "giving of notice" under UCC § 75-1-201(26), and (c) deposit of notice for delivery was proper "receipt" of notification under UCC § 75-1-201(26)(a); (6) that hand delivery of second letter containing notice of plaintiff's termination, which was left on desk of plaintiff's employee over her protest, constituted proper "giving" and "receipt" of notice under UCC § 75-1-201(26) and

also proper "sending" under UCC § 75-1-201(38); and (7) that because plaintiff's termination was authorized by board and notice of termination was properly given, board was not liable for breach of contract. *Logan v. Corinth-Alcorn County Joint Airport Bd.*, 665 F. Supp. 506 (N.D. Miss. 1987).

Lessee under contract with county airport board received sufficient written notice of termination of the contract under standards set by Miss Code § 75-1-201(26), (27), and (38), where lessee was provided with copy of minutes authorizing termination, where registered letter was mailed to lessee, and where second letter was hand delivered to lessee's offices, in spite of fact that receipt of both letters was refused. *Logan v. Corinth-Alcorn County Joint Airport Bd.*, 665 F. Supp. 506 (N.D. Miss. 1987).

In action by corporate depositor against drawee bank charging bank with improper disposition of money on deposit in corporation's account in that bank credited corporate checks which were made payable to bank to private accounts of corporate employee and his associate, under UCC § 1-201 (27) evidence of information possessed by individual employees of bank relating to bank's dealings with employee and his associate, tending to show that person who had knowledge of these facts would have had grounds for suspicion about financial activities of these two men, should be limited to that which jury could reasonably find would have come to attention of employees responsible for handling of these checks if bank had "exercised due diligence." *Transamerica Ins. Co. v. United States Nat'l Bank*, 276 Or. 945, 558 P.2d 328 (1976).

Notwithstanding that agents of owner of counterfeit United States treasury bill inquired at bank as to genuineness of bill, such inquiry did not constitute notice under UCC § 1-201 (25, 26, 27) that bill was not genuine and bank, which took bill as negotiable instrument in bearer form under UCC § 8-105 as bona fide purchaser, was entitled under UCC § 8-306 to rely on owner's warranties as principal that bill was genuine and was not materially altered, but recovery by bank under unjust enrichment was not permitted, since, un-

der UCC §§ 1-102 and 1-103, specific warranties of UCC displaced remedy of unjust enrichment in regard to negotiation of securities in this case. *Brannon v. First Nat'l Bank*, 137 Ga. App. 275, 223 S.E.2d 473 (1976).

In action by bank against makers of several notes pledged by third party as collateral for loan, trial court properly found that bank had taken notes in good faith and without notice of makers' alleged defenses, pursuant to UCC § 3-302(1) and definitions contained in UCC § 1-201, subsecs. (19), (25) and (27), where officers and employees of bank who handled the transaction testified that they had no knowledge or information concerning any defenses, and described in detail the investigation which they made and information which they gathered to satisfy themselves that notes were valid and that parties with whom they dealt were reliable; where trial court's findings described in some detail the investigations and inquiries made by bank; where trial court found those investigations were reasonable under the circumstances, and that the bank lacked knowledge to know or believe that alleged defenses existed; and where facts found by trial court established that the bank had no connection with transactions for which notes were given. *Security Pac. Nat'l Bank v. Chess*, 58 Cal. App. 3d 555 (2d Dist. 1976).

Bank was not bona fide purchaser within meaning of UCC § 8-302 and was liable for conversion of stolen treasury bills, where owner notified bank of loss but bank did not make reasonable efforts to advise its discount and collateral department of existence of lost securities file, and where bank subsequently took bills as collateral for loans. The test of sufficiency of notice is objective one under UCC § 1-201(27) and not whether or not individuals involved were in fact aware of notice. *Morgan Guar. Trust Co. v. Third Nat'l Bank*, 529 F.2d 1141 (1st Cir. Mass. 1976).

Account debtor did not receive notice of assignments made by its creditor to bank where, inter alia, notice was given to employee of debtor who was not in such position that notice to him could reasonably be construed to be notice to debtor.

Bank of Salt Lake v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 534 P.2d 887 (Utah 1975).

Notice to corporation president of private sale of repossessed equipment could not be imputed to corporate officers who were accommodation indorsers of note where president was also officer of repossessing equipment supplier, and where reposessor, although aware of this probability of conflict of interest, had not taken "such steps as may be reasonably required to inform the other party in the ordinary course". *T & W Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (L. Div. 1969).

22. Organization.

In action to determine priority of right to farm equipment (collateral) as between bankruptcy trustee and assignee-creditor with allegedly perfected security interest, where (1) partnership-debtor bought farm equipment from seller on October 25, 1974, (2) seller filed financing statement in Tallahatchie County, Mississippi, instead of Sunflower County, Mississippi, where partnership's property was located, (3) seller subsequently assigned sale contract and security agreement to plaintiff assignee-creditor, and (4) debtor thereafter became bankrupt, court held (1) that partnership can be debtor because (1) UCC § 9-105(1)(d) defines debtor as "person" who owes payment of secured obligation, (b) "person" under UCC § 1-201(30) includes "organization," and (c) "organization" under UCC § 1-201(28) includes "partnership," (2) that debtor-partnership's residence under UCC § 9-401(6) was its place of business, which was in Sunflower County, Mississippi, and not Tallahatchie County, Mississippi, (3) that under UCC § 9-401(1)(a), plaintiff's financing statement should have been filed in county of debtor's residence (Sunflower County), and (4) that as a result, plaintiff's security interest was unperfected because it was filed in wrong county. *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. Tenn. 1982).

The UCC expressly regards a partnership as a legal entity. *Loucks v. Albuquerque Nat'l Bank*, 76 N.M. 735, 418 P.2d 191 (1966).

23. Party.

Neither lady acquiring full interest in mortgaged property nor her father acquiring security interest from her assumed or existing note or mortgage became guarantor on same; held, neither were “parties” to mortgage transaction and could not invoke defenses relating to impairment of collateral in foreclosure action. *Lakeshore Com. Fin. Corp. v. Bradford Arms Corp.*, 45 Wis. 2d 313, 173 N.W.2d 165 (1970).

24. Person.

The notation “Food for Love Acc’t” does not indicate the name of a “person” as defined in UCC § 1-201, but signifies an account and suggests a direction to the drawee rather than a notice to the payee alerting it to any representational capacity in which the signature was executed. *Star Dairy, Inc. v. Roberts*, 37 A.D.2d 1038 (3d Dep’t 1971).

25. Presumption or presumed.

In action to enforce guarantor’s liability on promissory note, trial court did not err in instructing jury that sole question was whether or not defendant had signed guarantee agreement where, *inter alia*, defendant did not raise issue of effectiveness of her signature, where jury was presented with guarantee agreement which contained what appeared to be defendant’s signature, raising presumption of genuineness under UCC § 3-307, and where, under UCC § 3-416, guarantee agreement obligated defendant to repay loan, interest, and attorneys’ fees. *Wolfe v. Madison Nat’l Bank*, 30 Md. App. 525, 352 A.2d 914 (1976).

Blanket denials failed to overcome presumption of receipt of goods supported by receipted freight bill, check for freight charges, letter of notification, and actual delivery of merchandise. *Eazor Exp., Inc. v. Lanza*, 60 Misc. 2d 686 (1969).

26. Purchase.

In light of the definition of “purchase” in subsection (32), physical delivery of debentures was required in order to convert them into stock pursuant to a subscription agreement. *First Southwest Corp. v. Lampton*, 724 So. 2d 988 (Ct. App. 1998).

The term “purchaser of a limited interest” in UCC § 3-302(4) does not refer only

to holders of security interest in negotiable property, but comprehends those who become purchasers of such property by any of the means specified in UCC § 1-201(32). *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979).

In action for seller’s breach of warranty of good title to motor home purchased by plaintiff, where (1) original owner of home rented it for 13 days to thief who “drove off into the sunset” and was never again seen by owner, (2) thief thereafter obtained Alabama registration for home, and also Nebraska and Indiana certificates of title therefor, before trading it in to defendant dealer in Indiana as part payment for truck and trailer, (3) plaintiff purchased home from defendants, who gave plaintiff certificate of title thereto, (4) Indiana state police seized home from plaintiff and surrendered it to original owner’s insurer, (5) home’s serial number proved to have been stolen, and (6) such false identification number appeared on all documents respecting home that thief had obtained in Alabama, Nebraska, and Indiana, court held (1) that rental transaction between original owner and thief constituted a “purchase” under UCC §§ 2-403(1) and § 1-201(32), since thief had acquired possessory interest in home by renting it, (2) thief did not transfer good title to defendant, as good-faith purchaser for value, since thief’s title to home was void and not voidable under UCC § 2-403(1); (4) since defendant had no good title to convey to plaintiff, defendant breached its warranty of title under UCC § 2-312(1) and (5) evidence supported damages awarded plaintiff under UCC § 2-714(2) and (3). *McDonald’s Chevrolet, Inc. v. Johnson*, 176 Ind. App. 399, 376 N.E.2d 106 (1978).

Under UCC § 1-201(32), “purchase” includes any voluntary transaction that creates an interest in property and does not necessarily require transfer of title. *Bradley Grain Co. v. Peterson*, 267 N.W.2d 836 (S.D. 1978).

Where seller, as supplier of goods on credit, demanded return of goods from buyer within ten days upon discovery of buyer’s insolvency pursuant to UCC § 2-702 and where bank had prior perfected

security interest in all of buyer's inventory, then owned or thereafter acquired, bank, under definition of UCC § 1-201(32,33) qualified as good faith purchaser making it exempt from seller's right to reclaim under UCC § 2-702(3) and bank's perfected security interest had priority over seller as seller failed to perfect its claim by filing as required by UCC § 9-312. *House of Stainless, Inc. v. Marshall & Ilsley Bank*, 75 Wis. 2d 264, 249 N.W.2d 561 (1977).

Under UCC § 9-105(1)(i), a secured party under Article 9 is a "purchaser" within meaning of UCC § 1-201(33); thus, where credit corporation had prior valid security interest in automobile dealer's inventory, where automobile wholesaler sold and delivered used cars and trucks to dealer with unencumbered certificates of title, but where dealer's checks in payment for vehicles were dishonored, under UCC § 2-403, dealer could transfer good title to "good faith purchaser for value," despite fact dealer tendered, for purchase of vehicles, checks which were subsequently dishonored, and hence, credit corporation's security interest in automobiles delivered to dealer was superior to wholesaler's interest. *Swets Motor Sales, Inc. v. Pruisner*, 236 N.W.2d 299 (Iowa 1975).

In action to recover value of stock certificates which were stolen from broker, accepted by bank as collateral for loan, and subsequently sold to satisfy debt, testimony by bank president that, inter alia, prospective borrower offered certificates as collateral for loan, that certificates were issued to and endorsed by broker with transferee's name left blank, that borrower executed affidavit stating that he was rightful owner of certificates, that bank contacted issuing corporation and verified listing of stock in broker's name, and that bank sent certificates with borrower's name added as transferee to issuing corporation for issuance of new certificates in borrower's name, which were issued and held by bank, established prima case that bank was bona fide purchaser of stock certificates under UCC § 8-302; bank became "purchaser for value" when it accepted stock certificates as collateral. *Fidelity & Cas. Co. v. Key Biscayne Bank*, 501 F.2d 1322 (5th Cir.

Fla. 1974), reh'g denied, 504 F.2d 760 (5th Cir. Fla. 1974).

In action between lender who held unperfected security interest in automobiles and car dealer who sold collateral to debtor, seller's right to reclaim goods under UCC § 2-702(3), when buyer's check for purchase price was dishonored by bank, did not have priority over lender's unperfected security interest in automobiles which arose when lender, who qualified as "purchaser" under UCC § 1-201, acquired certificates of title; under UCC § 2-403(1), once certificates of title were delivered, debtor acquired voidable title and could convey enforceable right in automobiles to lender as good faith purchaser for value, even though debtor's check to seller of automobiles was later dishonored. *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 184 Colo. 166, 519 P.2d 354 (1974).

Agreement for rental of railroad station was clearly lease-purchase agreement intended for security, since railroad was to become owner of building at end of term of agreement for no additional consideration. In re *New Hope & I.R.R.*, 353 F. Supp. 608 (E.D. Pa. 1973).

In action arising when vice-president of defendant bank who was authorized to sign bank's serially numbered certificate of deposit forms acquired blank certificate of deposit, inserted his name as payee, signed instrument on behalf of defendant bank with name of another employee authorized to sign certificates of deposit, and then obtained \$20,000 loan from plaintiff bank with certificate of deposit given as security for loan, certificate of deposit was investment security governed by UCC § 8-102 even though it also met requirements of UCC § 3-103, where certificate was issued in registered form, was one of series, and evidenced obligation of issuer by acknowledging obligation to pay depositor specified sum of money upon presentment at maturity; under UCC §§ 1-201 and 8-205, plaintiff bank was purchaser for value without notice of certificate of deposit and unauthorized signature was effective in its favor where vice-president was employee of issuer entrusted with responsible handling of security who placed unauthorized signa-

ture on security in course of its issue. *Victory Nat'l Bank v. Oklahoma State Bank*, 520 P.2d 675 (Okla. 1973).

Defendant-bank was liable to plaintiff, as subrogee of true owner of federal home loan bond made payable to bearer, where bank took bond from depositor seven months after its maturity date, made immediate telephonic inquiry of Federal Reserve Bank to determine if bond could be redeemed, credited depositor's account with face value of instrument, and obtained payment on bond: (1) in dealing with bond, defendant-bank became "purchaser" as defined by UCC § 1-201, was not acting merely as agent pursuant to instructions under UCC § 8-318, and was subject to plaintiff's adverse claim unless it could show it was bona fide purchaser, i.e., purchaser for value in good faith and without notice of any adverse claim; (2) defendant-bank did not acquire rights of bona fide purchaser under "shelter" provision UCC § 8-301(1) since it failed to prove that its transferor was good faith purchaser for value; (3) and by acquiring bond after six months from its date of payment, defendant bank purchased with notice of adverse claim under UCC § 8-305 and therefore could not be bona fide purchaser, notwithstanding defendant's claim that by making immediate inquiry of Federal Reserve Bank it discharged its burden as to presumed notice of existence of adverse claim created by staleness of instrument. *Phoenix Ins. Co. v. National Bank & Trust Co.*, 366 F. Supp. 340 (M.D. Pa. 1972), *aff'd*, 485 F.2d 681 (3d Cir. Pa. 1973).

Automobile dealer who obtained automobiles from seller in exchange for two uncollectible checks previously issued to dealer by seller was "purchaser for value" of automobiles. *National Car Rental v. Fox*, 18 Ariz. App. 160, 500 P.2d 1148 (1972).

Under the definition of purchase in subsec. 32, the transaction must be a voluntary one, and a purchase by a judgment creditor at an execution sale to enforce his judgment does not qualify as such a voluntary transaction. *National Shawmut Bank v. Vera*, 352 Mass. 11, 223 N.E.2d 515 (1967).

27. Purchaser.

Persons who purchase stock from corporate officer who had converted such stock are "purchasers" within meaning of UCC § 1-201. *Green v. Carbaugh*, 465 F. Supp. 372 (E.D. Va. 1979).

28. Representative.

In action to recover on contract of guaranty on behalf of corporation in which guarantors were officers and thus "representatives" under UCC § 1-201(35), guarantors were personally liable on contract of guaranty under UCC § 3-403, notwithstanding their claims that they signed in representative capacity and that their intention at the time of signing guaranty was not to be bound in their individual capacities, (1) where guaranty did not name any person represented and (2) where there was evidence that bank officials explained to guarantors in detail that personal guaranty would be required of them and that bank relied on their personal obligation in making loan to corporation; burden of proof was on guarantors under UCC § 3-403 to "otherwise establish" that they were not personally liable. *Southern Nat'l Bank v. Pocock*, 29 N.C. App. 52, 223 S.E.2d 518 (1976), cert. denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

The definition of "representative" includes an officer of a corporation. *Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

29. Rights.

Intendment of UCC notice definition would seem to be an attempt to prevent those dealing in the commercial world from obtaining various rights when, from a reasonable inquiry into the true facts, that person would have discovered a fact which prevented him from obtaining the rights which he was seeking. *Winter & Hirsch, Inc. v. Passarelli*, 122 Ill. App. 2d 372, 259 N.E.2d 312 (1st Dist. 1970).

Notice that a party intends to consider a contract at an end or terminated amounts to a revocation of acceptance, and preserved to the buyer the remedies afforded by § 2-711. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

30. Security interests.

Where terms of bareboat charter-lease agreement and guaranty were unequivocal in defining and limiting rights of parties to agreement, contained nothing to indicate that agreement was intended to be anything other than a pure lease, and granted no right or option to lessee to purchase vessel leased, transaction could not be characterized under UCC § 1-201(37) as lease for security. *WPL Marine Servs., Inc. v. Woods-Tucker Aircraft & Marine Leasing Corp.*, 361 So. 2d 1304 (La. 1978), writ denied, 364 So. 2d 121 (La. 1978), writ denied, 364 So. 2d 122 (La. 1978).

A surety's right to earned progress payments under a construction contract that it has bonded is not an "interest in personal property" that is subject to the filing provisions of the Alaska UCC, since the surety in such a case has a right to complete the job and apply any earned funds against its costs. This right of the surety does not secure the payment or performance of an obligation as a "security interest," as that term is defined by Alaska UCC § 1-201(37). *Alaska State Bank v. General Ins. Co. of Am.*, 579 P.2d 1362 (Alaska 1978).

Under UCC § 9-102(1)(a) and (2) and UCC § 1-201(37), contract for lease of automobile was lease intended for security and not "pure lease" where it provided, among other things, (1) that on termination of agreement prior to expiration of fixed term, lessee was to return vehicle to lessor, (2) that lessor was then obligated to accept highest available cash offer at wholesale for vehicle and to notify lessee of any "gain or loss," which was difference between wholesale price accepted for vehicle and its "termination value" as determined by formula contained in lease agreement, (3) that lessee would owe lessor "depreciation value" of vehicle, as offset by amount received from its disposition at wholesale, and would receive from lessor any "gain" over such "depreciation value," (4) that lessee would have to pay all license fees and taxes, and (5) that lessee would also have to pay amounts specifically denominated as "sales tax" and "security deposit." *Bill Swad Leasing Co. v. Stikes*, 571 F.2d 1361,

23 U.C.C. Rep. Serv. 1335 (5th Cir. Ala. 1978) (applying Alabama and Ohio law; stating that termination formula of lease recognized lessee's equity in leased vehicle, that required security deposit of \$1,000 was equivalent of down payment on vehicle, and fact that lease agreement did not contain option to purchase was not controlling).

Where (1) first corporation obtained financing from Texas bank for purchase of five airplanes, which it intended to resell, and Texas bank, in November, 1972, filed separate chattel mortgage for each plane with Federal Aviation Administration pursuant to federal law, (2) second corporation purchased the five planes from the first corporation and borrowed \$18,000 from Kentucky bank on unsecured note to finance purchase, (3) second corporation, on default in payment for planes, entered into new agreement with first corporation for purchase of only one plane and return of other four, and also agreed not to file bill of sale with Federal Aviation Administration for plane purchased, (4) second corporation gave Kentucky bank, which held second corporation's unsecured note for \$18,000, security agreement which secured repayment of note by encumbering single plane purchased, and bank, in exchange for such security agreement, agreed not to sue on note and filed both security agreement and bill of sale for plane with Federal Aviation Administration, (5) second corporation defaulted in making payments on plane, and first corporation foreclosed on plane and sold it at auction under authority of its November, 1972 security agreement with Texas bank, which security agreement had been assigned to first corporation on its repayment of amount that it owed Texas bank, and (6) second corporation's financier (Kentucky bank) sued first corporation for wrongful interference with its collateral by not respecting bank's lien on repossessed plane, court held (1) that Kentucky bank, under UCC § 1-201(44)(b), gave "value" when it took security interest in plane purchased by second corporation to secure bank's preexisting claim against such corporation, (2) that by virtue of UCC § 9-204(1), Uniform Commercial Code does not require that "consideration"

in strict-law sense be given as prerequisite for security interest to attach to collateral, (3) that Kentucky bank's security interest attached at time it gave value and was duly and properly perfected when bank filed instruments with Federal Aviation Administration, (4) that first corporation, under UCC § 1-201(37), had no valid security interest in plane that it repossessed and sold, since first corporation, by discharge of obligation underlying its security interest, had extinguished such security interest, and (5) that first corporation's foreclosure on, and sale of, plane was wrongful and in derogation of rights of plaintiff Kentucky bank, which held valid security interest in plane. *Bank of Lexington v. Jack Adams Aircraft Sales, Inc.*, 570 F.2d 1220 (5th Cir. 1978).

The Uniform Commercial Code has many provisions, especially in Article 9, that apply to "security interests." Therefore, "security interest" is defined in UCC § 1-201(37) for the purpose of identifying the transactions to which those provisions apply. *United States Fid. & Guar. Co. v. Thompson & Green Mach. Co.*, 568 S.W.2d 821 (1978).

When the holder of promissory notes assigned his interest therein as collateral to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Under UCC § 1-201(37), lease under which lessee had option of purchasing leased equipment for one dollar at end of lease term could be viewed as conditional sale of the equipment. *Equilease Corp. v.*

D'Annolfo, 6 Mass. App. Ct. 919, 379 N.E.2d 1130 (1978).

Lease of equipment purchased for installation in lessee's motel was not true lease or bailment, but was lease intended for security purposes within meaning of UCC § 1-201(37), where (1) lessor was in finance business instead of equipment-leasing business, (2) lessee had option to purchase equipment at end of lease for its fair market value, which was estimated to be less than ten per cent of price lessor paid for equipment, (3) lease provided that lessee was liable for all taxes, fees, charges, and insurance premiums, (4) lessor was to be held harmless from all liability arising from ordering, delivery, or installation of equipment, (5) on lessee's default, all remaining "rentals" could be accelerated at lessor's option, and equipment could be repossessed at lessee's expense, and (6) equipment was leased subject to exclusion of implied warranties of merchantability and fitness for intended purpose. *Citizens & S. Equip. Leasing, Inc. v. Atlanta Fed. Sav. & Loan Ass'n*, 144 Ga. App. 800, 243 S.E.2d 243 (1978).

Where (1) lessor of computer, after purchasing it from manufacturer, leased it to lessee for 72 months at fixed rental per month, (2) lease provided that lessee could renew lease for one year for sum that equalled amount of one monthly rent payment and that at end of such renewal, lessee would become owner of computer, (3) lessee's obligation to pay rent was absolute and unconditional, and lease was not cancellable, (4) lessor disclaimed all warranties, express or implied, including implied warranties of merchantability and fitness for particular use, (5) computer did not function properly, and (6) lessee defended refusal to pay further rent on ground of failure of consideration, court held (1) that under UCC § 1-201(37), lease as a matter of law was actually intended as security agreement, especially since lessee could become owner of computer by paying amount that was equivalent to only one monthly rental, (2) that since lessor was to be viewed as conditional seller of computer, UCC § 9-206(2) applied with respect to effectiveness of lessor's disclaimer of warranties, (3) that warranty disclaimer in lease

clearly satisfied requirements of UCC § 2-316(2) for exclusion or modification of warranties, (4) that lessee's remedy was solely against manufacturer of computer, instead of lessor, and (5) that under UCC § 9-501(1), lessor, with respect to lessee's failure to pay rent, had rights and remedies provided in security agreement between the parties, which agreement provided that on lessee's default and demand by lessor, lessee would pay amount equal to all unpaid rentals under the lease, plus interest at specified rate. *Citicorp Leasing, Inc. v. Allied Institutional Distributions, Inc.*, 454 F. Supp. 511 (W.D. Okla. 1977).

Under UCC § 1-201(37), whether a lease is intended as security must be determined by the facts of each case. However, if the language of the agreement is clear and unambiguous, the intention of the parties is no longer a fact question on which testimony can be received, and the parol evidence rule requires that their intentions be found from the contract itself. In such a case, the matter becomes a question of law for the trial court. *Citicorp Leasing, Inc. v. Allied Institutional Distributions, Inc.*, 454 F. Supp. 511 (W.D. Okla. 1977).

The factors involved in determining whether a lease is intended as a security agreement or a pure lease (see UCC § 1-201(37)) are as follows: (1) the facts in each case are controlling as to the intention of the parties to create a security interest; (2) reservation of title in a lease, or in an option to purchase that is appurtenant to the lease or included therein, does not by itself make the lease a security agreement; (3) a lease which permits the lessee to become the owner of the property at the end of the term for a nominal consideration or for no additional consideration is deemed as a matter of law to be intended as a security agreement; (4) the percentage that the option-purchase price bears to the list price of the leased property, especially if it is less than 25 percent, is to be considered as showing the intent of the parties to make a lease as security; (5) where the terms of the lease and option to purchase are such that the only sensible course for the lessee to follow at the end of the term is to exercise the option and become the owner of the goods, the

lease is one intended to create a security interest; and (6) the character of a transaction as a true lease is indicated by (a) a provision specifying an option-purchase price that is approximately the market value of the leased property at the time of the exercise of the option, (b) rental charges indicating an intent to compensate the lessor for loss of value of the leased property over the term of the lease due to aging, wear, and obsolescence, (c) rentals that are not excessive and an option-purchase price that is not too low, and (d) facts showing that the lessee is acquiring no equity in the leased article during the term of the lease. *Citicorp Leasing, Inc. v. Allied Institutional Distributions, Inc.*, 454 F. Supp. 511 (W.D. Okla. 1977).

Provision in security agreement executed on purchase of new automobile which provided that until indebtedness was fully paid, "seller has and shall retain title to and a security interest in the property" did not violate federal Truth-in-Lending Act and Regulation Z, since (1) Uniform Commercial Code, in UCC § 1-201(37), now provides universal definition of term "security interest," (2) Uniform Commercial Code was designed to replace confusingly numerous security devices that prevailed under pre-Code practice, and (3) it would therefore be anomalous and counterproductive of UCC objectives to interpret Regulation Z, which requires disclosure of "type of any security interest held," as requiring lender to specify particular security device employed. In such case, it was sufficient that security agreement in issue contained reference to a "security interest" in property described in the agreement that was enforceable under the Uniform Commercial Code, and statement in the agreement that seller retained "title" to such property, although unnecessary and irrelevant in light of UCC § 9-102(1) and (2) and § 9-302(3), did not make lender's disclosure statement confusing or misleading. *Drew v. Flagship First Nat'l Bank*, 448 F. Supp. 434 (M.D. Fla. 1977).

Under UCC § 1-201(37), leasing agreements which provided for rental of computer equipment for specified monthly rental for first five years and for higher

monthly rental for remainder of lease period, and which also gave lessee option to purchase such equipment for 2.7 per cent of equipment's total rental value, or 4 per cent of price lessor paid for equipment, were leases intended as security for payment by lessee of purchase price of equipment and thus were governed by UCC Article 9. *National Equip. Rental, Ltd. v. Priority Elecs. Corp.*, 435 F. Supp. 236, 22 U.C.C. Rep. Serv. 280 (E.D.N.Y. 1977).

Although UCC § 1-201(37) states that effect of lease is to be determined by facts of each case, the statute also provides that if there is a purchase option for a nominal consideration, the lease is then one that is intended for security. *National Equip. Rental, Ltd. v. Priority Elecs. Corp.*, 435 F. Supp. 236 (E.D.N.Y. 1977).

Whether a transaction is characterized as a "sale" or a "lease" is not conclusive. Instead, it is the intention of the parties that is controlling, and this intention is to be determined by the facts of each case (see UCC § 1-201(37)). Indicative factors may include (1) whether the lessee is given an option to purchase the leased equipment and, if so, whether the option price is nominal (see UCC § 1-201(37)); (2) whether the lessee can acquire any equity in the equipment; (3) whether the lessee is required to bear the entire risk of loss; (4) whether the lessee is required to pay all charges and taxes imposed on ownership; (5) whether there is a provision for acceleration of rental payments; (6) whether the equipment was purchased specifically for lease to the lessee; and (7) whether the implied warranties of merchantability and fitness for a particular purpose are specifically excluded by the lease agreement. *Lease Fin., Inc. v. Burger*, 40 Colo. App. 107, 575 P.2d 857, 23 U.C.C. Rep. Serv. 1309 (1977) (holding that fact that "master lease" agreement did not grant lessee option to purchase leased equipment, plus other evidence which showed that both lessor and lessee apparently intended transaction to be lease, supported trial court's determination that agreement was lease and not conditional sales contract).

Lease arrangement, under which owner sold equipment to a company whose only business was financing and not equip-

ment maintenance, and company advanced funds to former owner's creditors, leased equipment to former owner with an option to buy, recorded an Article 9 UCC financing statement, and assigned the agreement to a bank, constituted a secured loan arrangement. *National Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255 (2d Cir. N.Y. 1977).

Where (1) buyer, under oral agreement to pay cash, bought used trencher and trailer from seller and accepted machinery on its delivery by seller, (2) seller listed buyer on seller's books as debtor but did not have buyer execute any document, (3) bank made loan to buyer, and buyer executed security agreement and financing statement giving bank security interest in machinery bought from seller (4) bank perfected its security interest in machinery, (5) on buyer's default, seller reclaimed machinery with buyer's consent, but without bank's consent or knowledge, and (6) bank sued seller for possession of machinery or value thereof, trial court properly held that seller's interest in machinery was subordinate to interest of bank, since under UCC § 2-401(1) and § 1-201(37), seller's reservation of title to machinery was limited in effect to reservation of security interest, and bank had perfected its security interest by filing financing statement, but seller had not filed such a statement. *Peerless Equip. Co. v. Azle State Bank*, 559 S.W.2d 114 (Tex. Civ. App. 1977).

Lease of automobile was not contract of sale with retained security interest under UCC § 1-201(37)(b), where agreement designated capital cost of vehicle as \$13,000, total rental due lessor was \$14,256 over period of lease, and option-to-purchase price was \$2,600, since option price was additional and sufficient consideration, and not nominal sum. *Rebhun v. Executive Equip. Corp.*, 90 Misc. 2d 576 (1977).

Under UCC § 9-102(1) and UCC § 1-201(37), Article 9 applies not only to any transaction that is intended to create security interest in chattel paper, accounts, or contract rights, but also to any sale of accounts, contract rights, or chattel paper. *Ralston Purina Co. v. Detwiler*, 173 Ind. App. 513, 364 N.E.2d 180 (1977).

Under UCC § 1-201(37) and UCC § 9-102(2), purported five-year "lease" of printing equipment was actually installment-sale contract which provided for an excessive rate of interest that rendered the contract void for usury where (1) lessor was finance company that was actually engaged in financing the sale of such printing equipment; (2) all risk of loss or damage to leased property was placed on lessee; (3) contract provided same remedies on lessee's default in payment of rent, even at end of first month, that would be available to a conditional seller or a mortgagee on a similar delinquency; (4) contract expressly provided that lessee, at lessor's request, would join lessor in executing financial statements pursuant to the Uniform Commercial Code; and (5) lessee, after all payments had been made under the purported "lease," could acquire title to the leased property by paying lessor nominal sum therefor. *Bell v. Itek Leasing Corp.*, 262 Ark. 22, 555 S.W.2d 1 (1977).

Although instrument under which corporation (engaged in business of financing lease agreements) leased new office machine, purchased by corporation from machine's manufacturer, to real estate company was denominated a "lease," transaction between parties was actually secured transaction under UCC § 1-201(37)(b), where such "lease" provided that lessee could purchase machine for nominal consideration; transaction was therefore subject to secured transactions provisions of UCC Article 9, and contract would be viewed as conditional sales contract under which the "lessee" was actually a "buyer." *Lectro Mgt., Inc. v. Freeman, Everett & Co.*, 135 Vt. 213, 373 A.2d 544 (1977).

As a result of the definition of "security interest" in UCC § 1-201(37) and the provisions of UCC § 9-102(2), only those consignments intended as security are directly subject to the provisions of UCC Art 9 concerning secured transactions, but all consignments, whether intended as security or not, are subject to the requirements of UCC § 2-326, which is in UCC Art 2 dealing with sales. *GECC v. Town & Country Mobile Homes, Inc.*, 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

Equipment lease agreement that permitted purchase at end of lease for approximately 10 per cent of list price, coupled with absence of option to terminate, created a security interest in lessor under UCC § 1-201(37) and since lessor's security interest was not perfected, the lessor's interest was junior to subsequently perfected liens against equipment. *Percival Constr. Co. v. Miller & Miller Auctioneers, Inc.*, 532 F.2d 166 (10th Cir. Okla. 1976).

Purported lease of computer equipment was intended as financing device and, thus, under UCC § 1-201(37), purported lessor's interest in computers was security interest falling squarely within Article 9 of UCC, where (1) purported lease not only included option to purchase and agreement that lessee could become owner of property at end of lease term for nominal consideration, but also provided that if lessee defaulted in its monthly payments, lessee became immediately liable, not only for total amount of unpaid rent, but also for any deficiency resulting from sale of equipment not equaling estimated market value of equipment as defined by contract; (2) purported lessor acquired security interest not only in leased computers, but also in other computer equipment in possession of lessee; and (3) moreover, concurrent with lease, purported lessor filed financing statements with secretary of state and county recorder of deeds. *Computer Sciences Corp. v. Sci-Tek, Inc.*, 367 A.2d 658 (Del. Super. 1976).

Notwithstanding language of "lease-purchase agreement," it was clear that credit corporation and purported lessee of dump truck contemplated entering into secured transaction under UCC § 9-101 et seq. where financing statement listed credit corporation as secured party and purported lessee as debtor, and covered dump truck as secured item, where motor vehicle certificate of ownership listed purported lessee as owner and credit corporation as secured party and where purported lessee had option under "lease" to purchase truck for one dollar after making all installment payments. *GECC v. Castiglione*, 142 N.J. Super. 90, 360 A.2d 418 (1976).

Filing of financing statement is not itself a factor in determining whether lease is intended as security. *Rollins Communications, Inc. v. Georgia Inst. of Real Estate, Inc.*, 140 Ga. App. 448, 231 S.E.2d 397 (1976).

Where purported lease agreement provided that lessors would turn over possession of 55 head of dairy cattle to lessees, that lessees would pay lessors \$450 per month for five year term, and that at expiration of term, lessees had option to purchase cattle for \$10, where market value of cattle was approximately \$450 per head at time parties entered into their agreement, and where parties anticipated that market value of animals at end of five year period would be no less than \$200 per head, lessees had option at expiration of "lease" term to purchase cattle for nominal consideration and, thus, under UCC § 1-201(37), agreement was one intended for security and lessors' interest in cattle was security interest. *Whitworth v. Krueger*, 98 Idaho 65, 558 P.2d 1026, 99 A.L.R.3d 1046 (1976).

Bankruptcy judge was justified in holding that purported lease transaction was conditional sale, that contract executed by bankrupt and typewriter dealer whereby bankrupt agreed to pay \$15.00 per month for 22 month term and was given option to purchase typewriter for \$6.55 at end of term was security interest required by UCC to be filed, and that, in view of absence of filing, title to machine vested in bankruptcy trustee, where it was clear that transaction was understood to be sale by both bankrupt and by typewriter dealer's employees who dealt with him; among other things, bankrupt came to dealer's place of business to buy typewriter, dealer intended to sell him typewriter, and so-called "lease-ownership" contract was used because bankrupt preferred it. *In re Shell*, 390 F. Supp. 273 (E.D. Ark. 1975).

Lessor's subsequent offer to sell leased beauty shop equipment to lessee did not convert lease into unperfected security interest under UCC § 1-201(37). *Leaseamerica Corp. v. Kleppe*, 405 F. Supp. 39 (N.D. Iowa 1975).

Purported lease of trade fixtures was not true lease, but was in fact installment loan, where, *inter alia*, although lease did

not contain express option to purchase, renewal option was in fact purchase option, and where option price was 10 per cent of original price, or approximately 7.2 per cent of total rentals under lease, and thus appeared to be minimal. *McGalliard v. Liberty Leasing Co. of Alaska, Inc.*, 534 P.2d 528, 94 A.L.R.3d 621 (Alaska 1975), but see, *Western Enters. v. Arctic Office Machs.*, 667 P.2d 1232 (Alaska 1983).

Automobile "lease agreement" was, in fact, secured transaction within meaning of Article 9 of Uniform Commercial Code where agreement was of indefinite duration and, at its inception, passed all risks and indicia of ownership of vehicle to purported lessee, in that lessee not only insured against any loss to leasing company of its capitalized cost, but after 26 months was entitled to any surplus funds if and when car was sold, and where at end of 56 months, car would, at option of lessee, pass to her at no cost, since monthly installment payments would have equaled capitalized cost of vehicle. Right of debtor to receive notice of intended disposition of collateral after default may not be limited under UCC § 9-501(1) and (3)(b), and inasmuch as leasing company failed to comply with notice provision of UCC § 9-504(3) before selling repossessed vehicle, it was precluded from recovering deficiency judgment and could only recover sums owed to it prior to repossession as well as repossession charges. *Avis Rent-A-Car Sys. v. Franklin*, 82 Misc. 2d 66 (1975).

Equipment lease transactions were security agreements under UCC § 1-201(37), and leasing corporation was "financing agency" and not seller of equipment under UCC § 2-104(2), where persons desirous of purchasing equipment or machinery applied to corporation for purchase money loan, corporation made commitments to advance money necessary for payment to manufacturer, plus sales tax, equipment was shipped by manufacturer directly to purchaser and invoice was sent to corporation, purchaser and corporation thereupon entered into security agreements in form of equipment leases with options to purchase at nominal extra charge, UCC financing statements were thereupon executed and deliv-

ered to purchaser and filed by corporation, corporation did not select or inspect any equipment, corporation did not maintain warehouse for storage of equipment or machinery, corporation did not carry leased property as assets on books or take any depreciation deductions, and corporation never took possession of any of leased equipment at end of leased term. In re Sherwood Diversified Services, Inc., 382 F. Supp. 1359 (S.D.N.Y. 1974).

In suit by lessor against lessees and guarantor on agreement designated as lease covering certain irrigation equipment for recovery of deficiency after repossession and sale of equipment, evidence was insufficient to support implied findings and judgment based thereon that transaction was lease not subject to UCC requirements where, although lease did not contain option to purchase, letter which was sufficiently identified as being applicable to lease agreement extended option to purchase to lessee and UCC § 1-201(37) makes no requirement that option to purchase be in body of lease contract, and where no evidence was offered as to fair market value of equipment at time purchase option may be exercised nor evidence as to depreciation schedule and anticipated useful life of equipment nor evidence as to whether rental payments were indicative of customary rental rates for similar equipment or were indicative of acquisition of equity in equipment from which court could determine whether consideration for exercise of option was nominal or substantial or determine party's intention as to whether purported lease agreement was to operate as security. *Davis Bros. v. Misco Leasing, Inc.*, 508 S.W.2d 908, 76 A.L.R.3d 1 (Tex. Civ. App. 1974).

Lease of radio equipment for five years at agreed price, with title to property remaining in lessor and with possession of equipment to be returned to lessor at expiration of lease, did not constitute "security interest"; thus, Article 9 of Code did not apply and parties' conduct was governed by terms of lease, which did not require sale of equipment upon default, nor crediting proceeds of sale against lessee's indebtedness, but instead provided that upon default lessor could retain all

payments made and recover full unpaid balance of term rental. *McGuire v. Associates Capital Servs. Corp.*, 133 Ga. App. 408, 210 S.E.2d 862 (1974).

Financing statement containing signatures of debtor and secured party, address of secured party, and containing description of collateral: "All Olivetti Corp. of America copying machines which have been delivered but not paid in full" met sufficiency test of description of collateral under UCC § 9-110 and formal requisites of financing statement under UCC § 9-402 and description reflected security interest under UCC § 1-201(37). *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Lease was "one intended for security" and, hence, was security agreement as defined by UCC § 1-201(37), rather than true lease, where, *inter alia*, lessee had option to purchase, had right to apply 93% of rentals against purchase price of equipment, and was liable for full rental for entire minimum period though property was returned to lessor; since lessor did not file financing statement covering leased equipment, its rights were subordinate to those of creditors of lessee who obtained perfected security interest in equipment. *Percival Constr. Co. v. Miller & Miller Auctioneers, Inc.*, 387 F. Supp. 882 (W.D. Okla. 1973), *aff'd*, 532 F.2d 166 (10th Cir. Okla. 1976).

Surety claiming under terms of performance bond application was not entitled to equitable lien proceeds from sale of contractor's personal property, and did not have contract right but only security interest which it was required to file and perfect. *Aetna Cas. & Sur. Co. v. J.F. Brunken & Son*, 357 F. Supp. 290 (D.S.D. 1973).

Lessor of citrus packing equipment was entitled to return of its property from trustee in bankruptcy for lessee, where lease agreement contained no evidence of intent to reserve security interest and contained no provisions whereby lessee was to be entitled to purchase equipment at expiration of term. *DeVita Fruit Co. v. FCA Leasing Corp.*, 71 Ohio Op. 2d 525, 473 F.2d 585 (6th Cir. Ohio 1973).

Lease which provided defendant with option to renew for trifling yearly rental,

which for all practical purposes amounted to making defendant owner of machine at end of lease for nominal consideration until total obsolescence, was intended for security within meaning of UCC § 1-210(37). *Leasco Data Processing Equip. Corp. v. Starline Overseas Corp.*, 74 Misc. 2d 898 (1973), *aff'd*, 45 A.D.2d 992, 360 N.Y.S.2d 199 (1st Dep't 1974), appeal dismissed, 35 N.Y.2d 645 (1974), appeal dismissed, 35 N.Y.2d 963, 365 N.Y.S.2d 179, 324 N.E.2d 557 (1974).

Where consideration to be paid if option to purchase was exercised amounted to approximately 4 percent of total consideration payable under truck lease agreement, finding that lease was intended for security was correct. *Crowder v. Allied Inv. Co.*, 190 Neb. 487, 209 N.W.2d 141 (1973).

Where plaintiff and defendant entered into agreement which purported to be lease of accounting machine manufactured by third party, where agreement provided that defendant would make 60 monthly payments \$150.05 to plaintiff and that at end of lease period, five years, defendant would have option to purchase machine for 10 percent of its initial cost, and where defendant defaulted after making nine payments, plaintiff replevied machine, sold it at private sale, and brought action against defendant to recover balance due under lease, trial court did not err in finding that transaction was lease, not security interest, that it was not subject to UCC Article 9, and that plaintiff was entitled to deficiency judgment, notwithstanding plaintiff failed to notify defendant of sale pursuant to UCC § 9-504(3); without evidence of market value of machine at termination of lease, it could not be said that option to purchase for 10 percent of original purchase price was option to purchase for "nominal consideration" within meaning of UCC § 1-201(37). *Granite Equip. Leasing Corp. v. Acme Pump Co.*, 165 Conn. 364, 335 A.2d 294 (1973).

Where party intended that seller's retention of title to equipment would secure buyer's payment of purchase price, retention of title was limited by Code § 2-401(1) to reservation of security interest, and contract created security interest as defined in Code § 1-201(3). *Witmer v.*

Kleppe, 469 F.2d 1245 (4th Cir. W. Va. 1972).

An option given to the lessee to purchase the leased property for a nominal consideration does not make the lease one intended for security. *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

Words of UCC § 1-201(37) are un-equivocal, namely that an option given to a lessee to purchase leased property for a nominal consideration does make the lease one intended for security, and hence, where options to buy construction equipment for the combined sum of \$2, were nominal in amount when compared to the total rental of \$73,000, security interests were created. *James Talcott, Inc. v. Franklin Nat'l Bank*, 292 Minn. 277, 194 N.W.2d 775 (1972).

Agreement providing that for a term of 36 months, a so-called lessee was required to pay what termed rental; that the lessee could extend the term for succeeding 12 months period at annual rentals; that at the end of the term, the lessee had an option to sell the equipment with any proceeds of the sale in excess of the present value of the payments provided for for the 36 months period and remaining unpaid going to the lessee; and that in event of default by lessee, he agreed to surrender possession of equipment to the lessor who might accept the equipment in final settlement or sell it and hold lessee for any deficiency of the amount due under the 36 months rental period, was a security agreement and not a lease. *John Deere Co. v. Wonderland Realty Corp.*, 38 Mich. App. 88, 195 N.W.2d 871 (1972).

"Equipment lease" which required so-called lessee to pay what was termed rental in quarterly or annual increments over 36 month term which lessee could extend for succeeding 12 month period at additional annual rental, and which gave lessee option to sell equipment at end of term, to receive any proceeds of sale in excess of present value of rental payments remaining unpaid, to bid as high as necessary to become successful bidder at sale without paying more than rental payments remaining unpaid, and which gave lessor upon default right to accept equipment in final settlement or sell it and hold

lessee for any deficiency of amount of rental payments due was security agreement and not lease. *John Deere Co. v. Wonderland Realty Corp.*, 38 Mich. App. 88, 195 N.W.2d 871 (1972).

Where promissory note for unpaid balance of corporate stock remained unpaid, document constituted assignment of buyer's interest in corporate stock and was security agreement within UCC § 1-201(37). *Gamble v. Hinds*, 10 Cal. App. 3d 1021 (2d Dist. 1970).

Security agreement describing collateral but containing no indication of obligation for which collateral was security and containing no agreement to grant a security interest could not be considered "security agreement" within UCC § 1-201(37) definition. *Needle v. Lasco Indus., Inc.*, 10 Cal. App. 3d 1105 (2d Dist. 1970).

Where reservation of title to gasoline had no other purpose than to secure payment for gasoline delivered, such reservation of title constituted "security interest". *Mann v. Clark Oil & Ref. Corp.*, 302 F. Supp. 1376 (E.D. Mo. 1969), *aff'd*, 425 F.2d 736 (8th Cir. Mo. 1970).

Although agreements were called leases, trial court was correct in finding that they were security agreements since they contained provisions conferring right to purchase equipment at any time during 60-month term of leases for some of \$58,000 less 75 percent of all sums paid as rental at rate of \$1,288 per month, indicating that purchase option available at end of term was for \$40, which was "nominal consideration", relative to \$58,000. *Stanley v. Fabricators, Inc.*, 459 P.2d 467 (Alaska 1969).

Where inclusion of option to purchase exists in lease only to protect lessee in case lessor ceases business activities, this factor alone will not make lease security interest. *First Nat'l Bank & Trust Co. v. Smithloff*, 119 Ga. App. 284, 167 S.E.2d 190 (1969).

A floor plan security agreement did not cover any cars owned by third persons which were merely in the temporary possession of the dealer, as an agent, for sale purposes in which the dealer's only interest was in a commission in the event that a sale was consummated. *Cosgriff v. Liberty Nat'l Bank & Trust Co.*, 58 Misc. 2d 884 (1968).

A security interest is an interest in property which secures payment for the performance of an obligation. Under Article 9 the UCC does not adopt a title or lien theory of security interests, and rights and obligations and remedies are not determined by the location or the title, but rather on function, compliance with statutory requirements, and the nature of the transaction. *Chrysler Credit Corp. v. Sharp*, 56 Misc. 2d 261 (1968).

Where an instrument is called a lease, does not contain any option to purchase, and provides merely for an option to renew upon continuing to make substantial payments, the relationship is in fact a lease and not a security agreement. *Sanders v. National Acceptance Co. of Am.*, 383 F.2d 606 (5th Cir. Ga. 1967).

An actual lease of personal property which does not give the lessee any right to acquire or purchase is not a security device and accordingly, the lessee's rights after the lessor's repossession upon his default are not determined by Article 9 of the Code. *Franklin Nat'l Bank v. Katzel*, 4 U.C.C. Rep. Serv. 124 (1967, NY Sup).

A lease intended as security is one which has the ultimate intent of a sale. In *re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff'd*, 383 F.2d 606 (5th Cir. Ga. 1967).

A lease of newspaper composing room equipment specifically stating it contained the entire agreement between the parties, providing that lessee acquired no interest in leased property except that of use, and giving lessor right to demand and take possession of property on termination of lease or in event of default was a bona fide lease, and lessor was not required to file a financing statement to preserve its right of possession after default. In *re Atlanta Times, Inc.*, 259 F. Supp. 820 (N.D. Ga. 1966), *aff'd*, 383 F.2d 606 (5th Cir. Ga. 1967).

A financing statement executed on behalf of corporate debtor by a duly authorized officer who failed to show the capacity in which he signed, which was indexed solely in the names of the corporate creditor and debtor, substantially complied with the provisions of § 9-402. *Plemens v. Didde-Glaser, Inc.*, 244 Md. 556, 224 A.2d 464 (1966).

A lease of a machine priced at over \$8,000 which contained an option to purchase under which the lessee could apply the monthly rental payments up to 75 percent of the value of the machine against the ultimate purchase price is not a security interest because the requirement that 25 percent of the purchase price be paid in cash clearly indicated that title would not be transferred for "a nominal consideration." In *re Wheatland Elec. Prods. Co.*, 237 F. Supp. 820 (W.D. Pa. 1964).

Since state highway department's obligation to a partner for his share of the work done by the partnership on a completed highway construction project was not a contract right but was an account, an absolute assignment of the contract right to a co-partner for the payment of a past due obligation was not a security transaction. *Spurlin v. Sloan*, 368 S.W.2d 314 (Ky. 1963).

A lease which provides that payments or parts of payments thereunder shall be applied to the payment of the purchase price creates a security interest since upon compliance with the terms of the lease the lessee shall become or has the option of becoming the owner of the property for no additional consideration or a nominal payment. *United Rental Equip. Co. v. Potts & Callahan Contracting Co.*, 231 Md. 552, 191 A.2d 570 (1963).

A lease purchase agreement is a "security interest created by contract" if it specifies that a stated percentage of the rental is to be applied to the purchase price of the property. *United Rental Equip. Co. v. Potts & Callahan Contracting Co.*, 231 Md. 552, 191 A.2d 570 (1963).

The fact that a debtor has the power to terminate the relationship by not making further payments does not preclude the relationship from being a security agreement where as long as the debtor makes the payments and otherwise complies with the terms of the agreement the relationship will continue and the debtor will ultimately obtain the title. *United Rental Equip. Co. v. Potts & Callahan Contracting Co.*, 231 Md. 552, 191 A.2d 570 (1963).

A transaction by which the purchaser of an automobile executed a security agreement to a bank and the president of the

automobile seller executed a security note to the bank (the transaction appearing to be the obligation of the president individually) could be shown to have been a "dealer" transaction where the bank customarily dealt with the seller in this way and had no transactions with the president in his individual capacity, and the bank issued its check in the transaction to the seller and not the president and gave the seller the usual dealer's discount. *Provident Tradesmens Bank & Trust Co. v. Pemberton*, 24 Pa. D. & C.2d 720 (1961), *aff'd*, 196 Pa. Super. 180, 173 A.2d 780 (1961).

An automobile manufacturer who delivered automobiles to its authorized dealer with reservation of title until actual payment therefor has the status of a holder of a security interest, and, where it failed to perfect such security interest, its interest is subordinate to the receiver of the dealer, who, as a lien creditor, is without notice of such unperfected security interest. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 12 Pa. D. & C.2d 351 (1957).

Where a bank, under its wholesale credit plan, financed the purchase of automobiles by a dealer, which for automobiles to be used in its business, executed installment sales contracts as both buyer and seller, the subsequent acceptance of an assignment of such installment sales contracts by the bank constituted a novation whereby financing under the installment contract was substituted for financing under the wholesale credit plan and the bank became the holder of a security interest in the vehicles within the meaning of § 1-201(37). *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 13 Pa. D. & C.2d 119 (1957).

The clause of a real estate mortgage which extends the coverage of the mortgage to things which are used in the operation of the business on the mortgaged premises gives the mortgagee security but it is not security interest within the Code because it relates to a real estate mortgage which is expressly excluded from the Code, and it is not to be brought within the Code merely because it happens to contain provisions relating to attached personal property. In *re Royer's Bakery*, 55 Berks C.L.J. 164 (Pa).

A "security interest" is generally defined as "an interest in personal property or fixtures which secures payment or performance of an obligation." In *re Royer's Bakery*, 55 Berks C.L.J. 164 (Pa).

31. Send.

(applying New York law, and noting that fact that total rentals under one lease exceeded cost of leased equipment by approximately 46 per cent, and that total rentals under other lease exceeded cost of leased equipment by approximately 30 per cent, also indicated that both leases were intended as security only and were not true leases).

In action for alleged breach by defendant airport board of one-year written agreement under which plaintiff was to serve as "fixed-base" operator of airport in return for use of airport terminal and other facilities, where (1) prior to end of agreement's one-year term, plaintiff attended board meeting at which board approved motion not to renew parties' agreement; and (2) during plaintiff's subsequent out-of-state absence, board sent (a) certified letter containing notice of agreement's termination to plaintiff's business address, and (b) hand-delivered letter containing similar notice that was not accepted by employee at plaintiff's business office, court held, on granting board's motion for summary judgment, (1) that agreement in suit could be described as either "lease of real property" or "contract for services"; (2) that although neither type of contract was explicitly covered by Uniform Commercial Code, code nevertheless constituted persuasive authority with respect to agreements like that in suit; (3) that as a result, provisions of UCC § 1-201(26) and (27), which deal with giving of notice, and provisions of UCC § 1-201(38), which define term "send," would be applied by analogy; (4) that under such provisions, fact that plaintiff was given copy of board meeting minutes that authorized termination of his contract was sufficient to terminate such agreement, even if court should adopt "actual-delivery-to-person" test urged by plaintiff; (5) that (a) mailing of registered letter to plaintiff's business address was proper "sending" under UCC § 1-201(38), (b) act of mailing was "giving

of notice" under UCC § 1-201(26), and (c) deposit of notice for delivery was proper "receipt" of notification under UCC § 1-201(26)(a); (6) that hand delivery of second letter containing notice of plaintiff's termination, which was left on desk of plaintiff's employee over her protest, constituted proper "giving" and "receipt" of notice under UCC § 1-201(26) and also proper "sending" under UCC § 1-201(38); and (7) that because plaintiff's termination was authorized by board and notice of termination was properly given, board was not liable for breach of contract. *Logan v. Corinth-Alcorn County Joint Airport Bd.*, 665 F. Supp. 506 (N.D. Miss. 1987).

Notice that is received has been "sent", even though notice is not written. *Crest Inv. Trust, Inc. v. Alatzas*, 264 Md. 571, 287 A.2d 261 (1972).

32. Signature.

A purchaser's letter was a sufficient "writing in confirmation of the contract and sufficient against the sender" within the meaning of § 75-2-201(2), in spite of the seller's assertion that a confirmatory writing must be manually signed, where the letter was on the purchaser's letterhead which bore his address, and the letter referred to and recited the contract terms, requested execution of the previously-delivered forward contract, and included the typewritten name of the sender on the line where a manual signature is usually made. *Dawkins & Co. v. L & L Planting Co.*, 602 So. 2d 838 (Miss. 1992).

Where offer to purchase shares of stock and offeror's transmittal letter expressly and unambiguously required signing of transmittal letter in order to effectuate proper acceptance of offer, offeree's failure to sign letter resulted in nonacceptance of offer. In such case, moreover, mere presence of brokerage firm's name in blank space for registered owner (offeree) in transmittal letter did not operate as owner's signature under UCC § 1-201(39), where secretary who prepared letter testified that that was not her intent in inserting brokerage firm's name in such space. *Kroeze v. Chloride Group Ltd.*, 572 F.2d 1099 (5th Cir. 1978).

Employee's typewritten and handwritten initials on documents contained in

benefit file where employee designations of retirement plan beneficiary were contained, did not constitute signature of employee under provisions of UCC §§ 1-201(39) and 3-401(2). *Mohawk Airlines v. Peach*, 61 A.D.2d 346 (4th Dep't 1978), appeal denied, 44 N.Y.2d 645, 406 N.Y.S.2d 1026, 378 N.E.2d 126 (1978), appeal denied, 44 N.Y.2d 838, 406 N.Y.S.2d 758, 378 N.E.2d 121 (1978).

Where contract between supplier and contractor was orally modified and where supplier sent letter of confirmation to contractor who did not object thereto, claim for modified price of additional materials was not barred by UCC § 2-201; typewritten signature on letter of confirmation sent by supplier met definition of "signed" under UCC § 1-201(39). *A & G Constr. Co. v. Reid Bros. Logging Co.*, 547 P.2d 1207 (Alaska 1976).

In action brought by buyer of automobile against seller auction company for breach of warranty of title to automobile, instrument revealing intention of auction company to make warranty of title was "signed" within meaning of UCC § 1-201(39) where bill of sale and warranty of title were printed with name under which sellers did business. *Evans v. Moore*, 131 Ga. App. 169, 205 S.E.2d 507 (1974).

Where plaintiff's office manager generally made deposits for it at bank but instead of depositing 35 checks as she had been instructed to do, she drew cash on them and did not account to the plaintiff for such money, and each of the checks had affixed thereto the blank rubber stamp indorsement of the plaintiff, such blank indorsement constituted an authorized indorsement, and when bank delivered cash to the office manager instead of depositing the proceeds from the checks to plaintiff's account, the bank was not guilty of conversion. *Palmer & Ray Dental Supply of Abilene, Inc. v. First Nat'l Bank*, 477 S.W.2d 954 (Tex. Civ. App. 1972).

Where as confirmation statement securities dealer took standard printed form containing its company symbol, address and other information in print at top and completed various labeled blank spaces or blocks with appropriate information regarding transaction in question, and addressed and mailed completed statement

to customer, finding would have been authorized, if not demanded, that dealer adopted his printed name with present intention to authenticate writing and that writing was sufficient against dealer under UCC § 8-319(a). *Kohlmeyer & Co. v. Bowen*, 126 Ga. App. 700, 192 S.E.2d 400 (1972).

Term "signed" as defined by UCC § 1-201(39) includes any symbol executed or adopted by party with present intention to authenticate writing; authentication may be printed, stamped or written, and may be on any part of document. *Southwest Eng'g Co. v. Martin Tractor Co.*, 205 Kan. 684, 473 P.2d 18 (1970).

Where a creditor's assistant treasurer intended to sign a financing statement but through inadvertence filed the statement without signing it, the typed words of the creditor's name were not an intended use of a symbol as a signature and the financing statement was not "signed" within the Code § 1-201(39) definition nor within the Code § 9-402(1) requirement; even though a search of the town clerk's records would have disclosed the unsigned financing statement and the name and address of the secured party as typed in the blank space, the "unsigned" statement did not "substantially comply" with the Code requirements under § 9-402(5). *Maine League Fed. Credit Union v. Atlantic Motors*, 250 A.2d 497 (Me. 1969).

The act of typing the mortgagee's name in the body of the financing statement, coupled with the mortgagee's subsequent act or filing the statement, sufficiently indicated his intention to authenticate his statement and constitute a compliance with this subparagraph of the section despite the fact that the mortgagee did not subscribe the instrument. *Benedict v. Lebowitz*, 346 F.2d 120 (2d Cir. Conn. 1965).

33. Surety.

Parties to note become sureties by guaranteeing payment of note. *West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n*, 506 So. 2d 241 (Miss. 1986).

Difference, if any, between "guaranty" and "surety" has been fused, at least for purposes of UCC, by § 1-201(40) which provides that "surety" includes "guaran-

tor". *Kennedy v. Thruway Serv. City, Inc.*, 133 Ga. App. 858, 212 S.E.2d 492 (1975).

Defense of usury was available to guarantor of note where execution of guarantee was not separate transaction from loan and money would not have been loaned except for guarantee by guarantor to pay payee face amount of notes. *Ammerman v. Miller*, 488 F.2d 1285, 159 U.S. App. D.C. 385 (1973).

34. Unauthorized signature or indorsement.

Under UCC § 1-201(43), a forged indorsement is of necessity an unauthorized indorsement. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

Under UCC § 8-311(a), the true owner of an investment security, with certain exceptions, may assert the ineffectiveness of an "unauthorized indorsement" that appears on pledged securities against a bona-fide purchaser, unless the bona-fide purchaser has received new, reissued, or re-registered securities from the issuer. Under UCC § 1-201(43), the "unauthorized indorsement" referred to in UCC § 8-311 "means one made without actual, implied, or apparent authority and includes a forgery." *Ogilvie v. Idaho Bank & Trust Co.*, 99 Idaho 361, 582 P.2d 215 (1978).

There was sufficient evidence to raise question of fact as to whether endorser had actual, apparent or implied authority to endorse three checks on behalf of corporate payee where, inter alia, endorser had authority to pick up checks from various customers of payee, including customer who drew checks in question, solicit jobs and make bids on contracts, sign his own name to business letters on payee's stationary, and make deposits for payee in its bank account. *W.R. Grimshaw Co. v. First Nat'l Bank & Trust Co.*, 563 P.2d 117 (Okla. 1977).

Where three-man law partnership was dissolved when one partner left firm but other two partners continued practice under new partnership, where bank account of former partnership was kept open for purpose of depositing receivables of former firm, where check made payable to withdrawn partner and one of his former partners was received by new partner-

ship, bookkeeper rubber-stamped check with indorsement of former partnership, bank deposited proceeds in former partnership account, and where new partnership subsequently withdrew money from former partnership account and withdrawn partner sued bank and former partner alleging conversion of check, judgment in favor of bank and former partner was upheld on two grounds: (1) Since indorsement may be made by agent under UCC § 3-403, and agent's authority may be actual, implied or apparent under UCC § 1-201(43), there was sufficient evidence to support conclusion that apparent authority existed for affixing rubber stamp in lieu of withdrawn partner's signature; (2) Record further supported defense by bank predicated upon UCC § 3-419(3), since there was expert testimony to effect that under circumstances handling of check was in accord with reasonable commercial standards and, although bank knew former partnership had dissolved, it was logical for its account to be kept open for purpose of depositing fees which were subsequently collected for services rendered by old firm. *Keane v. Pan Am. Bank*, 309 So. 2d 579 (Fla. App. 1975).

The term "unauthorized signature" includes a forgery. *Gast v. American Cas. Co.*, 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

In a case where forged indorsements were placed upon a check, it was said that the forged indorsements were wholly inoperative as the signature of the payee under §§ 3-404(1) and 1-201(43), and that this was so both as to restrictive indorsements for deposit under § 3-205(c) and as to indorsements in blank under § 3-204(2). *Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

35. Value.

A lender's forbearance from bringing suit to recover for the borrower's selling of vehicles out of trust so that the borrower could remain in business and repay the money that he owed to the lender constituted the giving of "value" for the purpose of attachment of the lender's security interest. *Ford Motor Credit Co. v. State Bank & Trust Co.*, 571 So. 2d 937 (Miss. 1990).

In action by unpaid credit seller of oil supplies to debtor against bank, which held perfected security interest in debtor's oil inventory, for lack of good faith in disposing of part of such inventory, court held (1) that under UCC § 2-702(3), plaintiff's right to reclaim oil supplies sold to debtor was subject to bank's right to dispose of such supplies, which were collateral for bank's loan to debtor, as good-faith purchaser for value under UCC § 2-403(1); (2) that under UCC § 1-201(44)(b), bank had given value for debtor's oil inventory which bank obtained under after-acquired property clause in debtor's security agreement; (3) that UCC definition of good-faith purchaser did not, expressly or impliedly, include as element of such definition lack of knowledge of third-party claims, since good faith is merely defined in UCC § 1-201(19) as "honesty in fact in transaction concerned"; and (4) that under circumstances of case, bank's knowledge that plaintiff was unpaid credit seller to debtor did not impair bank's good faith in disposing of debtor's oil inventory (collateral) to satisfy debtor's obligation to bank. *Shell Oil Co. v. Mills Oil Co.*, 717 F.2d 208 (5th Cir. 1983).

Where (1) first corporation obtained financing from Texas bank for purchase of five airplanes, which it intended to resell, and Texas bank, in November, 1972, filed separate chattel mortgage for each plane with Federal Aviation Administration pursuant to federal law, (2) second corporation purchased the five planes from the first corporation and borrowed \$18,000 from Kentucky bank on unsecured note to finance purchase, (3) second corporation, on default in payment for planes, entered into new agreement with first corporation for purchase of only one plane and return of other four, and also agreed not to file bill of sale with Federal Aviation Administration for plane purchased, (4) second corporation gave Kentucky bank, which held second corporation's unsecured note for \$18,000, security agreement which secured repayment of note by encumbering single plane purchased, and bank, in exchange for such security agreement, agreed not to sue on note and filed both security agreement and bill of sale for plane with Federal Aviation Administra-

tion, (5) second corporation defaulted in making payments on plane, and first corporation foreclosed on plane and sold it at auction under authority of its November, 1972 security agreement with Texas bank, which security agreement had been assigned to first corporation on its repayment of amount that it owed Texas bank, and (6) second corporation's financier (Kentucky bank) sued first corporation for wrongful interference with its collateral by not respecting bank's lien on repossessed plane, court held (1) that Kentucky bank, under UCC § 1-201(44)(b), gave "value" when it took security interest in plane purchased by second corporation to secure bank's preexisting claim against such corporation, (2) that by virtue of UCC § 9-204(1), Uniform Commercial Code does not require that "consideration" in strict-law sense be given as prerequisite for security interest to attach to collateral, (3) that Kentucky bank's security interest attached at time it gave value and was duly and properly perfected when bank filed instruments with Federal Aviation Administration, (4) that first corporation, under UCC § 1-201(37), had no valid security interest in plane that it repossessed and sold, since first corporation, by discharge of obligation underlying its security interest, had extinguished such security interest, and (5) that first corporation's foreclosure on, and sale of, plane was wrongful and in derogation of rights of plaintiff Kentucky bank, which held valid security interest in plane. *Bank of Lexington v. Jack Adams Aircraft Sales, Inc.*, 570 F.2d 1220 (5th Cir. 1978).

Brokerage firm which received stock for account of customer and promptly credited sales price to customer's account acquired stock in partial satisfaction of preexisting claim (UCC § 1-201, subd 44(b)), and thus for value within meaning of UCC § 8-302. *Colonial Sec., Inc. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 461 F. Supp. 1159 (S.D.N.Y. 1978).

In action by finance corporation against bank involving conflicting security interests in same automobile, where (1) dealer's invoice recited sale of automobile to wife and provided that she would pay \$1,400 down and finance balance with plaintiff, (2) wife and husband executed

(a) promissory note evidencing loan in amount of \$2,995 from defendant, of which \$1,400 was used as down payment for automobile and balance represented preexisting debt owed to defendant, and (b) security agreement which designated automobile as security for such loan, (3) husband, on giving dealer \$1,400 down payment for automobile, executed installment sale contract in husband's name only in favor of dealer, which dealer assigned to plaintiff, (4) defendant on August 9, 1972 filed financing statement that designated both husband and wife as debtors, (5) plaintiff on August 10, 1972 filed financing statement that designated only husband as debtor, (6) husband defaulted on payments due plaintiff, and (7) both husband and wife defaulted on note given to defendant, court held (1) installment sale contract assigned to plaintiff served as security agreement under UCC § 9-203(1)(b) and plaintiff acquired valid security interest in automobile, (2) plaintiff's security interest in automobile validly attached under UCC § 9-204(1), since husband had "right" in automobile as matter of law and could use it for collateral, even though wife was vehicle's registered owner, (3) under UCC § 9-402(1) and § 9-105(1)(d) financing statement filed by plaintiff was defective, since it only listed husband as "debtor" and did not refer to wife who actually owned automobile, (4) defendant's security interest validly attached when both husband and wife signed security agreement granting security interest in automobile to defendant, (5) defendant's financing statement complied with UCC § 9-402(1), since it was signed by both husband and wife, and thus defendant's security interest in automobile was perfected, and (6) since defendant gave "value" under UCC § 1-201(44)(b) by taking security interest in automobile to secure defendant's preexisting claim, defendant's perfected security interest in vehicle extended to entire amount of defendant's loan to husband and wife, and such perfected security interest was superior to plaintiff's unperfected security interest. *GMAC v. Washington Trust Co.*, 120 R.I. 197, 386 A.2d 1096, 3 A.L.R.4th 496 (1978).

Notwithstanding subsequent purchaser did not know that intermediate seller's

title was voidable due to intermediate seller's obtaining truck on basis of check which was dishonored, subsequent purchaser did not have good title against original seller by status of "good faith purchaser for value" under UCC §§ 1-201(19), 1-201(44) and 2-403, where subsequent purchaser knew that intermediate seller was sophisticated about value of automotive equipment, subsequent purchaser had just received three dishonored checks from intermediate seller, subsequent purchaser had no reason to believe that intermediate seller would give equipment worth \$13,500 or more to settle debt of \$9,100, and subsequent purchaser let intermediate seller retain possession of truck. *Graves Motors, Inc. v. Docar Sales, Inc.*, 414 F. Supp. 717 (E.D. La. 1976).

Where debtor delivered shares of stock to bank as security for various loans, but obtained possession of stock from bank under false pretenses and then transferred stock to his father-in-law for purpose of securing or indemnifying father-in-law against any loss which he might sustain as result of his having signed indemnity agreement on behalf of debtor: (1) under UCC § 1-201(44), value was given for transfer of stock when father-in-law accepted stock as security for preexisting claim, i. e., debtor's contingent liability to contribute if father-in-law paid more than his proportionate share of obligation under indemnity agreement; (2) father-in-law was bona fide purchaser under UCC § 8-302; and (3) under UCC § 8-301(2), he acquired stock free of bank's adverse claim. *Prisbrey v. Noble*, 505 F.2d 170 (10th Cir. Utah 1974).

In action to recover value of stock certificates which were stolen from broker, accepted by bank as collateral for loan, and subsequently sold to satisfy debt, testimony by bank president that, inter alia, prospective borrower offered certificates as collateral for loan, that certificates were issued to and endorsed by broker with transferee's name left blank, that borrower executed affidavit stating that he was rightful owner of certificates, that bank contacted issuing corporation and verified listing of stock in broker's name, and that bank sent certificates with borrower's name added as transferee to issu-

ing corporation for issuance of new certificates in borrower's name, which were issued and held by bank, established prima case that bank was bona fide purchaser of stock certificates under UCC § 8-302; bank became "purchaser for value" when it accepted stock certificates as collateral. *Fidelity & Cas. Co. v. Key Biscayne Bank*, 501 F.2d 1322 (5th Cir. Fla. 1974), reh'g denied, 504 F.2d 760 (5th Cir. Fla. 1974).

In transaction whereby sole shareholder of small corporation sold all his shares of stock to third person and corporation participated in transaction with purchaser as comaker of promissory note and written security agreement relating to corporate shares and various physical assets of corporation, corporation's execution of promissory note and security agreement was supported by sufficient consideration since seller, as part of sale transaction, agreed to refrain from competition with corporation, granted corporation option to purchase building in which business was conducted, and promised to remain on corporation's board of directors. *Miller's Shoes & Clothing v. Hawkins Furn. & Appliances, Inc.*, 300 Minn. 460, 221 N.W.2d 113, 71 A.L.R.3d 629 (1974).

Section 1-201(44)(b) provides that an antecedent debt is sufficient consideration for the execution and giving of a security interest. *United States v. Pirnie*, 339 F. Supp. 702 (D. Neb. 1972), aff'd, 472 F.2d 712 (8th Cir. Neb. 1973).

Automobile dealer who obtained automobiles from seller in exchange for two uncollectible checks previously issued to dealer by seller was "purchaser for value" of automobiles. *National Car Rental v. Fox*, 18 Ariz. App. 160, 500 P.2d 1148 (1972).

"Value" is given for rights if they are acquired as security for preexisting debt. *United States v. Big Z Whse.*, 311 F. Supp. 283 (S.D. Ga. 1970).

36. Warehouse receipt.

Warehouse receipt is document of title. *Lofton v. Mooney*, 452 S.W.2d 617 (Ky. 1970).

A forged delivery order is neither a "document of title" nor a warehouse receipt under the provisions of this section because it cannot be said to have been issued in the regular course of business or financing, nor can it be treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the good it covers. *David Crystal, Inc. v. Cunard S.S. Co.*, 223 F. Supp. 273 (S.D.N.Y. 1963), aff'd, 339 F.2d 295 (2d Cir. N.Y. 1964), cert. denied, 380 U.S. 976, 85 S. Ct. 1339, 14 L. Ed. 2d 271 (1965), cert. denied, 380 U.S. 976, 85 S. Ct. 1340, 14 L. Ed. 2d 271 (1965).

37. Writing.

Where plaintiff entered into oral contracts with defendant cotton growers for sale of their cotton crops, each involving more than \$500 worth of cotton: (1) under UCC §§ 2-105 and 2-107, sale of cotton was sale of goods and, under UCC § 1-201, was not enforceable unless there was writing sufficient to indicate contract for sale had been made, signed by party against whom enforcement was sought; (2) oral contracts between plaintiff and defendants did not come within agency or broker exception to statute of frauds where there were two separate, independent sets of contracts under which defendants agreed to sell to plaintiff, and plaintiff independently contracted to sell to mills; (3) although exception to statute of frauds exists under UCC § 2-201(3)(b) if party against whom enforcement is sought admits in his pleadings, testimony or otherwise in court that contracts for sale was made, such exception did not apply in present case since defendants denied under oath that agreement for sale was made with plaintiff and, although trial court made credibility determination adverse to defendants' testimony, such finding did not constitute finding that "admission" exception applied; (4) defendants were not estopped to assert defense of statute of frauds merely because plaintiff had acted in reliance on oral agreement. *Cox v. Cox*, 292 Ala. 106, 289 So. 2d 609 (1974).

RESEARCH REFERENCES

ALR. Signature by mark on certificate of acknowledgement. 25 A.L.R.2d 1124.

Validity of signature by mark. 81 A.L.R.2d 1020.

What is a "branch bank" within statutes regulating the establishment of branch banks. 23 A.L.R.3d 683.

Applicability and application, in civil case, of presumption of addressee's receipt of telegram. 24 A.L.R.3d 1434.

Extent of duty of transferee of bulk sale to investigate regarding seller's creditors under Uniform Commercial Code Article 6. 67 A.L.R.3d 1056.

Equipment leases as security interest within Uniform Commercial Code § 1-201(37). 76 A.L.R.3d 11.

Who is "buyer in ordinary course of business" under the Uniform Commercial Code. 87 A.L.R.3d 11.

Construction and application of UCC § 2-201(3)(b) rendering contract of sale enforceable notwithstanding Statute of Frauds to extent it is admitted in pleading, testimony, or otherwise in court. 88 A.L.R.3d 416.

Modern status of the Massachusetts or business trust. 88 A.L.R.3d 704.

Option to purchase real property as affected by optionor's receipt of offer for, or sale of, larger tract which includes the optioned parcel. 34 A.L.R.4th 1217.

What constitutes "money" within meaning of Uniform Commercial Code. 40 A.L.R.4th 346.

Duty of publisher with regard to distribution and promotion of book. 43 A.L.R.4th 1182.

Who is a "purchaser" within the meaning of § 2(a) of the Robinson-Patman Act (15 USCS § 13(a)), making it unlawful to discriminate in price between different purchasers of commodities. 60 A.L.R. Fed. 875.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 5-8, 20.

73 Am. Jur. 2d, Statutes §§ 223 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Form 5:28 (Instruction to jury; rights as between competing good faith purchasers of drafts under nonnotation credit).

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Forms 1:27-1:32 (Definitions and principles of interpretation).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:51 et seq. (Definition clauses).

21 Am. Jur. Proof of Facts, Sending and Receipt of Telegrams, §§ 10, 11 (Proof of delivery of telegram by telephone and proof of delay in delivery of telegram).

2 Am. Jur. Proof of Facts 2d, Status as "Buyer in Ordinary Course of Business", §§ 12 et seq. (proof of status as "buyer in ordinary course").

1983 Mississippi Supreme Court Review: Subjective or objective standard of "good faith." 54 Miss L. J. 110, March, 1984.

CJS. 82 C.J.S., Statutes §§ 207, 309.

§ 75-1-202. Prima facie evidence by third party documents.

A document in due form purporting to be a bill of lading, policy or certificate of insurance, official weigher's or inspector's certificate, consular invoice, or any other document authorized or required by the contract to be issued by a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

SOURCES: Codes, 1942, § 41A:1-202; Laws, 1966, ch. 316, § 1-202, eff March 31, 1968.

Cross References — Evidence, generally, see §§ 13-1-1 et seq.

JUDICIAL DECISIONS

1. In general.

In action by common carrier to recover freight charges, bill of lading would have been admissible under UCC § 1-202, if it had been offered into evidence. *Braswell Motor Freight Lines v. Tetens*, 538 S.W.2d 224 (Tex. Civ. App. 1976).

Original bills of lading which plaintiff sought to introduce as its exhibits to prove alleged overcharges for real transportation were not admissible under § 1-202 where they did not involve third party. *Atchison, T. & S.F. Ry. v. Lone Star Steel Co.*, 498 S.W.2d 512 (Tex. Civ. App. 1973).

In action by purchaser of automobiles to recover certain rebates allegedly promised it as inducement to purchase from dealer

letter of correspondence between automobile manufacturer and purchaser, stating that representative of manufacturer had contacted dealer who denied contractual agreement regarding rebates, was not self-authenticating document within meaning of Code § 1-202. *Thrifty Rent-A-Car Sys. v. Chuck Ruwart Chevrolet*, 500 P.2d 172 (Colo. Ct. App. 1972).

"Clean" bill of lading showing that goods, which were wrapped entirely in burlap covering, were "in apparent good order and condition" was prima facie evidence as to external conditions only. *Plastileather Corp. v. Aetna Cas. & Sur. Co.*, 361 Mass. 356, 280 N.E.2d 402 (1972).

RESEARCH REFERENCES

ALR. Verification and authentication of slips, tickets, bills, invoices, etc., made in regular course of business, under the Uniform Business Records as Evidence Act, or under similar "Model Acts." 21 A.L.R.2d 773.

Construction and effect of § 1-202 of the Uniform Commercial Code dealing with documents which are prima facie evidence of their own authenticity and genuineness. 72 A.L.R.3d 1243.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 32.

29 Am. Jur. 2d, Evidence §§ 834-913.

30 Am. Jur. 2d, Evidence §§ 914-1015.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:1221 (Notice; of intent to offer evidence of substitute market price).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:1222 (Motion; evidence of substitute market price offered without notice inadmissible).

CJS. 32 C.J.S., Evidence §§ 819, 820, 967.

§ 75-1-203. Obligation of good faith.

Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement.

SOURCES: Codes, 1942, 41A:1-203; Laws, 1966, ch. 316, § 1-203, eff March 31, 1968.

Cross References — Course of dealing and usage of trade, see § 75-1-205.

Good faith acceleration of payment, see § 75-1-208.

Cure by seller of improper tender or delivery, see § 75-2-508.

Good faith of buyer in selling after rejection of goods, see § 75-2-603.

Substituted performance, see § 75-2-614.

Delay or nondelivery caused by compliance in good faith with governmental regulation or order, see § 75-2-615.

JUDICIAL DECISIONS

1. In general.
2. Applicability to particular parties.
3. Commercial paper.
4. Letters of credit.
5. Sales.
6. Secured transactions.
7. Other commercial transactions.

1. In general.

Section 75-1-203, which provides that every contract imposes an obligation of good faith in its performance or enforcement, does not apply to employment contracts. *Hartle v. Packard Elec.*, 626 So. 2d 106 (Miss. 1993).

The requirement of good faith of the Code is an overriding provision that applies to the termination provision. *Tele-Controls, Inc. v. Ford Indus., Inc.*, 388 F.2d 48 (7th Cir. Ill. 1967).

The provisions of this section superimpose a general requirement of fundamental integrity on commercial transactions regulated by the Uniform Commercial Code. *Skeels v. Universal C.I.T. Credit Corp.*, 335 F.2d 846 (3d Cir. Pa. 1964).

2. Applicability to particular parties.

Words "or duty" were added to section to make it clear that third parties as well as parties to a contract have an obligation of good faith. *In re Davidoff*, 351 F. Supp. 440 (S.D.N.Y. 1972).

3. Commercial paper.

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unautho-

rized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. *Atlas Bldg. Supply Co. v. First Indep. Bank*, 15 Wash. App. 367, 550 P.2d 26 (1976).

Provision in loan agreement providing that borrower would not incur other indebtedness for borrowed money without consent of lender was not unconscionable under UCC § 2-302, since this § 2-302 is applicable only to sales transactions. Nor was clause a breach of obligation of good faith imposed by UCC § 1-203 where loan agreement was negotiated at arm's length between sophisticated commercial parties. *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976).

4. Letters of credit.

Issuer bank which refused to pay beneficiary under letter of credit because letter required delivery of goods to place other than place to which beneficiary had shipped goods, and which thereby extricated itself from precarious financial position because customer for whom letter was issued appeared incapable of reimbursing issuer, (1) was not required by good-faith obligation imposed by UCC § 1-203 to amend letter at instance of beneficiary and issuer's customer, so as to permit delivery at place to which goods were actually shipped, and (2) also was not required to amend letter by UCC § 1-205(2), dealing with issuer's obligation to act in accordance with banking custom and usage, since issuer, in issuing letters of credit, relied on written trade code entitled "Uniform Customs and Practice for Documentary Credits (UCP)" to establish banking practice, and UCP expressly declared that irrevocable letter of credit could not be amended or cancelled without agreement of all parties thereto, namely, beneficiary, customer, and issuer itself. *AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222, 23 U.C.C. Rep. Serv. 990 (D. Ariz. 1978) (construing Arizona law; holding issuer not liable for refusing payment to beneficiary).

5. Sales.

In action by seller of upholstery fabrics against buyer for balance due on unpaid invoices, in which buyer admitted ordering fabrics but alleged that seller had overshipped fabrics to buyer, that buyer had revoked acceptance of overshipped goods and returned them to seller, that seller had allowed credit for returned goods, and that buyer had then paid balance of its account, court held (1) that no overshipments had occurred; (2) that seller had agreed that buyer could return fabrics that buyer could not dispose of at reduced price; (3) that seller never notified buyer that credit memorandum for major part of returned fabrics had been erroneously sent to buyer; (4) that since disputed shipments had conformed to oral orders placed by buyer, buyer's revocation of its prior acceptance of goods under UCC § 2-608(1) was wrongful; (5) that seller was thereafter entitled to remedies provided by UCC § 2-703; (6) that seller's postbreach conduct—which consisted of allowing discount on disputed fabrics, accepting great number of pieces returned to seller, and sending buyer memorandum allowing credit for returned fabrics with no qualification as to memorandum's meaning—showed acquiescence in alleged agreement for return of goods and allowance of discount thereon; and (7) that seller, by failing to exercise diligence in enforcing its rights under the contract, had not exercised good faith required by UCC § 1-203, had seriously misled buyer, and thus was estopped to assert its abandoned rights. *Castle Fabrics, Inc. v. Fortune Furn. Mfrs., Inc.*, 459 F. Supp. 409 (N.D. Miss. 1978).

In buyer's action for seller's breach of written and oral warranties in sale of marine diesel engine, (1) where terms of sale contract were contained in seller's letter to buyer, buyer's written purchase order, and manufacturer's written warranty which accompanied sale of engine; (2) where seller also orally warranted to buyer that engine would deliver specified standard of performance, that if it did not do so it could be removed from buyer's boat at seller's expense, and that it would be delivered in time to meet requirements of builder of buyer's boat; (3) where such

oral warranties were breached and buyer, within six-months period provided in written engine warranty for manufacturer's repair or replacement of defective parts, refused to allow manufacturer's mechanic to inspect defective engine; (4) where buyer, more than six months after date engine was put into operation, notified seller that he had removed engine from his boat, tendered engine back to seller, and demanded return of purchase price; and (5) where such tender and demand were refused by seller, (1) trial court properly found that all terms of sale contract had not been reduced to writing; (2) admission in evidence of oral warranties as part of sale contract did not violate parol evidence rule contained in UCC § 2-202; (3) such oral warranties did not constitute "sale or return" provision in contract under UCC § 2-326(1)(b), but were analogous to "sale on approval" provision under UCC § 2-326(1)(a) and thus were not required by UCC § 2-326(4) to be in writing; (4) buyer's failure to allow seller to exercise right under UCC § 2-508(1) to inspect and repair engine negated warranty provisions of sale contract; (5) buyer accepted engine under UCC § 2-327(1)(b) by not seasonably notifying seller of buyer's election to return engine; and (6) buyer's delay of nearly six months in informing seller of buyer's intention to revoke acceptance of engine was insufficient compliance with buyer's good faith obligation under UCC § 1-203 and did not revoke such acceptance under UCC § 2-608. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

Where contract for sale of popcorn provided that buyer was to pay for shipments of popcorn when delivered and seller repudiated contract after delivering two shipments to buyer's processing plant (for which shipments seller did not demand on-the-spot payment and buyer did not offer to pay at such place, since it customarily paid its obligations from its business office in another city), seller breached his obligation of good faith under UCC § 1-203 in performance of contract, as "good faith" is defined by UCC § 1-201(19), by failing to demand payment after delivery

of each shipment and by hastily reselling undelivered part of popcorn crop to another buyer at nearly twice the contract price; trial court, in finding absence of good faith by seller, did not err in employing unconscionability concept of UCC § 2-302 in interpreting contract, since court's statement as to unconscionability was only dictum. *Baker v. Ratzlaff*, 1 Kan. App. 2d 285, 564 P.2d 153 (1977).

Wholesale parts distributor was not entitled to recover damages from manufacturer resulting from termination of distributorship contract where contract provided that either party could terminate at any time on written notice of 90 days, where, although distributor was required to carry "adequate" inventory of manufacturer's parts, contract also gave manufacturer option to refuse to repurchase inventory upon termination, and where manufacturer terminated contract and refused to repurchase distributor's inventory. Distributor failed to show that repurchase provision was unconscionable within meaning of UCC § 2-302 at time of formation of contract: there was no showing that manufacturer's reasons for reserving repurchase option in its distributorship agreements were not reasonably related to business risks involved; it was not unreasonable per se for manufacturer to reserve right to refuse to repurchase at least portions of distributor's inventory upon termination; and, although manufacturer may have had superior bargaining power, under Code, bona fide allocation of risks would not be disturbed merely because one party had superior bargaining position, particularly where both parties were sophisticated business people. Furthermore, repurchase provision was not unduly one-sided or oppressive; although provision appeared to be unqualified, on its face, any exercise of repurchase election by manufacturer was restricted by manufacturer's obligation to act in good faith pursuant to UCC § 1-203, and, although proof that manner in which repurchase election was exercised at time of termination amounted to breach of manufacturer's implied obligation of good faith and fair dealing would have been independent basis for recovery of damages, neither distributor's complaint

nor theory under which case was tried supported findings for distributor based on breach of implied covenant of good faith and fair dealing. *W.L. May Co. v. Philco-Ford Corp.*, 273 Or. 701, 543 P.2d 283 (1975).

Fact that party in default on contract for sale of wheat did not specifically disavow intention to perform obligation in default did not constitute breach of obligation of good faith imposed upon contracting parties under UCC § 1-203. Purpose of UCC § 1-205(1) was to assist court by allowing evidence as to those matters in which basic contract was lacking or as to which basic contract was ambiguous. *Cargill, Inc. v. Kavanaugh*, 228 N.W.2d 133 (N.D. 1975).

"Outputs" contract under which bakery agreed to sell all breadcrumbs produced by it to promisee did not carry with it implication that bakery was obligated to manufacture breadcrumbs for full term of contract; rather, good faith termination of production of breadcrumbs was permissible under contract. Thus, summary judgment could not be entered in favor of either party to suit for breach of contract where unresolved issues of fact remained as to whether bakery acted in good faith in ceasing production of crumbs because of alleged economic unfeasibility. *Feld v. Henry S. Levy & Sons*, 37 N.Y.2d 466, 335 N.E.2d 320 (1975).

6. Secured transactions.

In suit by debtor's receiver challenging bank's priority as perfected security interest holder and its concomitant right to take possession and dispose of secured collateral, UCC § 9-402 did not require bank to give notice to debtor's creditors that original security agreement was amended to increase amount of its loan and terms of repayment where increased loan was secured by same collateral originally described in financing statement. *Heights v. Citizens Nat'l Bank*, 463 Pa. 48, 342 A.2d 738 (1975).

Secured party was not entitled to recover alleged deficiency due after sale of repossessed automobile since (1) three days' notice of resale was not commercially reasonable under UCC § 9-504(3); (2) sale of automobile for only \$50 was not in good faith, under UCC § 1-203, or in

commercially reasonable manner under UCC § 9-504(3), although automobile was inoperable, where casual inspection would have revealed that automobile was missing spark plugs, points and air cleaner, and installation of these items would have made car operative and would only have required small expenditure; and (3) presumption that collateral was worth at least amount of debt, which arose as result of secured creditor's failure to give sufficient notice of resale, was not overcome by creditor's evidence. *Franklin State Bank v. Parker*, 136 N.J. Super. 476, 346 A.2d 632 (1975).

Although principles of estoppel and good faith underlie entire UCC, including provisions of Article 9, and lack of good faith on part of secured creditor may alter priorities which would otherwise be determined by Article 9 provisions, mere fact that secured party stood to gain from debtors' wrongful conduct did not in and of itself show lack of good faith and fact that secured party authorized debtors to purchase grain on credit from third party did not constitute evidence of fraudulent

scheme or conspiracy. *Central Soya Co. v. Bundrick*, 137 Ga. App. 63, 222 S.E.2d 852 (1975).

Code requirement of "good faith" prevented family corporation from enforcing security agreement as to mortgaged property of partnership, where security agreement had been granted in breach of partnership regulatory agreement provision that there would be no encumbrance of any mortgaged property without FHA approval and where both partnership and corporation were dominated by father of family. *Thompson v. United States*, 408 F.2d 1075 (8th Cir. Ark. 1969).

7. Other commercial transactions.

While this particular agreement relating to a license transfer does not come within the UCC, it is a commercial transaction in the broad sense and the legislature has specifically declared in UCC § 1-203 that good faith is a basic obligation in all such transactions. *Hardeman v. Liberty Mut. Ins. Co.*, 124 Ga. App. 710, 185 S.E.2d 789 (1971).

RESEARCH REFERENCES

ALR. Duty of publisher with regard to distribution and promotion of book. 43 A.L.R.4th 1182.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 20.

17 Am. Jur. 2d, Contracts § 380.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:24 (Answer; defense; absence of good faith on part of plaintiff in

exercising option to require additional collateral).

34 Am. Jur. Trials 343, Bad Faith Tort Remedy for Breach of Contract.

CJS. 17B C.J.S., Contracts § 561, 562.

Law Reviews. 1987 Mississippi Supreme Court Review: Lender liability in Mississippi: a survey, comparison, and comment. 57 Miss L. J. 1, April 1987.

§ 75-1-204. Time; reasonable time; "seasonably."

(1) Whenever this code requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action.

(3) An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

SOURCES: Codes, 1942, § 41A:1-204; Laws, 1966, ch. 316, § 1-204, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general.
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3. Express time provision.
4. —“Manifestly unreasonable”.
5. Particular acts; in general.
6. —Acceptance.
7. —Inspection.
8. —Negotiation.
9. —Rejection or revocation.
10. Particular circumstances; disability of party.

1. In general.

Reasonable time for taking any action is dependent on the nature, purpose and circumstances of the action. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

2. Question of law or fact.

Where facts are not substantially in dispute, question of what is a reasonable time to inspect and reject goods that fail to conform to contract specifications is a matter to be resolved by the court. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

Whether goods were substantially impaired by nonconformity under UCC § 2-608(1) and whether buyer's revocation of acceptance under UCC § 2-608(2) was given within reasonable time are questions of fact for jury. Under UCC § 1-204(2), what is reasonable time for taking any action under the code depends on nature, purpose, and circumstances of such action. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

Reasonableness is primarily a question for the fact finder. *Hane v. Exten*, 255 Md. 668, 259 A.2d 290 (1969).

3. Express time provision.

Where contract between manufacturer and distributor for sale of certain product was to run for “initial term,” defined to commence on date of execution and to “continue for a period of 12 months from the date of the first shipment” of specified product, and granted distributor right to renew for successive 12-month periods provided distributor maintained certain level of purchases, but where no such specified product was shipped or ordered

prior to manufacturer's repudiation of contract a little more than one year after execution of contract, “initial term,” and thus contract, did not expire one year after date of execution; question as to what constituted “reasonable time” for distributor's performance under contract depended upon circumstances of transaction and course of performance and, in view of dispute which had arisen between parties, it was not unreasonable for distributor to refrain from ordering specified product until contract renegotiations were resolved. *Copylease Corp. of Am. v. Memorex Corp.*, 403 F. Supp. 625 (S.D.N.Y. 1975).

Where a sales contract expressly creates an unlimited express warranty of merchantability which in a separate clause purports to indirectly modify the warranty without expressly mentioning the word merchantability, the language creating the unlimited express warranty must prevail over the time limitation insofar as the latter modifies the warranty, and the express warranty of merchantability includes latent shading defects and defendants may claim for such defects not reasonably discoverable within the time limits established by the contract if plaintiff was notified of these defects within a reasonable time after they were or should have been discovered. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

This section permits parties to a contract of sale and purchase to fix the time within which notice of defective goods must be given by seller to purchaser so long as the time is reasonable. *Q. Vandenberg & Sons v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964).

4. —“Manifestly unreasonable”.

Notwithstanding contract specified that buyer had thirty days to inspect fabricated pipe, which constituted goods within meaning of UCC § 2-105, trial court erred in holding buyer's performance bond liable by reason of buyer's failure to reject allegedly defective pipe within thirty days of delivery: (1) under UCC § 2-607, buyer was required to notify seller of breach of

warranty within a reasonable time after actual or constructive discovery of defects; (2) UCC § 1-204 provides that whenever UCC requires action within reasonable time, any time which is not manifestly unreasonable may be fixed by agreement; (3) seller guaranteed workmanship and material in contract provided claim was made within one year from shipment; and (4) buyer made claim within one year following shipment. *United States Fid. & Guar. Co. v. North Am. Steel Corp.*, 335 So. 2d 18 (Fla. App. 1976).

A time limitation providing that a buyer unqualifiedly accepts all material and waives all claims in respect thereto unless he gives notice of a claim within 15 days after delivery is "manifestly unreasonable" and invalid when applied to latent defects not discoverable on ordinary inspection within the 15-day time limitation. *Neville Chem. Co. v. Union Carbide Corp.*, 294 F. Supp. 649 (W.D. Pa. 1968), vacated on other grounds, 422 F.2d 1205 (3d Cir. Pa. 1970), cert. denied, 400 U.S. 826, 91 S. Ct. 51, 27 L. Ed. 2d 55 (1970).

5. Particular acts; in general.

Contract under which seller agreed to manufacture cooling systems for incorporation into electronic countermeasure (ECM) pods for United States Air Force was breached by buyer when it failed to furnish seller with source-control drawings for such systems within commercially reasonable time implied in contract by UCC § 2-309(1) and UCC § 1-204(2). *Westinghouse Elec. Corp. v. Garrett Corp.*, 437 F. Supp. 1301 (D. Md. 1977), aff'd, 601 F.2d 155 (4th Cir. Md. 1979).

Where contract between manufacturer and distributor for sale of certain product was to run for "initial term," defined to commence on date of execution and to "continue for a period of 12 months from the date of the first shipment" of specified product, and granted distributor right to renew for successive 12-month periods provided distributor maintained certain level of purchases, but where no such specified product was shipped or ordered prior to manufacturer's repudiation of contract a little more than one year after execution of contract, "initial term," and thus contract, did not expire one year after date of execution; question as to

what constituted "reasonable time" for distributor's performance under contract depended upon circumstances of transaction and course of performance and, in view of dispute which had arisen between parties, it was not unreasonable for distributor to refrain from ordering specified product until contract renegotiations were resolved. *Copylease Corp. of Am. v. Memorex Corp.*, 403 F. Supp. 625 (S.D.N.Y. 1975).

Where default occurred in payment of an automobile retail instalment contract in August of 1965 but the security holder did not make demand upon the dealer for performance of its repurchase agreement until October of 1966, and it was the custom and usage that the lending institution is required to repossess and return the vehicle for repurchase within a reasonable time after default and that 90 days is regarded as a reasonable time, the security holder could not enforce the repurchase agreement which contained no provision inconsistent with the custom and usage. *Valley Nat'l Bank v. Babylon Chrysler-Plymouth, Inc.*, 53 Misc. 2d 1029 (1967), aff'd, 28 A.D.2d 1092, 284 N.Y.S.2d 849 (2d Dep't 1967).

6. —Acceptance.

Where contract for sale of tractor was not complete until defendant accepted by picking up tractor, and defendant did not inform seller that he had picked up tractor until approximately two to four weeks after he had done so, evidence would support finding that defendant failed to give notice of his acceptance within reasonable time, permitting seller to treat offer as having lapsed under Code § 2-206(2). *Petersen v. Thompson*, 264 Or. 516, 506 P.2d 697 (1973).

7. —Inspection.

There is no inflexible rule that the time to inspect goods to determine their conformance with contract specifications must coincide with passage of title. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

8. —Negotiation.

Where letter of credit provided that drafts issued against it must be negotiated by specified date and that the credit

was subject to the Uniform Customs And Practice for Documentary Credits (1962 revision), and where provision of Uniform Customs And Practice for Documentary Credits stated only that documents must be presented within "reasonable time" after issuance, court, in holding that timeliness of presentment of draft was issue of material fact, would take note of UCC § 1-204(2), dealing with reasonableness of time for taking any action, and UCC § 3-503(2), dealing with time for presenting commercial paper. *Flagship Cruises, Ltd. v. New England Merchants Nat'l Bank*, 569 F.2d 699 (1st Cir. Mass. 1978).

9. —Rejection or revocation.

In proceeding based on seller's alleged breach of contract to sell buyer 4,150 tons of Class I steel, which matter was submitted to arbitration governed by Uniform Commercial Code, where arbitrators found that such steel was received for buyer's inspection on November 8, 1974, that buyer did not accept steel because it did not conform to contract of sale, and that buyer orally rejected steel on December 4, 1974, and gave seller written notice of such rejection on December 12, 1974, buyer's rejection was proper and seller received timely notification thereof under UCC § 2-602(1) and UCC § 1-204(2). *North Am. Steel Corp. v. Siderius, Inc.*, 75 Mich. App. 391, 254 N.W.2d 899 (1977).

In action arising out of auction sale of mare described in sales catalog as "barren," but which subsequently "slipped" a dead foal, buyer made effective revocation within reasonable time under UCC §§ 1-204 and 2-608 where buyer wrote letters five days after mare "slipped" to seller and to sales director of organization which conducted sale indicating that the sale should be "null and void" on basis of misrepresentation of mare in sales catalog. *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976).

Trial court properly submitted to jury issue of whether buyer revoked acceptance of cattle herd within reasonable time under UCC §§ 1-204 and 2-608 and buyer failed to persuade jury that his revocation occurred within reasonable time, notwithstanding cattle were nonconforming, value of herd was substantially impaired and buyer gave notice of noncon-

formity 17 days after delivery, where, prior to notice of revocation given 15 months later after failure of adjustment negotiations, herd was underfed, herd suffered weight and death loss, and introduction of bulls into herd caused pretermis- sion of registration. *Sylvester v. Watkins*, 538 S.W.2d 827 (Tex. Civ. App. 1976), *ref. n.r.e.* (Nov. 10, 1976).

Mere fact that because of seller's action the passing of title to stud horse was accelerated by some six months did not affect timing of obligation to inspect horse to determine its fitness for breeding purposes or decision to accept or reject the horse since, pursuant to agreement, it was only in the two-month period prior to stated date for passing of title and after end of racing season that seller was to have horse tested to determine his fitness for breeding purposes, actual inspection took place during such time and horse sustained no serious bodily injury during last months of racing; inspection and rejection in month before title would have passed absent acceleration was timely. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

Whether goods were substantially impaired by nonconformity under UCC § 2-608(1) and whether buyer's revocation of acceptance under UCC § 2-608(2) was given within reasonable time are questions of fact for jury. Under UCC § 1-204(2), what is reasonable time for taking any action under the code depends on nature, purpose, and circumstances of such action. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

In action between purchaser of nonconforming mobile home and assignee of security agreement, purchaser's revocation of acceptance occurred within reasonable time under UCC §§ 2-608 and 1-204(2) where purchaser relied on dealer's promises to make corrections while retaining option of cancellation; under UCC § 2-711(1) and (3) purchaser retained security interest in price paid and was allowed to recover so much of price as had been paid. *Frontier Mobile Home Sales, Inc. v. Trigleth*, 256 Ark. 101, 505 S.W.2d 516 (1974).

Buyers' revocation of acceptance of automobile 9 months after sale of automobile

and 7 months after filing of suit for rescission of sale contract was within "reasonable time" when balanced against obligation of automobile dealer under contract. *Moore v. Howard Pontiac-American, Inc.*, 492 S.W.2d 227 (Tenn. Ct. App. 1972).

A reasonable time in which to make a rescission depends on the facts and circumstances of a particular case. *Reece v. Yeager Ford Sales, Inc.*, 155 W. Va. 453, 184 S.E.2d 722 (1971).

Where goods are effectively rejected for breach of warranty, the burden of proving they conform presumably remains on the seller, whereas upon acceptance the buyer has the burden to establish any breach. *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. N.Y. 1968).

10. Particular circumstances; disability of party.

In an action brought to recover for injuries sustained by plaintiff as a result of

the unauthorized registration of stock owned by her in the two defendant companies, plaintiff notified each corporate issuer within a reasonable time after she had noticed that her shares had been transferred as a result of forgery as provided by UCC 8-4-4, where it appeared that plaintiff was a 94-year-old woman who, while a guest in a home, had allowed one of her hosts, whom she trusted, to handle her affairs over a 2 year period, and in light of plaintiff's reliance on the perpetrator of the acts which deprived her of title to her securities and in light of her own age and decrepitude, plaintiff could not be charged with unreasonable action in not checking her accounts from time to time and consequently plaintiff did not have required statutory notice of host's dishonesty until she left his residence. *Weller v. AT & T*, 290 A.2d 842 (Del. 1972).

RESEARCH REFERENCES

ALR. Duty of collecting bank as to time of presentment with respect to draft or bill of exchange for acceptance. 39 A.L.R.2d 1296.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty. 41 A.L.R.2d 812.

Time, place and manner of buyer's inspection of goods under UCC § 2-513. 36 A.L.R.4th 726.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 322.

15A Am. Jur. 2d, Commercial Code § 26.

17 Am. Jur. 2d, Contracts §§ 478, 479, 480.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:156 (Instruction to jury; time for shipment or delivery in absence of agreement).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:61 et seq. (Time).

CJS. 13 C.J.S., Carriers §§ 408, 441.

§ 75-1-205. Course of dealing and usage of trade.

(1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable, express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that part of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise to the latter.

SOURCES: Codes, 1942, § 41A:1-205; Laws, 1966, ch. 316, § 1-205, eff March 31, 1968.

Cross References — Variation by agreement, see § 75-1-102.

Obligation of good faith, see § 75-1-203.

Merchant as one having knowledge of practices involved in transaction, see § 75-2-104.

Statute of frauds, see § 75-2-201.

Course of dealing or usage of trade to explain or supplement agreement, see § 75-2-202.

Formation of sales contract generally, see § 75-2-204.

When course of performance is relevant in determining meaning of agreement, see § 75-2-208.

Unconscionable contract or clause, see § 75-2-302.

JUDICIAL DECISIONS

1. In general.
2. Scope.
3. Course of dealing.
4. —Price.
5. —Variance in quality or quantity.
6. Usage of trade.
7. —Livestock.
8. —Negotiable instruments.
9. —Risk of loss.
10. —Variation in quality or quantity.
11. Modification or waiver; express agreements.
12. —Express agreement; secured transactions.
13. —Implied warranties.
14. —Statute of frauds.
15. Evidence and burden of proof.
16. —Admissibility.
17. —Presumptions.

1. In general.

In action for seller's breach of contract to sell investment securities that buyer had contracted to resell to third person, which breach caused buyer to make "cover" purchase of other securities to effect such resale, court held (1) that although UCC Art 8 contains no provision for buyer's remedies against seller for breach of contract to purchase securities, and although UCC § 2-105(1) expressly excludes investment securities from definition of "goods" for purposes of UCC Art 2, nevertheless, as indicated by Official Comment 1 to UCC § 2-105, buyer's remedies in Art 2 for breach of contract also apply by analogy to investment security transactions; (2) that under UCC § 2-712(2), buyer was entitled to recover as

damages difference between cost of cover and contract price of securities in suit, plus incidental and consequential damages; and (3) that benefits that had accrued to buyer as result of its trading of its interest in securities in suit before seller's breach were not relevant to buyer's measure of damages for such breach. *G.A. Thompson & Co. v. Wendell J. Miller Mtg. Co.*, 457 F. Supp. 996 (S.D.N.Y. 1978).

Purpose of UCC § 1-205(1) was to assist court by allowing evidence as to those matters in which basic contract was lacking or as to which basic contract was ambiguous. *Cargill, Inc. v. Kavanaugh*, 228 N.W.2d 133 (N.D. 1975).

2. Scope.

Since Uniform Commercial Code does not apply to contract to excavate boot-pit area for rice dryer, provisions of code did not govern admissibility of evidence of custom and usage of trade to explain basis for paying for such excavation work. *Venturi, Inc. v. Adkisson*, 261 Ark. 855, 552 S.W.2d 643 (1977).

Although the "course of dealing between parties" and "any usage of trade" may be competent to explain ambiguities in a contract, this does not mean that a course of dealing or trade usage may be used to make a contract between parties, and evidence of a seller's dealings with other customers, the discounts granted them, and their names and addresses was not competent in an action in which the purchaser alleged that the seller had agreed to give him a ten percent discount on the price of merchandise purchased. *Martin v. Ben P. Eubank Lumber Co.*, 395 S.W.2d 385 (Ky. 1965).

In *Carpenters & Millwrights Local Union v. Riggs-Distler & Co.* (1962) 73 NJ Super 253, 179 A.2d 564, rev'd on other grounds 40 NJ 97, 190 A.2d 844, the court stated that the wider scope given to customs of trade by Code § 1-205(a) should be followed in a labor hiring controversy although "hiring labor may or may not be regarded as a commercial practice." *Carpenters & Millwrights Local Union No. 2018 v. Riggs-Distler & Co.*, 73 N.J. Super. 253, 179 A.2d 564 (1962), rev'd on other grounds, 40 N.J. 97, 190 A.2d 844 (1963).

3. Course of dealing.

Collecting bank, which held for 52 days after presentment for payment three sight

drafts drawn by bank's customer on third-party buyer of goods from bank's customer and such buyer's bank before giving customer notice of drafts' dishonor, acted "seasonably" within meaning of UCC § 4-202(2), since (1) prior course of dealing can establish seasonableness of party's action under UCC §§ 1-205(1) and 3-503; and (2) in present case, bank's collection of payment on three prior drafts of customer had been delayed for 48 days, and in seven other prior transactions, bank had experienced delays of nine to 45 days before obtaining payment of customer's drafts. *Southern Cotton Oil Co. v. Merchants Nat'l Bank*, 670 F.2d 548 (5th Cir. 1982).

In action for defendant's breach of contract to repurchase cars used in plaintiff's car-rental business, where (1) plaintiff purchased business from independent owner thereof, (2) owner of business, prior to its sale to plaintiff, had agreed with defendant that cars purchased from defendant for use in such business would be repurchased by defendant if they had not been used more than 6,000 miles, and (3) plaintiff's written contract with defendant, covering purchase and repurchase of vehicles used in plaintiff's business and executed after plaintiff had purchased business from prior owner, did not specify number of miles vehicles could be used before repurchase by defendant, but merely provided that after 9,000 miles, "time left in service" of vehicle would "be negotiated," court held (1) that evidence did not show that written contract between plaintiff and defendant had been modified, with respect to defendant's repurchase of vehicles, by prior course of dealing between same parties within meaning of UCC § 1-205(1), but showed that person involved in such prior course of dealing with defendant was seller of business to plaintiff; (2) purchaser of business does not adopt, in absence of evidence to the contrary, seller's prior course of dealing with third parties; and (3) provision in contract between plaintiff and defendant concerning "time left in service" of vehicle did not impose absolute mileage limitation, but was agreement to negotiate "continued use" of vehicle after it had been used for 9,000 miles. *Budget Sys. v. Seifert Pontiac, Inc.*, 80 Colo. App. 406,

579 P.2d 87, 25 U.C.C. Rep. Serv. 630 (1978) (stating that on retrial of case, if evidence should establish a prior course of dealing between plaintiff and defendant that included a mileage limitation, such evidence would be admissible under UCC § 2-202(a) since it would not directly contradict terms of parties' written agreement, but would supplement it).

Where (1) buyer's purchase order to steel supplier provided that shipments of steel were to be made "as directed" by buyer, (2) buyer did not direct any steel shipments to be made until about one year after contract was entered into, (3) seller, at time of receiving such directions, informed buyer that it could no longer furnish steel at contract price, and (4) seller's officers testified that seller had expected that buyer would start to request deliveries about three months after contract was made, based on seller's performance of prior contracts with buyer, court held (1) that since such prior contracts had concerned smaller construction projects, testimony about them was not a sufficient basis to enable jury to find that parties' prior course of dealing gave to words "as directed" in parties' present contract the meaning—namely, a three-months' delivery time—that seller placed on such words, and (2) that trial court therefore had no reason under UCC § 1-205(1), dealing with effect of prior course of dealing between parties, to submit seller's interpretation of such words to jury. *Capital Steel Co. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978).

The term "course of dealing" refers to previous conduct between the parties indicating a common basis for interpreting expressions used by them, and proof of such conduct is limited to objective facts as distinguished from oral statements of agreements. *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987 (S.D.N.Y. 1968).

Where a used bulldozer was sold under a written contract which made no provision for the assumption by the seller of any part of the cost of future repairs, the fact that the seller subsequently assumed 50 percent of the cost of repairs on two separate occasions was not sufficient to establish a course of dealing between the

parties by which the seller was obligated to pay half the cost of any or all of the repairs thereafter made to the machine. *Clyde Everett Equip. Co. v. Brockton Perforating Mach. Co.*, 27 Mass. App. Dec. 66 (1963).

4. —Price.

Testimony by one corporate officer as to his company's practices in pricing resin used for PVC pipes is insufficient to establish pattern or "regularity of observance" and therefore such testimony should not be admitted as evidence of course of dealing or usage of trade. *H & W Indus., Inc. v. Occidental Chem. Corp.*, 911 F.2d 1118 (5th Cir. 1990).

Even in the absence of a written agreement with respect to every term of a contract, great weight attaches to the course of dealing of the parties, and where it appears from the conduct of the parties that their mode of calculating price, although not accepted formally by signature of a written instrument, was adhered to by both parties during an extensive course of dealing, during which the purchaser received, accepted, and paid for over \$800,000 worth of merchandise, this course of dealing must be held applicable and governing with respect to remaining merchandise which was received, accepted, but not paid for. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 236 F. Supp. 879 (W.D. Pa. 1965), vacated on other grounds, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

5. —Variance in quality or quantity.

Letter from seller to buyer, confirming that buyer was "committed to take" lawn mowers, established parties' intent to contract and contained all prerequisites for enforceable contract under Mississippi law, despite purported expert's opinion that trade usage definition of "committed to take" was "forecast" or "estimate"; expert's construction was unreasonable, and buyer produced no evidence that expert's definition was embodied in any written trade code or similar writing. *Yazoo Mfg. Co. v. Lowe's Cos.*, 976 F. Supp. 430 (S.D. Miss. 1997).

Shipping instructions issued by buyer calling for delivery of 10,000 tons of fertilizer during first 25 working days of

month, freight prepaid, to places other than buyer's plant, did not constitute anticipatory repudiation of contract under which seller agreed to sell and ship, and buyer agreed to buy and receive at its plant, 10,000 tons of fertilizer within eight-month period of time where (1) quantity requested in shipping instructions did not exceed quantity specified in contract; (2) evidence established that prepayment of freight and shipping to place other than buyer's plant were in accord with course of dealing between parties and, even without course of dealing, there was nothing in language of contract repugnant to place or manner of shipment specified in shipping instructions; (3) seller failed to demonstrate that buyer's demanding entire season's supply in one month was commercially unreasonable and not made in good faith as required by UCC § 2-311(1). *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. Ill. 1974).

In action by buyer alleging that breed of turkeys delivered by seller did not conform to their agreement, evidence established that contract, whether oral or written, was reached in context of well established course of dealing and that supplying cross-breed turkeys did not constitute material change from past practice. *Amerine Nat'l Corp. v. Denver Feed Co.*, 493 F.2d 1275 (10th Cir. Colo. 1974).

Description of cotton covered by contracts for sale of future cotton crop, i.e., purchase of cotton grown on specified approximate acreage, was not so vague as to render contracts unenforceable under Code where it appeared, by contracts in question, that each seller intended to sell his entire cotton crop for the year to buyer. *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. Ga. 1974).

Where writings of parties to contract for sale of sand failed to supply any definition of term "truck measure," but buyer accepted and paid for large quantity of sand at price which had been computed in accordance with seller's understanding of disputed phrase, buyer's course of performance could be viewed as complete acquiescence in seller's interpretation of phrase "truck measure." *Blue Rock Indus. v.*

Raymond Int'l, Inc., 325 A.2d 66 (Me. 1974).

6. Usage of trade.

Trade usages are not automatically binding on all persons. Under UCC § 1-205(3), the party sought to be bound by a trade usage will not be bound if he was not in a position where he should have been aware of the usage. *United States ex rel. Union Bldg. Materials Corp. v. Haas & Haynie Corp.*, 577 F.2d 568 (9th Cir. Haw. 1978).

Regardless of what usage of trade might be under UCC § 1-205(2), secured party could not enforce collection of unaccrued finance charges on debtor's obligation after maturity date of such obligation had been accelerated by creditor under acceleration clause following debtor's default. *Credit Alliance Corp. v. Adams Constr. Corp.*, 570 S.W.2d 283 (Ky. 1978).

Under UCC § 1-205(2), a custom or usage, to become binding on the parties, must have antiquity as well as uniformity and universality and must have continued for such a length of time that the parties must have contracted with respect to it. *Riemer Bros. v. Marlis Constr. Co.*, 64 Ill. App. 3d 80, 380 N.E.2d 1160 (2d Dist. 1978).

In accordance with usage of trade, foundry was not required to deliver patterns to customer before receiving payment therefor. *Cooper Alloy Corp. v. E.B.V. Sys.*, 111 R.I. 756, 306 A.2d 837 (1973).

The term "usage of trade" refers to evidence of generalized industry practice or similar recognized custom, as distinguished from particular conversations or correspondence between the parties with respect to the terms of the agreement. *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987 (S.D.N.Y. 1968).

Where default occurred in payment of an automobile retail instalment contract in August of 1965 but the security holder did not make demand upon the dealer for performance of its repurchase agreement until October of 1966, and it was the custom and usage that the lending institution is required to repossess and return the vehicle for repurchase within a reasonable time after default and that 90 days is regarded as a reasonable time, the security holder could not enforce the re-

purchase agreement which contained no provision inconsistent with the custom and usage. *Valley Nat'l Bank v. Babylon Chrysler-Plymouth, Inc.*, 53 Misc. 2d 1029 (1967), *aff'd*, 28 A.D.2d 1092, 284 N.Y.S.2d 849 (2d Dep't 1967).

7. —Livestock.

In action arising out of auction sale of mare described in sales catalog as "barren," but which subsequently "slipped" a dead foal, buyer who effectively revoked sale had right under UCC §§ 2-601 and 2-608 to reject mare after acceptance and burden under UCC § 2-607 upon buyer to show breach did not apply. Since acceptance was revoked, burden was on seller to show mare's conformity with catalog description but seller did not meet that burden where he failed to prove that mare was either barren or that, pursuant to usage of trade under UCC § 1-205, mare pronounced in foal and later found empty without evidence of abortion could be described as barren. *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976).

In action arising out of sale of bull, seller's answer; which alleged, *inter alia*, that by custom of trade in breeding animals there was no implied warranty of fitness for particular purpose in sale of bull, was sufficient under UCC § 1-205(6) to put buyers on notice of defense of exclusion under UCC § 2-316 of implied warranty of fitness under UCC § 2-315. *Torstenson v. Melcher*, 195 Neb. 764, 241 N.W.2d 103 (1976).

8. —Negotiable instruments.

Issuer bank which refused to pay beneficiary under letter of credit because letter required delivery of goods to place other than place to which beneficiary had shipped goods, and which thereby extricated itself from precarious financial position because customer for whom letter was issued appeared incapable of reimbursing issuer, (1) was not required by good-faith obligation imposed by UCC § 1-203 to amend letter at instance of beneficiary and issuer's customer, so as to permit delivery at place to which goods were actually shipped, and (2) also was not required to amend letter by UCC § 1-205(2), dealing with issuer's obligation to act in accordance with banking

custom and usage, since issuer, in issuing letters of credit, relied on written trade code entitled "Uniform Customs and Practice for Documentary Credits (UCP)" to establish banking practice, and UCP expressly declared that irrevocable letter of credit could not be amended or cancelled without agreement of all parties thereto, namely, beneficiary, customer, and issuer itself. *AMF Head Sports Wear, Inc. v. Ray Scott's All-American Sports Club, Inc.*, 448 F. Supp. 222, 23 U.C.C. Rep. Serv. 990 (D. Ariz. 1978) (construing Arizona law; holding issuer not liable for refusing payment to beneficiary).

9. —Risk of loss.

In action for damages for sale of negligently manufactured film, (1) evidence was sufficient to support jury finding that at time of sale of film to plaintiff, trade usage existed, within meaning of UCC § 1-205(2), which limited commercial buyer's remedy to replacement of negligently manufactured film; (2) evidence also was sufficient to support finding that replacement of negligently manufactured film constituted plaintiff's sole remedy under UCC § 2-719(1)(b); (3) such limited remedy did not fail of its essential purpose under UCC § 2-719(2); and (4) such limited remedy also did not operate in unconscionable manner within meaning of UCC § 2-719(3) because it was reasonably adapted to general commercial background and needs of film industry. *Posttape Assocs. v. Eastman Kodak Co.*, 450 F. Supp. 407 (E.D. Pa. 1978).

In action by diamond wholesaler against retailer to recover price of goods shipped under "all-risk" memorandum, custom and usage of industry established liability of consignee for full memorandum price of merchandise stolen while in his possession. *Lipschutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375 (S.D. Tex. 1974).

10. —Variation in quality or quantity.

In action by purchaser of air conditioners to recover damages from manufacturer for repudiation of contract to supply airconditioners, where manufacturer had submitted bid to supply airconditioners in accord with buyer's specifications, where, although specifications provided that "[c]apacities shall not be less than indi-

cated," airconditioners had approximate six per cent deficiency in capacity to remove heat, and where manufacturer refused to supply airconditioners in literal compliance with bid, trial court erred (1) in excluding evidence as to customs and usage in air conditioning industry to effect that reasonable variations in cooling capacity are considered to comply with specifications, and (b) in refusing to permit jury to consider such customs and usage if they would vary terms of written agreement. *Modine Mfg. Co. v. North E. Indep. Sch. Dist.*, 503 S.W.2d 833 (Tex. Civ. App. 1973), ref. n.r.e (Apr. 17, 1974).

11. Modification or waiver; express agreements.

UCC § 9-306(2) codifies the common-law waiver. However, although prior course of dealing, without more, is not sufficient to waive written agreement to the contrary in light of UCC § 1-205(4), any course of performance or other conduct subsequently to the agreement can amount to a waiver. *Southwest Wash. Prod. Credit Ass'n v. Seattle-First Nat'l Bank*, 19 Wash. App. 397, 577 P.2d 589 (1978), overruled on other grounds, 92 Wash. 2d 30, 593 P.2d 167 (1979).

In action for breach of contract to construct mechanical loading platforms for use in distribution center building, letter sent to defendant after it became clear that defendant would not perform which cancelled contract "without charge" could not as matter of law amount to waiver or renunciation of claim arising out of breach under UCC §§ 1-107 and 2-720; under UCC § 1-205, meaning to be given phrase "without charge" would require consideration of any course of dealing between parties and any applicable trade usage. *NCR v. UNARCO Indus., Inc.*, 490 F.2d 285 (7th Cir. Ill. 1974).

Express terms of agreement should be construed where reasonable as consistent with custom of trade or course of dealing evidenced by previous conduct of parties. *Gindy Mfg. Corp. v. Cardinale Trucking Corp.*, 111 N.J. Super. 383, 268 A.2d 345 (1970).

When custom and usage are inconsistent with the express terms of an agreement, the agreement terms control. *Valley Nat'l Bank v. Babylon Chrysler-Plymouth,*

Inc., 53 Misc. 2d 1029 (1967), aff'd, 28 A.D.2d 1092, 284 N.Y.S.2d 849 (2d Dep't 1967).

12. —Express agreement; secured transactions.

In suit by lender against auctioneer for conversion of cattle constituting lender's collateral by sales in which proceeds were remitted only to debtor, (1) provisions in security agreement specifically authorizing debtor to sell cattle and other collateral with lender's prior written consent, or with payment made jointly to debtor and lender, did not violate UCC § 1-205(4) or § 9-306(2), and did not constitute either express waiver of lender's security interest in cattle or express consent to sales complained of; (2) lender under UCC § 1-205(4) did not impliedly consent to such cattle sales, and thus impliedly waive its security interest, by its course of conduct in allowing debtor to sell other collateral in debtor's name, receive payment therefor, and remit proceeds to lender without admonishing debtor for his violation of security agreement's provisions; (3) lender's statement to debtor, however, that he could sell cattle "providing he applied the proceeds from that sale" constituted express consent to sell cattle in manner not designated in parties' security agreement; and (4) defendant auctioneer, as debtor's agent, acquired same right to sell that debtor possessed, thus rendering auctioneer not liable for conversion. *North Cent. Kan. Prod. Credit Ass'n v. Washington Sales Co.*, 223 Kan. 689, 577 P.2d 35 (1978).

Where bank had perfected security interest in cattle under agreement which prohibited sale of collateral without bank's prior written approval and where farmer sold cattle without such approval, security interest survived sale pursuant to UCC § 9-306(2) and buyers were liable for conversion, even though in prior transactions with debtor bank had not objected to such sales of collateral, as UCC § 1-205(4) provides that course of dealings may be used to interpret terms of agreement but not to contradict them. *Wabasso State Bank v. Caldwell Packing Co.*, 308 Minn. 349, 251 N.W.2d 321 (1976).

Although security agreement covering livestock expressly prohibited debtor from

selling collateral without written consent of secured party, debtor had implied authority to sell collateral free from security interest under UCC § 9-306(2) where, from beginning of secured party's relationship with debtor, sales of livestock pledged as collateral were made to various livestock dealers, and where secured party had knowledge of this, raised no objection, accepted checks from these sales for credit to debtor's account, and clearly relied on debtor's honesty to properly account for proceeds; this established course of dealing which constituted authority to sell livestock free from security interest, notwithstanding claim that, under UCC § 1-205(4), express terms of security agreement prohibiting sale controlled. *Hedrick Sav. Bank v. Myers*, 229 N.W.2d 252 (Iowa 1975).

An agreement between an equipment manufacturer and a finance company to the effect that the finance company was under no responsibility to record or file security paper was deemed waived by the finance company's retention of, and inaction upon, a letter from the manufacturer accompanying its transmittal of a conditional sales contract and judgment note requesting the finance company to record the paper, and the finance company's failure to comply with the statute placed the burden of loss from the dissipation of the security upon its shoulders. *Congress Fin. Corp. v. Sterling-Coin Op Mach. Corp.*, 456 F.2d 451 (3d Cir. Pa. 1972).

Security agreement provision that debtor would not sell or otherwise dispose of collateral without prior written consent of secured party controlled course of dealing of parties and usage of trade in determining whether sale of collateral was impliedly authorized by inclusion of proceeds as collateral. *United States v. E.W. Savage & Son*, 343 F. Supp. 123 (D.S.D. 1972), *aff'd*, 475 F.2d 305 (8th Cir. S.D. 1973).

Course of dealing or trade usage, within meaning of Code, is used as factor to determine commercial meaning of agreement which parties made, and, under facts established by pleadings, would not cause lender and holder of security agreement on corn to waive or be estopped to assert its security interest in corn purchased by grain elevator operator from

borrower. *Vermilion County Prod. Credit Ass'n v. Izzard*, 111 Ill. App. 2d 190, 249 N.E.2d 352 (4th Dist. 1969).

Written agreements between a finance company and an automobile dealer could be explained or supplemented by a course of dealing or usage or by a course of performance. *Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), *vacated on other grounds*, 335 F.2d 846 (3d Cir. Pa. 1964).

Where, according to the usage of the trade, "cotton waste" and "cotton linters" are entirely different articles, a financing statement which describes cotton waste cannot be interpreted to impose a security interest on cotton linters. *Annawan Mills, Inc. v. Northeastern Fibers Co.*, 26 Mass. App. Dec. 115, 4 U.C.C. Rep. Serv. 787 (1963).

13. —Implied warranties.

An implied warranty may be excluded or modified by a course of dealing (Uniform Commercial Code, § 2-316, subd [3], par [c]; § 1-205, subd [1]); however, there is no exclusion where proof of such a course of dealing between plaintiff and third-party defendant is inconclusive and where the third-party defendant asserting the exclusion had notice and aided in the completion of a written agreement which contained an assignment of plaintiff's rights for breach of warranty against the third-party defendant. *United States Leasing Corp. v. Comerale Assocs.*, 101 Misc. 2d 773 (1979).

Discussions between president of corporate purchaser and seller of golf carts re warranties and filing of claim thereunder constituted course of dealing under UCC § 1-205(1) and thus could be basis for limitation of implied warranties. *Country Clubs, Inc. v. Allis-Chalmers Mfg. Co.*, 430 F.2d 1394 (6th Cir. Tenn. 1970).

Where buyer asserted unawareness of usage of trade as to exclusion of implied warranty of merchantability as to seeds, there was question of fact as to exclusion of warranty, precluding summary judgment for seller, even though written warranty exclusion was ineffective. *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17 (4th Dep't 1969), *appeal denied*, 26 N.Y.2d 610 (1970).

14. —Statute of frauds.

In action by buyer against seller arising out of nondelivery of wheat under oral sales contract, original oral contract was not rendered unenforceable by UCC § 2-201 statute of frauds, where seller admitted existence of contract. Nor was oral modification of contract as to delivery date due to unavailability of elevator space rendered unenforceable by statute of frauds requirement under UCC §§ 2-209 and 2-201 where pursuant to UCC § 1-103 and 2-209, seller waived statute of frauds defense through his course of performance under UCC § 2-208 and 1-205 in delivering 36 truckloads of wheat well after original delivery date without making timely objection. *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 552 P.2d 63 (1976).

Portions of Uniform Commercial Code relating to course of dealings or trade usage were not intended to be applied in manner to defeat Code's statute of frauds requirements and, at least, evidence of custom or usage in trade could be used to explain ambiguous portions of an agreement; thus, potato farmer could not introduce evidence of usage or course of dealings within trade to substantiate oral agreement with potato buyer. *Dangerfield v. Markel*, 222 N.W.2d 373 (N.D. 1974).

15. Evidence and burden of proof.

Evidence of "course of dealing" can have no probative value where parties have previously entered into written agreement setting forth their respective rights and duties, but where that agreement is not produced at time of trial nor any evidence of its terms. *Family Provisioners, Inc. v. Columbia Acceptance Co.*, 274 Or. 303, 545 P.2d 1379 (1976).

Where trade usage must be resorted to for interpretation of contract, such trade usage would have to be demonstrated by something more than oral argument. *Cable-Wiedemer, Inc. v. A. Friederich & Sons Co.*, 71 Misc. 2d 443 (1972).

Notwithstanding that there was contradicted testimony that it was custom and usage of trade that second-hand or used airplanes were sold without warranty, where seller of aircraft failed to show scope of this custom, whether local or universal, seller failed to carry burden

cast upon it on its motion for summary judgment in buyer's action on alleged implied warranty as to merchantability. *Georgia Timberlands, Inc. v. Southern Airways Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972).

16. —Admissibility.

In action on open account, trial court erred in excluding evidence of prior dealings between parties because such dealings, under UCC § 1-205(1), would have been probative as to whether defendant had maintained account during particular year alleged by plaintiff and for which suit was brought. *Deroller v. Powell*, 144 Ga. App. 585, 241 S.E.2d 469 (1978).

In action to determine priority of security interests of bank and seller of hardware store, where evidence showed that seller's security interest in purchaser's collateral was perfected by filing on July 20, 1972, and that bank's interest in same collateral was perfected by filing on November 2, 1972; that bank, by subordination agreement entered into on July 12, 1972, had subordinated its claim against purchaser to claim of seller; and that on December 11, 1973, rider to subordination agreement supplementary principles of law and equity, non-UCC parol evidence rule applied to case; (3) under UCC § 1-205(4), non-UCC parol evidence rule barred parol evidence by bank that rider was intended to grant bank priority as to claims in excess of first \$15,000 of purchaser's indebtedness to seller, since such evidence was totally inconsistent with unambiguous terms of rider which were controlling; and (4) even if seller's security interest should fail to meet test for special priority under UCC § 9-312(3), executed by bank, seller, and purchaser provided that agreement should apply only to first \$15,000 of purchaser's indebtedness to seller and that priority of claims concerning remainder of such indebtedness should be determined in accordance with UCC Article 9, (1) provisions of UCC Article 1 applied to case, since subordination agreement and rider related to transactions covered by Uniform Commercial Code and rider specifically referred to Article 9; (2) under UCC § 1-103, dealing with application of seller's interest would still prevail under first-to-file rule of UCC

§ 9-312(5). *Peoples Bank & Trust v. Reiff*, 256 N.W.2d 336 (N.D. 1977).

In action by wholesaler against retailer for recovery of purchase price of two motorcycles, under UCC §§ 1-205, 2-202 and 2-326(4) trial court properly denied admissibility to defendant's proposed parol evidence that agreement was actually consignment sale agreement under "sale or return" arrangement, where written sales agreement between parties was not ambiguous. *Recreatives, Inc. v. Travel-On Motorcycles Co.*, 29 N.C. App. 727, 225 S.E.2d 637 (1976).

In action on contract to deliver 4,000 bushels of soybeans by buyer against farmer who as result of drought was able to deliver less than 2,000 bushels, his entire crop, rejection of buyer's evidence relating to custom and usage of soybean trade was proper under UCC § 1-205(6) where offer of evidence came late in trial and probably would have denied seller opportunity to rebut it absent continuance or other disruption of trial. *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652 (Miss. 1975).

In action by car dealer against buyer to recover alleged unpaid balance due on sale of car, dealer was not entitled to offer parol testimony under UCC § 2-202(a) that buyer had agreed to deliver insurance check covering wrecked trade-in vehicle as part of consideration where insurance check was not mentioned in contract and contract was, by its own terms, complete and exclusive statement of terms of agreement; nor did evidence disclose course of dealing and usage of trade as defined by UCC § 2-205 or course of performance as defined by UCC § 2-208 which would permit introduction of such evidence. *Noble v. Logan-Dees Chevrolet-Buick, Inc.*, 293 So. 2d 14 (Miss. 1974).

Portions of Uniform Commercial Code relating to course of dealings or trade usage were not intended to be applied in manner to defeat Code's statute of frauds requirements and, at best, evidence of

custom or usage in trade could be used to explain ambiguous portions of an agreement; thus, potato farmer could not introduce evidence of usage or course of dealings within trade to substantiate oral agreement with potato buyer. *Dangerfield v. Markel*, 222 N.W.2d 373 (N.D. 1974).

When UCC § 2-202 expressly allowing evidence of course of dealing or usage of trade to explain or supplement terms intended by the parties as a final expression of their agreement, is read in light of UCC § 1-205(4), it is clear that the test of admissibility is not whether the contract appears on its face to be complete in every detail, but whether the proffered evidence of course of dealing and trade usage reasonably can be construed as consistent with the express terms of the agreement. *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. Va. 1971).

Evidence of course of dealing and usage of trade is admissible under UCC § 1-205 to amplify, supplement or qualify terms of an agreement, but it does not create an agreement where none previously existed. *White Lumber Sales, Inc. v. C. Brinson Lamb & Sons Lumber Co.*, 121 Ga. App. 702, 175 S.E.2d 81 (1970).

Taken along with other relevant sections of the Uniform Commercial Code, the provision that an agreement may be supplemented by course of dealing or usage of trade tends to allow the use of parol testimony in a proper case. *Holland Furnace Co. v. Heidrich*, 7 Pa. D. & C.2d 204 (1955).

17. —Presumptions.

Trade usages sanctioned by passage of time are presumed to be within knowledge of parties regularly engaged in business, in present case shipment and carriage of goods by sea, and all contracts are presumed made with reference to trade usages and practice. *du Pont de Nemours Int'l S.A. v. S.S. MORMACVEGA*, 367 F. Supp. 793 (S.D.N.Y. 1972), *aff'd*, 493 F.2d 97 (2d Cir. N.Y. 1974).

RESEARCH REFERENCES

ALR. Admissibility, in negligence action against bank by depositor, of evidence as to custom of banks in locality in han-

dling and dealing with checks and other items involved. 8 A.L.R.2d 446.

Duties of collecting bank with respect to

presenting draft or bill of exchange for acceptance; reasonable time as affected by bank customs. 39 A.L.R.2d 1299.

Custom or usage as affecting time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality. 52 A.L.R.2d 925.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 27, 29.

21 Am. Jur. 2d, Customs and Usages §§ 4 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:21 (Complaint, petition, or declaration; allegation; application of trade usages).

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:33 (Instruction to jury; "course of dealing" defined; effect on construction of agreement).

6 Am. Jur. Pl & Pr Forms (Rev), Sales Form 2:311 (Instruction to jury; creation of implied warranty from course of dealing or usage of trade).

7 Am. Jur. Legal Forms 2d, Customs and Usages §§ 81:1 et seq.

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:81 et seq. (Course of dealings and usage of trade).

5 Am. Jur. Proof of Facts, Habit and Custom, Proof No. 2 (proof of business custom as to mailing and receipt of letter).

25 Am. Jur. Proof of Facts 2d, Bank's Liability for Payment of Check or Withdrawal on Less Than Required Number of Signatures, §§ 6 et seq. (Proof that bank was negligent resulting in payment of checks with less than required number of signatures).

26 Am. Jur. Proof of Facts 2d, Meaning of Abbreviation, Word, or Phrase According to Usage of Trade, §§ 16 et seq. (Proofs of meanings of particular written terms according to usages of trade).

CJS. 17A C.J.S., Contracts § 338-340.

25 C.J.S., Customs and Usages §§ 1, 14 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December 1979.

§ 75-1-206. Statute of fraud for kinds of personal property not otherwise covered.

(1) Except in the cases described in subsection (2) of this section, a contract for the sale of personal property is not enforceable by way of action or defense beyond Five Thousand Dollars (\$5,000.00) in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent.

(2) Subsection (1) of this section does not apply to contracts for the sale of goods (Section 75-2-201) nor of securities (Section 75-8-113) nor to security agreements (Section 75-9-203).

SOURCES: Codes, 1942, § 41A:1-206; Laws, 1966, ch. 316, § 1-206; Laws, 1996, ch. 468, § 54, eff from and after July 1, 1996.

Editor's Note — Laws, 1996, ch. 468, § 72, provides as follows:

"SECTION 72. (a) This act does not affect an action or proceeding commenced before this act takes effect.

"(b) If a security interest in a security is perfected at the date this act takes effect, and the action by which the security interest was perfected would suffice to perfect a security interest under this act, no further action is required to continue perfection. If a security interest in a security is perfected at the date this act takes effect but the action by which the security interest was perfected would not suffice to perfect a security interest under this act, the security interest remains perfected for a period of

four (4) months after the effective date and continues perfected thereafter if appropriate action to perfect under this act is taken within that period. If a security interest is perfected at the date this act takes effect and the security interest can be perfected by filing under this act, a financing statement signed by the secured party instead of the debtor may be filed within that period to continue perfection or thereafter to perfect."

Cross References — Statute of frauds generally, see §§ 15-3-1 et seq.

Statute of frauds in connection with sale of goods, see § 75-2-201.

Requisites of security agreement, see § 75-9-203.

JUDICIAL DECISIONS

1. In general.

Statute of frauds under UCC § 1-206 did not bar recovery by distributors against distiller upon oral agreement by distiller to relocate distributors with a new distributorship. *Lee v. Joseph E. Seagram & Sons*, 413 F. Supp. 693 (S.D.N.Y. 1976), *aff'd*, 552 F.2d 447 (2d Cir. N.Y. 1977).

Enforcement of oral agreement to sell stock worth more than \$5,000 is not barred by UCC § 1-206(1), since UCC § 1-206(2) specifically states that UCC § 1-206(1) does not apply to contracts for sale of securities. *Burns v. Gould*, 172 Conn. 210, 374 A.2d 193 (1977).

Contract for sale of cattle received by buyer was not required to be in writing under UCC § 1-206, since provision does not apply to contracts for sale of goods, nor by § 2-201, since written contract was not required with respect to goods which have been received or accepted. *Clifton Cattle Co. v. Thompson*, 43 Cal. App. 3d 11 (2d Dist. 1974).

An agreement for the sale of a business, evidenced only by a letter between the parties stating that a contract existed for such a sale under specified conditions, was only partially enforceable, to the extent that \$5000, under the statute, providing that a contract for the sale of personal property was not enforceable beyond \$5000 unless a writing existed indicating that a contract had been made and stating a price. *Olympic Junior, Inc. v. David*

Crystal, Inc., 463 F.2d 1141 (3d Cir. N.J. 1972).

In action for alleged breach of agreement to include clothing "contractor" in contemplated sale of corporation which supplied designs and materials and promoted sale of garments tailored by contractor, only writing contained no "defined or stated price," and so Code § 1-206 would make any contract unenforceable beyond \$5,000. *Olympic Junior, Inc. v. David Crystal, Inc.*, 463 F.2d 1141 (3d Cir. N.J. 1972).

Draft of executory accord relating to settlement of litigation was sufficient to satisfy statute of frauds, where document more than adequately spelled out consideration for contract and more than reasonably identified subject matter, and was accompanied by cover letter which was signed by defendant's agent who had authority to draw up written version of settlement agreement. *Pyle v. Wolf Corp.*, 354 F. Supp. 346 (D. Or. 1972).

Even though several letters or other writings could be resorted to for the agreed upon terms, these writings had to be connected either expressly or by the internal evidence of subject-matter and occasion. *Oswald v. Allen*, 417 F.2d 43 (2d Cir. N.Y. 1969).

Since a "call option" does not involve the sale of a "security," such a transaction is governed by this section rather than by § 8-319 [Repealed]. *Cohn, Ivers & Co. v. Gross*, 56 Misc. 2d 491 (1968).

RESEARCH REFERENCES

ALR. Undelivered lease or contract (other than for sale of land), or undelivered memorandum thereof, as satisfying statute of frauds. 12 A.L.R.2d 508.

Construction and effect of exception making statute of frauds provision inapplicable where goods are manufactured by seller for buyer. 25 A.L.R.2d 672.

Statute of frauds as applicable to seller's oral warranty as to quality or condition of chattel. 40 A.L.R.2d 760.

Parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds. 81 A.L.R.2d 991.

Buyer's note as payment within statute of frauds. 81 A.L.R.2d 1355.

Promissory estoppel as basis for avoidance of statute of frauds. 56 A.L.R.3d 1037.

Promissory estoppel as basis for avoidance of UCC statute of frauds (UCC § 2-201). 29 A.L.R.4th 1006.

Construction and application of statute-of-fraud provision under UCC § 1-206 governing personal property not otherwise covered. 62 A.L.R.5th 137.

Am Jur. 72 Am. Jur. 2d, Statute of Frauds § 62.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:23 (Answer; defense; contract to purchase goods not in writing).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:101 et seq. (Statute of frauds for kinds of property not otherwise covered).

CJS. 77 C.J.S., Sales §§ 61-68.

§ 75-1-207. Performance or acceptance under reservation of rights.

(1) A party who, with explicit reservation of rights, performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest" or the like are sufficient.

(2) Subsection (1) does not apply to an accord and satisfaction.

SOURCES: Codes, 1942, § 41A:1-207; Laws, 1966, ch. 316, § 1-207; Laws, 1992, ch. 420, § 70, eff from and after January 1, 1993.

Cross References — Effect of acceptance, etc., see § 75-2-607.

Accord and satisfaction by use of instrument, see § 75-3-311.

JUDICIAL DECISIONS

1. In general.

A stamped notation on the backs of checks purporting to reserve the seller's rights (§ 75-1-207), which was done in the ordinary course of business, did not preclude a finding that the seller waived enforcement of the floor pricing provision of the parties' contract. *Exxon Corp. v. Crosby-Mississippi Resources, Ltd.*, 40 F.3d 1474 (5th Cir. 1995).

Where defendant agreed to pay reasonable counsel fees rendered by plaintiff to a third party, and forwarded a check to plaintiff in an amount almost \$800 less than the itemized statement and bill submitted by plaintiff, stating that the charges were excessive and that the check would be considered full payment if accepted, there was a bona fide dispute of an

unliquidated claim, and the cashing of the check by plaintiff resulted in an accord and satisfaction; the fact that plaintiff informed defendant that he did not regard the check as full payment did not preclude the making of an accord and satisfaction, since Section 1-207 of the Uniform Commercial Code, which deals with the explicit reservation of rights, is not applicable to the rendition of services. *Blottner, Derrico, Weiss & Hoffman, P.C. v. Fier*, 101 Misc. 2d 371 (1979).

UCC § 1-207 precludes conclusion that payee of check, prior to its negotiation, must notify drawer that payee's acceptance is under protest or reservation of rights. *Miller v. Jung*, 361 So. 2d 788, 24 U.C.C. Rep. Serv. 1085 (Fla. Dist. Ct. App. 2d Dist. 1978) (stating that UCC § 1-207

minimizes impediments to flow of commercial paper while reserving rights of immediate parties thereto).

UCC § 1-207 provides machinery for the continuation of performance along the lines contemplated by the contract, despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment "without prejudice," "under protest," "under reserve," "with reservation of all our rights," and the like. All of these phrases completely reserve all rights within the meaning of UCC § 1-207. *Miller v. Jung*, 361 So. 2d 788, 24 U.C.C. Rep. Serv. 1085 (Fla. Dist. Ct. App. 2d Dist. 1978).

Common-law rule that accord and satisfaction results where check tendered as payment in full for disputed amount is accepted by payee has been changed by UCC § 1-207. Under such section, if party indorses final-payment check with words "without prejudice and under protest," party thus reserves right to demand balance alleged to be due, and negotiation of check does not effect an accord and satisfaction. *Lange-Finn Constr. Co. v. Albany Steel & Iron Supply Co.*, 94 Misc. 2d 15 (1978).

Where (1) general contractor involved in payment dispute with steel supplier sent supplier check for certain sum as final payment of amount due and thereafter, in further effort to resolve dispute, sent supplier second check for slightly higher amount also as final payment of account, and (2) supplier, after first certifying both checks and holding them for several months, returned first check to general contractor, deposited second check with indorsement "without prejudice and under protest," and thereafter advised general contractor that it was still asserting its claim for entire amount allegedly due, court held (1) that UCC § 1-207 was inapplicable because supplier had made no reservation of its rights at time it had second check certified, and (2) that trial court correctly concluded as a result that an accord and satisfaction had occurred as to amount in dispute on date second check was certified. *Lange-Finn Constr. Co. v. Albany Steel & Iron Supply Co.*, 94 Misc. 2d 15 (1978).

Although the acceptance of a check tendered as final payment in full for a disputed amount with an indorsement stating that the negotiation of the check is "without prejudice" or "under protest" does not result in an accord and satisfaction (Uniform Commercial Code, § 1-207), defendant's failure to expressly reserve its rights at the time it caused plaintiff's check tendered as a final payment for materials supplied by defendant on a construction project to be certified resulted in an accord and satisfaction. Where a check is tendered as payment in full for a disputed amount and the payee causes the check to be certified, an accord and satisfaction results since certification is equivalent to acceptance by the payee. Defendant only advised plaintiff that it was still asserting its claim for the entire balance after it caused plaintiff's check to be certified. Had defendant merely negotiated the check while reserving its rights, no accord and satisfaction would have occurred. *Lange-Finn Constr. Co. v. Albany Steel & Iron Supply Co.*, 94 Misc. 2d 15 (1978).

Under UCC § 1-207, buyers of stock, by continuing to perform under contract, did not waive right to complain of sellers' retention of dividends where, although buyers made no explicit reservation of right to dividends, buyers' actions clearly indicated that they were not waiving any rights accruing to them. *Deering Milliken, Inc. v. Clark Estates, Inc.*, 57 A.D.2d 773 (1st Dep't 1977), *aff'd*, 43 N.Y.2d 545, 402 N.Y.S.2d 987, 373 N.E.2d 1212 (1978).

Rights which cotton sellers had, in event of reversal of their appeal from trial court judgment that certain written contracts between sellers and buyer were valid agreements, were fixed by statutes relating to reversal of judgments on appeal; UCC § 1-207 did not apply. *Peek Planting Co. v. W.H. Kennedy & Sons*, 257 Ark. 669, 519 S.W.2d 49 (1975).

Indorsement with explicit reservations is not acceptance in full payment but reservation of right to collect remainder of unpaid bill. *Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E.2d 85 (1969).

RESEARCH REFERENCES

ALR. Application of UCC § 1-207 to avoid discharge of disputed claim upon qualified acceptance of check tendered as payment in full. 37 A.L.R.4th 358.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 33.

17 Am. Jur. 2d, Contracts §§ 199, 655, 656.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:34 (Instruction to jury;

effect of explicit reservation of rights; what words are sufficient to protect reserved rights).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 253:111 et seq. (Performance or acceptance under reservation of rights).

27 Am. Jur. Proof of Facts 2d 559, Offeree's Acceptance of Contract Offer.

§ 75-1-208. Option to accelerate at will.

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised.

SOURCES: Codes, 1942, § 41A:1-208; Laws, 1966, ch. 316, § 1-208, eff March 31, 1968.

Cross References — Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

Reinstatement of accelerated debt secured by deed of trust or other lien upon payment of default before sale, see § 89-1-59.

JUDICIAL DECISIONS

1. In general; necessity of express provision for acceleration.
2. Construction of acceleration clauses.
3. What constitutes good faith.
4. Circumstances justifying exercise of option.
5. What constitutes demand for additional collateral.
6. Presumptions.
7. Burden of proof.

1. In general; necessity of express provision for acceleration.

Section 75-1-208 is inapplicable to situations where a creditor, under the terms of its contract with the debtor, has accelerated its debtor's outstanding obligations after the occurrence of an event that was in the complete control of the debtor-i.e., where the creditor accelerates indebtedness because the debtor fails to comply

with the terms and conditions contained in the promissory note, deed of trust, or loan agreement. *Peoples Bank & Trust Co. v. Cermack*, 658 So. 2d 1352 (Miss. 1995).

Although UCC does recognize validity of acceleration clauses under certain circumstances, if such clause is expressly set forth in instrument, UCC makes no provision for automatic acceleration upon default of installment payments not yet due; thus, where so-called "lease-purchase" agreement did not contain acceleration clause, installment payments could not be accelerated upon default and creditor was limited to recovery of unpaid installments then actually accrued. *GECC v. Castiglione*, 142 N.J. Super. 90, 360 A.2d 418 (1976).

There is no right to accelerate commercial paper in the absence of an express

provision therefor. *McDown v. Wilson*, 426 S.W.2d 112 (Mo. Ct. App. 1968).

2. Construction of acceleration clauses.

An acceleration clause is not to be interpreted as exercisable only when the paper is given to an attorney for collection, even though the absence of punctuation in the note would appear to give the clause that meaning. *Olsen v. Valley Nat'l Bank*, 91 Ill. App. 2d 365, 234 N.E.2d 547 (2d Dist. 1968).

3. What constitutes good faith.

In action by debtor against bank and its loan officer for conversion, trespass, false imprisonment, and malicious prosecution, where evidence showed that bank, which had made loan to debtor that was secured by automobile purchased with loan's proceeds, (1) had concluded, even before due date of first installment payment on loan, that debtor had falsified loan application, (2) that as a result, bank had declared loan to be in default, accelerated the debt obligation, and entered on debtor's property to repossess automobile, all without notice to debtor, (3) that bank's loan officer had asked debtor to come to officer's office to discuss the matter, (4) that when debtor arrived at bank, he was met by two FBI agents who interviewed him, and (5) that as a result of such interview, debtor was indicted, tried, and acquitted on federal charges of supplying false information to bank to obtain loan, it was error for trial court to grant summary judgment in favor of bank and loan officer on conversion and trespass claim, since issue of fact existed as to whether bank had acted in good faith under UCC § 1-208 and § 1-201(19) in deeming itself to be insecure with regard to debtor's obligation. *Ginn v. Citizens & S. Nat'l Bank*, 145 Ga. App. 175, 243 S.E.2d 528 (1978).

Ordinarily, the issue of whether the holder of an option to accelerate has or has not acted in good faith, within the meaning of UCC § 1-208, presents a question of fact for the jury and not a question of law for the court. Thus, under UCC § 1-208, the issue of good faith must ordinarily be submitted to the jury, unless the evidence relating to it is no more than a scintilla or lacks probative value having fitness to

induce conviction in the minds of reasonable men. *McKay v. Farmers & Stockmens Bank*, 92 N.M. 181, 585 P.2d 325 (Ct. App. 1978), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

In action to foreclose security interest in both real and personal property of defendant mink ranchers pursuant to acceleration clause in security agreement, trial court's findings in favor of plaintiff were sustained by evidence showing (1) that such acceleration clause provided that defendants would be in default if they did not pay any of three promissory notes when due, or did not perform any undertaking provided for in notes or security agreement, or if any part of collateral for notes should be lost, stolen, or damaged; and (2) that all notes were in default, that defendants had not cared for the mink (which were part of collateral) in husband-like manner, and that defendants claimed that mink pelts worth \$25,000 had been stolen. In such case, defendants did not sustain their burden of proof under UCC § 1-208 to show lack of good faith on part of plaintiff in declaring notes in default and in accelerating payment thereof, since plaintiff genuinely believed that its prospects for payment had been impaired. *State Bank v. Woolsey*, 565 P.2d 413 (Utah 1977).

In view of fact that promissory note was secured by second mortgage on farm property which defendant had purchased for \$110,000, there could be little doubt that note would have been paid, principal and interest, notwithstanding fact that defendants were frequently late in making monthly installment payments on note, and thus holders of promissory note failed to show good faith belief that prospect of payment was impaired justifying acceleration of note under UCC § 1-208. *Williamson v. Wanlass*, 545 P.2d 1145 (Utah 1976).

Even if UCC § 1-208 was applicable to contracts involving land, it imposes "good faith" standard on creditor where it is agreed that he may accelerate debt at his option, and thus did not apply to due-on-sale clause contained in deed of trust since right to accelerate was conditioned on occurrence of condition which was in control of debtor. *Crockett v. First Fed. Sav. &*

Loan Ass'n, 289 N.C. 620, 224 S.E.2d 580 (1976).

In action by trustee in bankruptcy to recover amount of funds bank had set off against bankrupt's checking account, finding that bank had acted in good faith within meaning of UCC § 1-208 was not clearly erroneous where bank, which had perfected security interest in bankrupt's cattle, discovered prior security interest in same cattle, deemed itself insecure, and, pursuant to clause contained in promissory notes executed by bankrupt in favor of bank, accelerated notes' due date, notwithstanding that bank gave no notification of acceleration and setoff to bankrupt. *Jensen v. State Bank*, 518 F.2d 1 (8th Cir. Iowa 1975).

Grain elevator cooperative failed to produce substantial evidence that bank was not in good faith in accelerating elevator's promissory notes where, on contrary, there was evidence that elevator owed bank \$272,000 and needed additional \$50,000 within next 2 weeks, that elevator had more checks outstanding than its bank balance, that elevator had loss of \$22,000 in fiscal year just completed and that elevator closed for 2 business days. *Farmers Coop. Elevator v. State Bank*, 236 N.W.2d 674 (Iowa 1975).

Where security agreement, executed in connection with sale of truck, provided that secured party could not only accelerate payment thereunder but also repossess truck without demand or notice if secured party felt insecure, test as to whether secured party acted in "good faith" under UCC § 1-208 in repossessing truck was whether "reasonable man" under same set of facts or circumstances would have made same determination as to whether debt or collateral were insecure. *Universal C.I.T. Credit Corp. v. Shepler*, 164 Ind. App. 516, 329 N.E.2d 620 (1975).

Plaintiff, as an unsecured creditor, had to consider the overall financial stability of defendant corporation in order to determine the likelihood of payment being made on loans previously extended to corporation by plaintiff, and even if plaintiff was negligent in not checking to determine whether defendant had in fact been denied a loan by third party, negligence

was irrelevant to good faith, the standard being what plaintiff actually knew, or believed he knew, not what he could or should have known, and because plaintiff believed defendant had been denied a loan, and acted in accordance with that belief, he acted in good faith in demanding payments of notes. *Van Horn v. Van De Wol, Inc.*, 6 Wash. App. 959, 497 P.2d 252, 61 A.L.R.3d 241 (1972).

4. Circumstances justifying exercise of option.

Plaintiff bank is entitled to liquidate municipal bonds held as collateral for loans made to defendant securities dealer since plaintiff had adequate cause to "deem itself insecure", a condition constituting default under the parties' security agreement, where defendant had engaged in wash sales to postpone the effect of losses occasioned by the declining bond market. *Bankers Trust Co. v. J.V. Dowler & Co.*, 47 N.Y.2d 128, 390 N.E.2d 766 (1979).

Where creditor loaned debtor \$250,000 for five-year period and loan was evidenced by one-year note that was renewable solely at debtor's option if all interest payments were made during first year of loan; where collateral for loan was second mortgage on building and surety bond for \$250,000 that only covered first year of loan; where debtor failed to make interest payments during first year and surety cured such default by paying all interest arrearages; where before start of second year of loan, creditor's request that debtor obtain extension of its surety bond was not complied with; and where creditor then refused debtor's request to renew note for second year and claimed that note was fully due and payable under acceleration clause therein, which was of type permitted by UCC § 1-208, because creditor deemed collateral insufficient to secure entire indebtedness, creditor's demand for extension of debtor's surety bond was not demand for "additional collateral" within meaning of note's acceleration clause and UCC § 1-208, since right to demand "additional collateral" does not mean right to demand "temporal extension of same collateral" in case where parties expressly bargained for expiration of collateral (surety bond in present case) at precise

date within term of principal debt and such agreed-on collateral currently covered debtor's full indebtedness. *Bank of N.J. v. Brokers Fin. Corp.*, 557 F.2d 365 (3d Cir. 1977), cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

"Good faith" requirement of UCC § 1-208 is in harmony with equitable principle that acceleration of payment of instrument in harsh remedy that should be allowed only for some reasonable justification, such as good-faith belief that prospect of payment has been impaired. *State Bank v. Woolsey*, 565 P.2d 413 (Utah 1977).

Under UCC § 1-208, conditional vendor of automobile was justified in exercising its "insecurity clause" and accelerating payment of balance due under conditional sales contract where conditional purchaser was charged with illegally transporting controlled substances in violation of state law, thereby subjecting vehicle to possible forfeiture proceedings by state and federal governments. *Blaine v. GMAC*, 82 Misc. 2d 653 (1975).

A bank, in enforcing its security interest in a roadside diner was not guilty of abuse of process in so doing where the facts justified the institution in deeming itself insecure and, as a matter of law, it acted in good faith. *Fort Knox Nat'l Bank v. Gustafson*, 385 S.W.2d 196 (Ky. 1964).

5. What constitutes demand for additional collateral.

Under language of retail instalment contract which provided that upon buyer's default seller would have right, at its election, to declare unpaid portion of total payments to be immediately due and payable, entire indebtedness did not become due ipso facto upon default in making of instalment payment on due date thereof, and creditor could not effectively exercise option to declare whole principal due

without communicating his decision to debtor by some outward affirmative act sufficient to constitute notice of his election. *Chrysler Credit Corp. v. Barnes*, 126 Ga. App. 444, 191 S.E.2d 121 (1972).

6. Presumptions.

Creditor exercising power to accelerate payment is presumed to have acted in good faith; trial court erroneously turned presumption around when it placed burden of proof on creditor. *Sheppard Fed. Credit Union v. Palmer*, 408 F.2d 1369 (5th Cir. Tex. 1969).

7. Burden of proof.

Under the last sentence of UCC § 1-208, the burden of establishing a lack of good faith is on the debtor. This burden applies to the quantum of evidence and sufficiency of proof as to the lack of good faith after all of the evidence is before the court. Such a burden, however, does not apply on a motion for summary judgment where the sole question before the court is whether a genuine issue of material fact exists; in such a case, the movant has the burden of proving the absence of a genuine issue of fact. *McKay v. Farmers & Stockmens Bank*, 92 N.M. 181, 585 P.2d 325 (Ct. App. 1978), cert. denied, 92 N.M. 79, 582 P.2d 1292 (1978).

Bank exercised good faith within meaning of UCC § 1-208 in accelerating payment date of note executed by debtor where debtor failed to sustain its burden of showing lack of good faith on bank's part and bank's evidence showed extent of debtor's indebtedness to other creditors and degree to which debtor was in default on such other indebtedness. *Custom Panel Sys. v. Bank of Hampton*, 143 Ga. App. 681, 239 S.E.2d 558 (1977) (holding that under express terms of note executed by debtor, bank could appropriate without notice, for application on note, amount in debtor's account with bank).

RESEARCH REFERENCES

ALR. Provision for acceleration on death as affecting instrument's character and validity as contract. 1 A.L.R.2d 1206.

What is essential to exercise of option to accelerate maturity of bill or note. 5 A.L.R.2d 968.

"Insecurity" acceleration or repossession clause as affecting question whether transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as subject to defenses which

chattel purchaser could assert against seller. 44 A.L.R.2d 84.

What constitutes "good faith" under Uniform Commercial Code § 1-208 dealing with "insecure" or "at will" acceleration clauses. 61 A.L.R.3d 244.

What constitutes "good faith" under UCC § 1-208 dealing with "insecure" or "at will" acceleration clauses. 85 A.L.R.4th 284.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 110-111.

15A Am. Jur. 2d, Commercial Code § 34.

17 Am. Jur. 2d, Contracts § 493.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:22 (Complaint, petition, or declaration; allegation; acceleration of payment).

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:24 (Answer; defense;

absence of good faith on part of plaintiff in exercising option to require additional collateral).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 1 — General Provisions, §§ 121-136 (Acceleration and additional collateral provisions).

3 Am. Jur. Proof of Facts, Credit, Proof Nos. 1, 2 (proof of impairment of credit).

Law Reviews. 1983 Mississippi Supreme Court Review: Subjective or objective standard of "good faith." 54 Miss. L. J. 110, March, 1984.

1987 Mississippi Supreme Court Review: Lender liability in Mississippi: a survey, comparison, and comment. 57 Miss. L. J. 1, April 1987.

Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

CHAPTER 2

Uniform Commercial Code — Sales

Part 1.	Short Title, General Construction and Subject Matter.....	75-2-101
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PART 1.

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER.

SEC.	
75-2-101.	Short title.
75-2-102.	Scope; certain security and other transactions excluded from this chapter.
75-2-103.	Definitions and index of definitions.
75-2-104.	Definitions: “merchant”; “between merchants”; “financing agency.”
75-2-105.	Definitions: transferability; “goods”; “future” goods; “lot”; “commercial unit.”
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75-2-107.	Goods to be severed from realty; recording.

§ 75-2-101. Short title.

This chapter shall be known and may be cited as Uniform Commercial Code—Sales.

SOURCES: Codes, 1942, § 41A:2-101; Laws, 1966, ch. 316, § 2-101, eff March 31, 1968.

Comparable Laws from other States — Alabama Code, §§ 7-2-101 through 7-2-725.

Arkansas Code Annotated, §§ 4-2-101 through 4-2-725.

Georgia Code Annotated, §§ 11-2-101 through 11-2-725.

Tennessee Code Annotated, §§ 47-2-101 through 47-2-725.

Texas Business and Commerce Code, § 2.101 et seq.

JUDICIAL DECISIONS

1. In general.

General contract law, rather than sales provisions in Uniform Commercial Code (UCC), governed dispute between general contractor and subcontractor arising from subcontractor's refusal to dispose of cabinets that it tore out from public housing redevelopment site for purposes of installation of new cabinets; case did not con-

cern cabinets manufactured, but rather subcontractor's refusal to assume duties which general contractor obligated itself to perform pursuant to contract with public housing authority. *J.O. Hooker & Sons v. Roberts Cabinet Co.*, 683 So. 2d 396 (Miss. 1996).

Whether contract involving mixed transaction of goods and services should

be interpreted under Uniform Commercial Code (UCC) or general contract law should depend on nature of contract and on whether dispute primarily concerns goods furnished or services rendered under contract. *J.O. Hooker & Sons v. Roberts Cabinet Co.*, 683 So. 2d 396 (Miss. 1996).

UCC Article 2 (UCC §§ 2-101 et seq.) did not apply in action for breach by employer of contractual provision providing that employer, on employee's termination as golf professional at employer's country club, would repurchase 20 golf carts that employee had been required to purchase on accepting employment, since predominant purpose of employee's contract with employer was rendition of services and not sale of goods. *Executive Ctrs. of Am., Inc. v. Bannon*, 62 Ill. App. 3d 738, 379 N.E.2d 364 (3d Dist. 1978).

No conflict existed between Uniform Commercial Code provisions dealing with sales (UCC §§ 2-101 et seq.) and New Jersey Consumer Fraud Act, and regulations adopted under such act to govern sale of pet cats and dogs, since (1) Uniform Commercial Code provisions on sales are merely intended to give stability to law of commercial transactions and do not limit proper exercise of police power in public interest, and (2) UCC § 2-102 expressly declares that Article 2 of the code dealing with sales does not impair or repeal any statute regulating sales to consumers. Thus, regulations adopted under New Jersey Consumer Fraud Act to govern sales of pet cats and dogs were valid and not in conflict with sales provisions of Article 2 of Uniform Commercial Code merely because such regulations provided consumer with broader remedies than were available under the code. *Pet Dealers Ass'n of N.J., Inc. v. Division of Consumer Affairs*, Dep't of Law & Pub. Safety, 149 N.J. Super. 235, 373 A.2d 688 (App. Div. 1977), certification denied, 75 N.J. 16, 379 A.2d 247 (1977).

In action for recovery of purchase price of accounting machine and accounting system allegedly sold to plaintiff by defendant through its agent, trial court properly awarded damages to plaintiff based on breach of both express and implied warranties, notwithstanding defendant's

claims that trial court erred in finding it sold machine and system in question to plaintiff, when in fact it sold machine to leasing company which in turn leased it to plaintiff, and that transaction did not fall within scope of Article 2 of UCC and, accordingly, was barred by statute of limitations for oral contract actions. Leasing company was financing agency and, as such, held security interest in subject matter transaction, and defendant was seller based on fact that: (1) equipment was shipped and installed by defendants; (2) leasing company did not select or inspect equipment; (3) leasing company was not manufacturer or dealer in like equipment; (4) monthly payments under lease were calculated to return to leasing company purchase price, sales tax and interest; (5) it was not contemplated equipment would be returned to leasing company; and (6) renewal rental was for nominal amount and extended to period beyond usable life of equipment. *Atlas Indus., Inc. v. National Cash Register Co.*, 216 Kan. 213, 531 P.2d 41 (1975).

To determine which provisions of UCC Article 2 are applicable to lease transaction, court would look to commercial setting in which problem arises and contrast relevant common law with Article 2; court would use Article 2 as "a premise for reasoning only when the case involves the same consideration that gave rise to the Code provision and an analogy is not rebutted by additional antithetical circumstances." *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 541 P.2d 1184 (1975).

Oral agreement between sub-contractor and contractor for installation of carpeting, whereby sub-contractor was to furnish material for installation other than carpeting, which was to be furnished by contractor, for which sub-contractor was to receive \$1.00 per yard for installation, 35 cents per foot for metal and 75 cents per yard for padding, was service contract, not one for "goods," and thus UCC was not applicable. *Dionne v. Columbus Mills, Inc.*, 311 So. 2d 681 (Fla. App. 1975).

When gravamen of consumer suit against manufacturer or retailer for consequential personal injuries and property damage is defect in article, action will be

considered as one founded in strict liability in tort, whether cause of action is pleaded in express or implied warranty, in strict liability or in any combination of these theories; this is not to say that injured consumer, who cannot prove or does not desire to rely entirely on defect, may not sue, solely or alternatively, under Uniform Commercial Code for casually related breach of pertinent express warranty. *Realmuto v. Straub Motors, Inc.*, 65 N.J. 336, 322 A.2d 440 (1974).

Contract for sale of two radio stations was not agreement for sale of "goods," to which Article 2 of UCC would apply, where nature of transaction, intention of parties as reflected by writing, and lack of specific reference to designated assets rendered inescapable conclusion that letter agreement was one integrated contract for sale of businesses of two radio stations, including their tangible and intangible assets, as going concern. *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 305 A.2d 689 (1973), cert. denied, 414 U.S. 1158, 94 S. Ct. 916, 39 L. Ed. 2d 110 (1974).

Bareboat charter for period of 18 months is not sale as defined in UCC, and is not kind of lease which has been held to come within Code as "analogous" to sale.

Neubros Corp. v. Northwestern Nat'l Ins. Co., 359 F. Supp. 310 (E.D.N.Y. 1972).

Uniform Commercial Code, effective Oct. 1, 1958 supersedes previous Sales Act formerly appearing in c 106. *Nugent v. Popular Mkts., Inc.*, 353 Mass. 45, 228 N.E.2d 91 (1967).

A buyer's right to recover under this Article after his revocation of acceptance of a sale is limited to the seller, and he has no right of recovery against the seller's agent. *Campbell v. Pollack*, 101 R.I. 223, 221 A.2d 615 (1966).

The sales provision of the Uniform Commercial Code have altered some of the formerly established doctrines of contract law in order to react more positively to the realistic needs of modern commerce. *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp.*, 325 F.2d 2 (3d Cir. Pa. 1963).

The Uniform Commercial Code virtually re-enacts the Uniform Sales Act. *Bafile v. Remchow & Ford Motor Co.*, 58 Schuyl. L. Rec. 108 (Pa 1962).

In construing the Uniform Commercial Code, Article 2, the court may resort to decisions under comparable provisions of the Uniform Sales Act. *Bafile v. Remchow & Ford Motor Co.*, 58 Schuyl. L. Rec. 108 (Pa. 1962).

RESEARCH REFERENCES

ALR. Construction and effect of UCC Art 2, dealing with sales. 17 A.L.R.3d 1010.

§ 75-2-102. Scope; certain security and other transactions excluded from this chapter.

Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

SOURCES: Codes, 1942, § 41A:2-102; Laws, 1966, ch. 316, § 2-102, eff March 31, 1968.

Cross References — General requirement that certain contracts be in writing, see § 15-3-1.

Secured transactions, see §§ 75-9-101 et seq.

Regulation of going out of business sales, see §§ 75-65-1 to 75-65-17.

JUDICIAL DECISIONS

1. In general; relationship with other laws.
2. Transaction in goods.
3. —Sale.
4. Mixed transactions.
5. Secured transactions.
6. Specified classes of buyers.
7. What constitutes goods.

1. In general; relationship with other laws.

In seller's action for buyer's breach of contract to buy specified quantity of potatoes suitable for processing into potato chips, which potatoes were to be delivered to buyer "as needed," trial court correctly concluded (1) that contract, pursuant to UCC § 1-102(3), varied normal rules for tender contained in Uniform Commercial Code in that contract required buyer to request delivery of quantity of potatoes, which buyer at no time did, before seller would become obligated to tender delivery, and (2) that as a result, seller's failure to tender delivery of any potatoes at all during entire contract period did not relieve buyer of liability for payment under UCC § 2-301 and § 2-507(1). *Halverson v. Pet, Inc.*, 261 N.W.2d 887, 23 U.C.C. Rep. Serv. 574 (N.D. 1978) (also holding that even if potatoes in seller's warehouse were not suitable for buyer's use throughout entire contract period, buyer still breached contract by not requesting any deliveries at all during such period).

No conflict existed between Uniform Commercial Code provisions dealing with sales (UCC §§ 2-101 et seq.) and New Jersey Consumer Fraud Act, and regulations adopted under such act to govern sale of pet cats and dogs, since (1) Uniform Commercial Code provisions on sales are merely intended to give stability to law of commercial transactions and do not limit proper exercise of police power in public interest, and (2) UCC § 2-102 expressly declares that Article 2 of the code dealing with sales does not impair or repeal any statute regulating sales to consumers. Thus, regulations adopted under New Jersey Consumer Fraud Act to govern sales of pet cats and dogs were valid and not in conflict with sales provisions of Article 2 of

Uniform Commercial Code merely because such regulations provided consumer with broader remedies than were available under the code. *Pet Dealers Ass'n of N.J., Inc. v. Division of Consumer Affairs*, Dep't of Law & Pub. Safety, 149 N.J. Super. 235, 373 A.2d 688 (App. Div. 1977), certification denied, 75 N.J. 16, 379 A.2d 247 (1977).

Action for price of goods, wares and merchandise sold and delivered to buyer on open account was not time barred by the general statute of limitations of three years for oral contracts even though the purchases were incurred more than three but less than five years prior to filing of action, since, under UCC § 10-102 and 2-102, the five-year period of limitations of UCC § 2-725 superseded the pre-existing general statute and abrogated distinctions between oral and written sales contracts for purposes of statutes of limitations. *Sesow v. Swearingen*, 552 P.2d 705 (Okla. 1976).

Six-year limitation period relating to contracts in general, rather than more restrictive four-year statute of limitations specified in UCC, applied to action for breach of implied warranties of merchantability and fitness for use in connection with rental of scaffold. *Owens v. Patent Scaffolding Co.*, 50 A.D.2d 866 (2d Dep't 1975).

Where (1) general contractor retained sum due under contract with subcontractor on ground that subcontractor's work was poorly performed, and (2) subcontractor then assigned such sum to creditor, to whom subcontractor owed preexisting debt, without general contractor's written consent, although such consent was required by contract between general contractor and subcontractor, court held that since assignment did not involve sale within the meaning of UCC § 2-102, prohibition against assignments in contract between general contractor and subcontractor was not rendered invalid by UCC Article 2 on sales or by any other provision of Uniform Commercial Code, including UCC § 9-104(f) which deals with inapplicability of Article 9 to assignment of accounts or contract rights for collection

only. *Bafle v. Remchow & Ford Motor Co.*, 58 Schuyl. L. Rec. 108 (Pa. 1962).

2. Transaction in goods.

Whether contract involving mixed transaction of goods and services should be interpreted under Uniform Commercial Code (UCC) or general contract law should depend on nature of contract and on whether dispute primarily concerns goods furnished or services rendered under contract. *J.O. Hooker & Sons v. Roberts Cabinet Co.*, 683 So. 2d 396 (Miss. 1996).

Article 2 of the Mississippi UCC furnished analogous rules for determining controversies arising over a 2 party copier-equipment lease that conferred exclusive use and dominion to, and created obligations of maintenance and payment of taxes and insurance by, lessee, and which also contained renewal and purchase options, as well as an express warranty of freedom from defects of material and workmanship. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

As indicated in UCC §§ 2-102 and 2-106(1), the Uniform Commercial Code applies only to transactions in goods and not to service or repair contracts. *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

UCC Article 2 applies only to transactions in goods and is inapplicable to construction contracts (see UCC § 2-102). *Christiansen Bros. v. State*, 90 Wash. 2d 872, 586 P.2d 840 (1978).

Plumbing construction contract that involves both labor and materials is not a "transaction in goods" under UCC § 2-102. *Cork Plumbing Co. v. Martin Bloom Assocs.*, 573 S.W.2d 947 (Mo. Ct. App. 1978).

If a contract is for services, the transaction is not a sale within the provisions of the Uniform Commercial Code. The code applies to transactions involving goods (see UCC § 2-102), and its provisions are not applicable to either service or construction contracts. *Perlmutter v. Don's Ford, Inc.*, 96 Misc. 2d 719 (1978).

Action for breach by buyer of written installment agreement, executed by buyer after having defaulted on original contract of sale, is governed by four-year statute of

limitations prescribed by UCC § 2-725(1) and not by 15-year, non-UCC statute of limitations for written contracts generally. In such case, installment agreement was subject to scope of UCC Article 2, even though it was not executed contemporaneously with original contract of sale, since under UCC § 2-102, provisions of Article 2 apply to "transactions in goods" and term "transaction," as used in UCC § 2-102, encompasses a far wider activity than a "sale." *May Co. v. Trusnik*, 54 Ohio App. 2d 71, 375 N.E.2d 72 (1977).

In action by assignee of computer-equipment lease for rent due under lease, (1) although applicable provisions of UCC Article 2 should be applied to equipment leases, entire article would not be applied on theory that equipment lease is transaction in goods under UCC § 2-102; (2) lease in issue was not unconscionable under UCC § 2-302, since it conferred rights and imposed duties on both lessor and lessee, and parties to lease had virtually equal bargaining power; (3) language in lease disclaiming implied warranties of merchantability and fitness were sufficiently conspicuous under UCC § 2-316(2); and (4) since defense that plaintiff was not assignee in good faith within meaning of UCC § 9-206(1) presented fact issue that could not be resolved solely as issue of law, trial court erred in dismissing defendant's amended answer on ground that it raised insufficient defense as matter of law. *Walter E. Heller & Co. v. Convalescent Home of First Church of Deliverance*, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1st Dist. 1977).

A written agreement for the purchase and sale of an airplane and an oral modification thereof come within the phrase "transactions in goods" set forth in the instant section so as to make the instant article applicable thereto. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

3. —Sale.

The terms of a lease agreement between a motel owner and a television set supplier, including a nominal purchase price of \$1 per television set at the expiration of the lease term, was evidence of a sale, sufficient to warrant application of the provisions of UCC Article 2. *Patel v.*

Telerent Leasing Corp., 574 So. 2d 3 (Miss. 1990).

The sale of an automobile is a sale of "goods" that is governed by UCC Article 2 (see UCC § 2-102). *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978).

In action by purchasers of new homes against contractor who built homes and seller of bricks used therein for damages resulting from defective brick: (1) contracts between purchasers and contractor did not provide for "sale" as that term is used in UCC Article 2 and, thus, were not governed by four-year statute of limitations contained in § 2-725, but rather by general six-year limitations for breach of contract; (2) conversely, only relationship between purchasers and seller of bricks was that of buyers and seller, which was governed by UCC Article 2, and, since more than four years passed between respective purchases from seller and alleged breach of warranty, action was barred. *DeMatteo v. White*, 233 Pa. Super. 339, 336 A.2d 355 (1975).

In action by hybrid seed corn processor against gas company for property damage resulting from gas explosion, allegations that gas company warranted fitness of its own equipment knowing that processor would rely upon warranty "and use the equipment for the purpose for which it was intended," failed to state cause of action against gas company for breach of implied warranties under UCC, since implied warranties under UCC extend only to goods sold to a buyer and gas company's meters and service lines were not sold to processor, and there was no allegation of breach of warranty with respect to gas which was sold to processor. *Pioneer Hi-Bred Corn Co. v. Northern Ill. Gas Co.*, 61 Ill. 2d 6, 329 N.E.2d 228 (1975).

In action arising when aluminum step-ladder which had been loaned to plaintiff collapsed, plaintiff could not recover for breach of implied warranty where application of code to "transactions in goods" under UCC § 2-102 was not extended to loan of goods which were sold before UCC became law and question of whether plaintiff was foreseeable user of goods under UCC § 2-318 was moot. *Harvey v. Sears, Roebuck & Co.*, 315 A.2d 599 (Del. Super. 1973).

4. Mixed transactions.

Whether contract involving mixed transaction of goods and services should be interpreted under Uniform Commercial Code (UCC) or general contract law should depend on nature of contract and on whether dispute primarily concerns goods furnished or services rendered under contract. *J.O. Hooker & Sons v. Roberts Cabinet Co.*, 683 So. 2d 396 (Miss. 1996).

General contract law, rather sales provisions in Uniform Commercial Code (UCC), governed dispute between general contractor and subcontractor arising from subcontractor's refusal to dispose of cabinets that it tore out from public housing redevelopment site for purposes of installation of new cabinets; case did not concern cabinets manufactured, but rather subcontractor's refusal to assume duties which general contractor obligated itself to perform pursuant to contract with public housing authority. *J.O. Hooker & Sons v. Roberts Cabinet Co.*, 683 So. 2d 396 (Miss. 1996).

Even adopting lessee's contention that truck-rental and service contract, which provided that lessee would purchase rented trucks on cancellation of contract within first three years of contract's operation, was actually a sale that was subject to provisions of the Uniform Commercial Code, lessee's reliance on Uniform Commercial Code remedies was misplaced where evidence did not show proper and timely rejection of the goods under either UCC § 2-607(2) and (3)(a) or in the manner required by the contract itself. Furthermore, since lessee's defenses, in action for deficiency arising out of lessee's refusal to purchase rented trucks, related solely to alleged inadequacy of services provided by lessor and not to trucks themselves, and since remedies provided by Uniform Commercial Code apply only to sale of goods and not to sale of services (see UCC § 2-102), lessee could not avail itself of UCC remedies relating to nonconforming goods. *Pepsico Truck Rental, Inc. v. Eastern Foods, Inc.*, 145 Ga. App. 410, 243 S.E.2d 662 (1978).

Contract between general contractor and subcontractor under which subcontractor was to complete cement construc-

tion work on apartment-tower project was transaction that, although calling for both labor and materials, had as its essence performance of services rather than sale and passage of title to goods (see UCC § 2-102) and thus was not governed by Uniform Commercial Code. *Freeman v. Shannon Constr., Inc.*, 560 S.W.2d 732, 23 U.C.C. Rep. Serv. 867 (Tex. Civ. App. 1977), writ ref'd n.r.e., (June 14, 1978) (rejecting subcontractor's contention that essence of agreement was sale of 4815 cubic yards of cement).

Contract for sale and installation of carpeting in large apartment complex was primarily for sale, rather than installation, of such carpeting and thus was subject to UCC Art 2 on sales. *Snyder v. Herbert Greenbaum & Assocs.*, 38 Md. App. 144, 380 A.2d 618 (1977).

Test for determining whether UCC Art 2 on sales applies to mixed sale and services contract is not whether contract is mixed but, granting that it is mixed, whether its predominant purpose, reasonably stated, is rendition of services with goods being incidentally involved (for example, contract with artist for painting) or whether it is sale transaction with labor being incidentally involved (for example, installation of water heater in bathroom). *Snyder v. Herbert Greenbaum & Assocs.*, 38 Md. App. 144, 380 A.2d 618 (1977).

Test as to whether mixed-goods-and-services contract comes under UCC Article 2 is whether predominant purpose of such contract, reasonably stated, is rendition of services with sale of goods being incidentally involved, or whether contract is primarily sales transaction with rendition of services being incidentally involved. *Air Heaters, Inc. v. Johnson Elec., Inc.*, 258 N.W.2d 649, 5 A.L.R.4th 489 (N.D. 1977).

Under UCC 2-102, engineering and construction contract that primarily involved rendition of services and not sale of goods is outside scope of UCC Article 2, even though such contract also involved furnishing of equipment. *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 436 F. Supp. 262 (D. Me. 1977).

Contract for sale of trucks was not contract for sale of goods and, thus, was not governed by four-year statute of limita-

tions contained in UCC § 2-725(1) where contract was executed simultaneously with contract for sale of truck manufacturing plant and where contract for sale of trucks was merely incidental and collateral to main object of effecting transfer of truck manufacturing plant. *Dynamics Corp. of Am. v. International Harvester Co.*, 429 F. Supp. 341 (S.D.N.Y. 1977).

Contract for sale of various bowling alley equipment, including, inter alia, lanes and ball returns, to be delivered and installed by seller, who warranted that lanes would be free from defects in workmanship and materials and that they would meet "all ABC specifications," was a "transaction in goods" under UCC § 2-102 and came within Article 2 of Code, despite fact that contract involved substantial amounts of labor; items sold under contract were "goods" as defined in UCC § 2-105(1) since they were all items of tangible property, normally in flow of commerce, portable at time of contract; contract was not construction contract, outside Code coverage, nor was it excluded from coverage merely because it was "mixed" contract for goods and services. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. Iowa 1974).

Where the assets of a going concern are sold, Article 2 will apply to transfer with respect to the goods portion although not applicable to the non-goods portion of the transaction. *Foster v. Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. N.M. 1967).

5. Secured transactions.

As secured transactions are not governed by the provisions of Article 2 it follows that the "unconscionable" section of the Code (§ 2-302) does not apply to a secured transaction and it is therefore no objection that the advantage that a creditor has under a secured transaction may appear inequitable or even unconscionable. In re *Advance Printing & Litho Co.*, 277 F. Supp. 101 (W.D. Pa. 1967), aff'd, 387 F.2d 952 (3d Cir. Pa. 1967).

6. Specified classes of buyers.

Even though contract for sale of used tractor to farmer contained complete disclaimer of warranties in accordance with UCC § 2-316, UCC § 2-102 states that Article 2 does not "impair or repeal any

statute regulating sales to consumers, farmers or other specified classes of buyers," and hence disclaimer provision was void since it was in conflict with statute relating to purchase of tractors which made such disclaimers void; once disclaimer provision was voided, UCC § 2-314 injected implied warranty of merchantability into contract for sale of tractor. *Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353 (N.D. 1976).

7. What constitutes goods.

Carpeting is "goods" under UCC § 2-102. *Trust Co. Bank v. Barrett Distribs., Inc.*, 459 F. Supp. 959 (S.D. Ind. 1978).

Contract to publish, distribute, and sell book was not contract for sale of "goods" within meaning of UCC § 2-102. *Mallin v. University of Miami*, 354 So. 2d 1227 (Fla. App. 1978).

Term "goods" as employed in UCC § 2-102 applies to sale by merchant of used, as well as new, goods; thus, buyer of used truck was entitled to bring action against seller for breach of implied warranty of merchantability. *Moore v. Burt Chevrolet, Inc.*, 39 Colo. App. 11, 563 P.2d 369 (1977).

In action for damages for destruction of swimming pool, although there was no proof that pool was defective, there was proof that negligent installation of liner resulted in destruction of pool, and warranty provisions of UCC § 2-314 and 2-315 applied since sale was primarily one of goods as defined in UCC § 2-102 and services were necessary to insure that goods were merchantable and fit for particular purpose. *Riffe v. Black*, 548 S.W.2d 175 (Ky. Ct. App. 1977).

Where cotton farmer entered into contract with cotton merchants to sell cotton crop to be produced on 800 acres, where farmer was obligated by terms of lease to pay one-fourth of his cotton crop as rent, and where as result of flood conditions farmer was only able to plant 717 acres rather than expected 1066 acres, cotton merchants were entitled to whole crop and lessor's remedies, if any, were against lessee; when read together UCC §§ 2-102, 2-105 and 2-107 indicated that forward contracts for sale of yet to be grown cotton fell within § 2-402(1) which subordinates rights of seller's unsecured creditors in subject matter to those of buyer. *Ralli-*

Coney, Inc. v. Gates, 528 F.2d 572 (5th Cir. 1976).

Purchase of horse, apparently for recreational use, was covered by UCC Article 2 even though it was possibly casual sale. *Key v. Bagen*, 136 Ga. App. 373, 221 S.E.2d 234 (1975).

Contract to sell future cotton crop was sale of goods within scope of Article 2 of UCC. *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. Ga. 1974).

Sale of laundry and drycleaning business which was nothing more than sale of equipment, furniture, and other movables of business and which did not involve non-goods such as goodwill or real property, was a transaction in goods and came within scope of Article 2 of UCC; thus, where buyer breached contract to purchase laundry and drycleaning business and seller elected to resell business at private sale, but failed to give buyer notice of intention to resell, of time, place and manner of resale or of seller's intention to sue buyer for difference between contract price and amount ultimately realized on resale, seller was not entitled to recover difference between resale price and contract price as provided in UCC § 2-706, but was entitled to measure of damages prescribed by UCC § 2-708(1). *Miller v. Belk*, 23 N.C. App. 1, 207 S.E.2d 792 (1974).

Except as limited by UCC § 2-102, provisions of sales of goods chapter of UCC are applicable to sale of motor vehicle and, under UCC § 2-312(1), dealer in motor vehicles warrants he will convey good title free from any security interest or other lien or encumbrance of which buyer is without knowledge when contract of sale is made; absent express contractual language or circumstances under which person buying motor vehicle knows or should have known that only limited warranty is intended in accord with UCC § 2-312(2) (but only to extent that such warranty can be limited), automobile dealer having authority to expose floor-planned cars for sale in ordinary course of business binds his mortgagee to deliver title to any vehicle so sold when payment is made to dealer and whether or not dealer remits proceeds to his mortgagee. *Levin v.*

Nielsen, 37 Ohio App. 2d 29, 306 N.E.2d 173 (1973).

Under New York law, Article 2 of the Uniform Commercial Code applies to the

sale of securities. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

RESEARCH REFERENCES

ALR. Electricity, gas, or water furnished by public utility as "goods" within provisions of Uniform Commercial Code, Article 2 on Sales. 48 A.L.R.3d 1060.

What constitutes a transaction, a contract for sale, or a sale within scope of UCC Article 2. 4 A.L.R.4th 85.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services. 5 A.L.R.4th 501.

Third-party beneficiaries of warranties under UCC § 2-318. 50 A.L.R.5th 327.

Am Jur. 67 Am. Jur. 2d, Sales §§ 34-37.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:3 (Answer; defense; contract for

sale of investment securities not within Commercial Code provisions relating to sales).

CJS. 77 C.J.S., Sales § 5.

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§ 75-2-103. Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires:

(a) "Buyer" means a person who buys or contracts to buy goods.

(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:

"Acceptance"	Section 75-2-606.
"Banker's credit"	Section 75-2-325.
"Between merchants"	Section 75-2-104.
"Cancellation"	Section 75-2-106(4).
"Commercial unit"	Section 75-2-105.
"Confirmed credit"	Section 75-2-325.
"Conforming to contract"	Section 75-2-106.
"Contract for sale"	Section 75-2-106.
"Cover"	Section 75-2-712.
"Entrusting"	Section 75-2-403.
"Financing agency"	Section 75-2-104.
"Future goods"	Section 75-2-105.
"Goods"	Section 75-2-105.
"Identification"	Section 75-2-501.
"Installment contract"	Section 75-2-612.
"Letter of Credit"	Section 75-2-325.
"Lot"	Section 75-2-105.

“Merchant”	Section 75-2-104.
“Overseas”	Section 75-2-323.
“Person in position of seller”	Section 75-2-707.
“Present sale”	Section 75-2-106.
“Sale”	Section 75-2-106.
“Sale on approval”	Section 75-2-326.
“Sale or return”	Section 75-2-326.
“Termination”	Section 75-2-106.
(3) The following definitions in other chapters apply to this chapter:	
“Check”	Section 75-3-104.
“Consignee”	Section 75-7-102.
“Consignor”	Section 75-7-102.
“Consumer goods”	Section 75-9-102.
“Dishonor”	Section 75-3-502.
“Draft”	Section 75-3-104.

(4) In addition Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Codes, 1942, § 41A:2-103; Laws, 1966, ch. 316, § 2-103, eff March 31, 1968; Laws, 2001, ch. 495, § 6, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, updated the section references in (2) and (3).

Cross References — General definitions, see § 75-1-201.

Delegation of performance and assignment of rights, see § 75-2-210.

JUDICIAL DECISIONS

1. Buyer.
2. Consumer goods.
3. Good faith.
4. Goods.
5. Receipt.
6. Sale.
7. Seller.

1. Buyer.

Truck driver who obtained gasoline for his employer's truck and charged gasoline to his employer was not in privity with service station that sold gasoline and, thus, could not maintain action for breach of warranty against service station for injuries sustained when his truck became disabled and was struck by another vehicle allegedly as result of water in gasoline; under UCC § 2-103(1)(a) truck driver was not “buyer” of gasoline, but mere agent of buyer to whom UCC sales warranties did not extend; under UCC § 2-314 employee of buyer was not in privity with seller. *Weaver v. Ralston Mo-*

tor Hotel, Inc., 135 Ga. App. 536, 218 S.E.2d 260 (1975).

A buyer who acquires property from one who has a voidable title must show that he was a “good faith purchaser for value”, which requires “honesty in fact and the observance of reasonable commercial standards of fair dealing”. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

A licensed automobile wrecker and junk dealer who purchased a two-year-old station wagon from a thief for \$900 by placing \$300 down, and who sold the vehicle for \$1200 that same day, although he never obtained a bill of sale or registration certificate, was liable to the two owners, since the car had not been entrusted to a merchant who dealt in used cars and the defendant had not demonstrated that he was a “buyer in ordinary course of business” or that he was a “good faith purchaser for value”. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

A hotel manager who, on behalf of his employer, personally purchased from a state liquor store champagne intended for the use and consumption by guests of the hotel was a buyer as that term is defined in the instant section. *Yentzer v. Taylor Wine Co.*, 414 Pa. 272, 199 A.2d 463 (1964).

2. Consumer goods.

Sandblasting hoods and respirators used by employees in course of their employment are not consumer goods within meaning of UCC § 9-109(1) and UCC § 2-103(3). *Simmons v. American Mut. Liab. Ins. Co.*, 433 F. Supp. 747 (S.D. Ala. 1976), *aff'd sub nom. Love v. American Mut. Liab. Ins. Co.*, 560 F.2d 1021 (5th Cir. Ala. 1977), *aff'd*, 560 F.2d 1022 (5th Cir. Ala. 1977).

3. Good faith.

Where buyer of natural gas under 19 output contracts with producer-seller, after discovering that charts measuring seller's production and delivery of gas from wells involved in some of such contracts had been altered to show more protection and delivery of gas to buyer than was actually the case, stopped payments on all contracts entered into with seller, instead of only those affected by the altered charts, (1) buyer's action constituted under UCC § 2-703 repudiation of whole of each contract that was not affected by altered charts, (2) buyer's action did not constitute repudiation of contracts that were affected by altered charts, and (3) under UCC § 2-103(1)(b), buyer acted in commercially unreasonable manner with regard to all 19 contracts by insisting that it recover all excess payments made to seller, and also all amounts due on unpaid loans made by it to seller, before it would resume paying for seller's deliveries of gas. *Columbia Gas Transmission Corp. v. Larry H. Wright, Inc.*, 12 Ohio Op. 3d 95, 443 F. Supp. 14 (S.D. Ohio 1977).

In replevin action by buyer against seller to obtain possession of supposedly used Ferrari sports car of limited availability that seller ordered for buyer from another dealer, where car on seller's receipt thereof proved to be virtually new racing vehicle, not intended for highway use, that seller wished to retain for him-

self, and where parties were shown to have modified in writing prior oral agreement under which buyer was to be sold "used" car in suit, seller's conduct in claiming that since such car was "new" it was not what buyer had ordered did not meet standards of good faith imposed by UCC § 1-201(19) and UCC § 2-103(1)(b); and when car was identified to contract buyer had right of replevin under UCC § 2-716(3), since he was unable to effect cover and there was no other way for him to protect himself against loss of his deposit on car. *Tatum v. Richter*, 280 Md. 332, 373 A.2d 923 (1977).

"Honesty-in-fact" definition of good faith in UCC § 1-201(19) is to be distinguished from definition of good faith in UCC § 2-103(1)(b), since latter definition includes not only honesty in fact but also observance of reasonable commercial standards of fair dealing in trade. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

When the UCC intends to apply a concept of "good faith" beyond its definition in UCC § 1-201, subd 19 as "honesty in fact", a broader definition is provided, e.g. UCC § 2-103, subd 1(b), which adds the words "observance of reasonable commercial standards of fair dealing in the trade" to the definition of "good faith" as between merchants. *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 72 Misc. 2d 614 (1973), *rev'd on other grounds*, 79 Misc. 2d 149, 360 N.Y.S.2d 142 (1973).

Section referred to an example of explicit requirement that party exercise more than "honesty in fact." *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

It is unreasonable to conclude that the drafters of the Code intended the UCC § 2-103(1)(b) definition of good faith to be applied to merchant-buyers throughout the entire Code; this definition would not be applied to question of rights and obligations of buyer and secured creditor, one to the other, a transaction expressly controlled by Article 9, and more specifically by the good faith definition of UCC § 1-201(19). *Sherrock v. Commercial Credit Corp.*, 290 A.2d 648 (Del. 1972).

Requirements for establishing one's self as "good faith" buyer vary depending on commercial status of purchaser; and indi-

vidual who purchases tractor for his own personal use is not held to same degree of sophistication in ascertaining existence of security interest on that tractor as is merchant who regularly deals in business of buying and selling tractors. *Swift v. J.I. Case Co.*, 266 So. 2d 379 (Fla. App. 1972), cert. denied, 271 So. 2d 147 (Fla. 1972).

Commercially prudent tractor merchant may not purchase tractor from another dealer and thereby acquire title free of any prior recorded security interests without first making good faith inquiry into existence of such previously perfected interests. *Swift v. J.I. Case Co.*, 266 So. 2d 379 (Fla. App. 1972), cert. denied, 271 So. 2d 147 (Fla. 1972).

An oral agreement between property owners and a handyman whereby the handyman agreed to purchase a heating unit for owners and install it in the owners' building did not create between the parties a relationship of buyer and seller, so as to entitle the owners to a recovery against the handyman on the ground of a breach of implied warranty of merchantability and of fitness for the purpose. *Victor v. Barzaleski*, 19 Pa. D. & C.2d 698 (1959).

4. Goods.

A motor vehicle is "goods." *Park County Implement Co. v. Craig*, 397 P.2d 800 (Wyo. 1964).

5. Receipt.

Where (1) buyer paid for motorcycle in full, was given necessary registration and insurance papers, and registered machine and secured liability insurance for it prior to its theft from seller's premises, although its license plates were never affixed, (2) seller agreed to hold machine on seller's premises until buyer returned from vacation, and (3) machine was stolen from seller's premises without negligence on seller's part, court held (1) that evidence showed that buyer had never exercised dominion or control over motorcycle, and (2) that in such situation, seller must bear risk of loss under UCC § 2-509(3), which provides that risk of loss passes to buyer on his receipt of goods if seller is merchant, and UCC § 2-103(1)(c), which provides that "receipt" of goods means taking physical possession of them.

Ramos v. Wheel Sports Ctr., 96 Misc. 2d 646 (1978).

Regardless of whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains on him, under UCC §§ 2-509(3) and 2-103(1)(c), until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. The underlying theory is that a merchant who is to make physical delivery at his own place of business continues to control the goods in the meantime and can be expected to insure his interest in them. *Ramos v. Wheel Sports Ctr.*, 96 Misc. 2d 646 (1978).

Under UCC where goods are delivered to buyer under contract for sale and are physically received by him, they are in his possession. *North Platte State Bank v. Production Credit Ass'n*, 189 Neb. 44, 200 N.W.2d 1 (1972).

A buyer receives goods when he takes physical possession of them. *Tennessee-Virginia Constr. Co. v. Willingham*, 117 Ga. App. 290, 160 S.E.2d 444 (1968).

6. Sale.

There is no "sale" to a beauty parlor customer of materials used in giving her treatments, for the materials used in the performance of such services are patently incidental to the treatment itself and do not constitute a purchase of an article by the customer. *Epstein v. Giannattasio*, 25 Conn. Supp. 109, 197 A.2d 342 (1963).

7. Seller.

Purchaser of automobile battery who was injured when battery exploded could not recover under theory of implied warranty of merchantability from organization which allowed its name to be printed on battery because organization did not sell or contract to sell battery and was therefore not in position to make such warranty; organization was not liable for misrepresentation because no evidence was presented that plaintiff relied on name of organization in purchasing battery. *Harmon v. National Automotive Parts Ass'n*, 720 F. Supp. 79 (N.D. Miss. 1989).

Action for breach of implied warranty of merchantability against manufacturer, as seller, may be maintained by buyer because manufacturer qualified as seller under UCC § 2-103(1)(d) as person who sells or contracts to sell goods, although motor home in question had not been purchased directly from manufacturer. *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663 (Miss. 1987).

An automobile manufacturer was a "seller" within the meaning of § 75-2-103(1)(d), where the retailer's sales contract accompanied by the manufacturer's warranty were so closely linked both in time of delivery and subject matter that they blended into a single unit at the time of sale. *Volkswagen of Am., Inc. v. Novak*, 418 So. 2d 801 (Miss. 1982).

In action for breach of implied warranty of fitness of isomax reactor charge heater, where buyer contracted directly with defendant corporation to purchase a completed product (isomax unit and hydrogen plant) assembled by defendant, and where defendant assembled component parts into final completed product and maintained title thereto until product was sold to buyer, defendant was "seller" within meaning of UCC § 2-103(1)(d), and buyer could bring action against it for breach of the implied warranty. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (1978).

Since Uniform Commercial Code does not limit definition of "seller" contained in UCC § 2-103(1)(d) to immediate seller of product but defines seller as "person who sells or contracts to sell goods," manufacturer of mobile homes which sold homes to retail buyers was "seller" under the code. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

In action by buyer of new 1970 Lincoln Continental automobile against dealer and manufacturer, in which buyer alleged seller's breach of warranty and buyer's justifiable revocation of acceptance of vehicle, manufacturer was not "seller" under UCC § 2-103(1)(d), on theory that dealer from whom buyer actually purchased vehicle was "agent" of manufacturer, where (1) sales contract expressly recited that buyer understood that no principal-and-agent relationship existed between dealer

and manufacturer, (2) dealer's franchise agreement with manufacturer also expressly stated that dealer was not manufacturer's agent, and (3) no other evidence supported conclusion that dealer was manufacturer's agent in sale of vehicle to buyer. Thus, manufacturer was entitled to directed verdict since buyer, to be entitled to remedy of revocation of acceptance under UCC § 2-608 as against manufacturer, was required to prove existence of buyer-seller relationship, and such proof was absent. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144, 20 U.C.C. Rep. Serv. 899 (1976) (also observing that ordinarily automobile dealer's only attribute as agent of manufacturer is authority to extend manufacturer's limited warranty to dealer's purchasers).

In action for recovery of purchase price of accounting machine and accounting system allegedly sold to plaintiff by defendant through its agent, trial court properly awarded damages to plaintiff based on breach of both express and implied warranties, notwithstanding defendant's claims that trial court erred in finding it sold machine and system in question to plaintiff, when in fact it sold machine to leasing company which in turn leased it to plaintiff, and that transaction did not fall within scope of Article 2 of UCC and, accordingly, was barred by statute of limitations for oral contract actions. Leasing company was financing agency and, as such, held security interest in subject matter transaction, and defendant was seller based on fact that: (1) equipment was shipped and installed by defendants; (2) leasing company did not select or inspect equipment; (3) leasing company was not manufacturer or dealer in like equipment; (4) monthly payments under lease were calculated to return to leasing company purchase price, sales tax and interest; (5) it was not contemplated equipment would be returned to leasing company; and (6) renewal rental was for nominal amount and extended to period beyond usable life of equipment. *Atlas Indus., Inc. v. National Cash Register Co.*, 216 Kan. 213, 531 P.2d 41 (1975).

Mechanical contracting firm that accepted order to supply custom cooling equipment which would conform to speci-

fications supplied by buyer and that guaranteed its work for period of one year against defects was (1) "seller" as defined in UCC § 2-103(1)(d), and (2) "a merchant with respect to goods of that kind," i.e., with respect to cooling system, as provided in UCC § 2-314(1). *Frantz, Inc. v. Blue Grass Hams, Inc.*, 520 S.W.2d 313 (Ky. 1974).

Auto manufacturer who sold autos only to authorized dealers was not "seller" of auto to retail purchaser. *Ford Motor Co. v. Pittman*, 227 So. 2d 246 (Fla. App. 1969), cert. denied, 237 So. 2d 177 (Fla. 1970).

An Illinois florist who receives interstate telegraphic orders for retail sales of flowers in Illinois is a seller, his sales are present sales made in the state whether the contract is unilateral or bilateral, and title to the flowers passes in Illinois, and the sale is not one for resale which would be true if the seller were the out-of-state florist who telegraphs the order; and the Illinois florist is subject to that state's retailers' occupational tax on such sales. *O'Brien v. Isaacs*, 32 Ill. 2d 105, 203 N.E.2d 890 (1965).

RESEARCH REFERENCES

ALR. Electricity, gas, or water furnished by public utility as "goods" within provisions of Uniform Commercial Code, Article 2 on Sales. 48 A.L.R.3d 1060.

Products liability of endorser, trade association, certifier, or similar party who expresses approval of product. 1 A.L.R.5th 431.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 5, 6, 36.

67 Am. Jur. 2d, Sales §§ 10 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Forms 1:28-1:33. (Definitions and principles of interpretation).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2-Sales, §§ 253:161 et seq. (Definitions).

CJS. 77 C.J.S., Sales §§ 1 et seq.

Law Reviews. 1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss. L. J. 141, March 1983.

§ 75-2-104. Definitions: "merchant"; "between merchants"; "financing agency."

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2-707) [Section 75-2-707].

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

SOURCES: Codes, 1942, § 41A:2-104; Laws, 1966, ch. 316, § 2-104, eff March 31, 1968.

Cross References — Purposes and rules of construction, see § 75-1-102.

Obligation of good faith, see § 75-1-203.

Implied warranties, see §§ 75-2-314, 75-2-315.

Secured transactions, see §§ 75-9-101 et seq.

JUDICIAL DECISIONS

1. In general.
2. Merchants.
3. —Farmers as.
4. —Warranties.
5. Financing agency.
6. Between merchants.

1. In general.

Contract for sale of two radio stations was not agreement for sale of “goods,” to which Article 2 of UCC would apply, where nature of transaction, intention of parties as reflected by writing, and lack of specific reference to designated assets rendered inescapable conclusion that letter agreement was one integrated contract for sale of businesses of two radio stations, including their tangible and intangible assets, as going concern. *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 305 A.2d 689 (1973), cert. denied, 414 U.S. 1158, 94 S. Ct. 916, 39 L. Ed. 2d 110 (1974).

A purchaser of a product under a trade or patent name receives no implied warranty of fitness of use for any particular purpose, but does receive an implied warranty that the goods are of merchantable quality. *Montgomery Ward & Co. v. McKesson & Robbins, Inc.*, 55 Misc. 2d 529 (1967).

Even in the absence of a written agreement with respect to every term of a contract, great weight attaches to the course of dealing of the parties, and where it appears from the conduct of the parties that their mode of calculating price, although not accepted formally by signature of a written instrument, was adhered to by both parties during an extensive course of dealing, during which the purchaser received, accepted, and paid for over \$800,000 worth of merchandise, this course of dealing must be held applicable and governing with respect to remaining

merchandise which was received, accepted, but not paid for. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 236 F. Supp. 879 (W.D. Pa. 1965), vacated on other grounds, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

2. Merchants.

Although, through training and years of experience, the plaintiff may have possessed or acquired special knowledge, skills, and expertise about tractors, this did not make him a “professional,” equal in the marketplace with a company that sold and repaired tractors. *Davidson v. North Cent. Parts, Inc.*, 737 So. 2d 1015 (Miss. Ct. App. 1998).

In breach-of-warranty action for damages by buyer of allegedly defective dump trailers against manufacturer-seller, court held (1) that buyer and its ultimate Mexican customers were “merchants” within meaning of UCC § 2-104(1); (2) that seller was “merchant” within meaning of both UCC § 2-104(1) and § 2-314(1); (3) that telephoned order for 20 additional trailers was not enforceable under statute of frauds in UCC § 2-201(1) because it did not come within exceptions to such statute contained in UCC § 2-201(3); (4) that “specially manufactured goods” exception in UCC § 2-201(3)(a) applies only when seller, rather than buyer, seeks to escape statute-of-frauds defense; (5) that since three trailers purchased under valid written contract were put to improper use by buyer’s Mexican customers, rather than being used for their “ordinary purposes,” no breach of implied warranty of merchantability under UCC § 2-314(1) and (2)(c) occurred; (6) that use of trailers for improper purposes, rather than for their stated “particular purpose,” prevented recovery under implied warranty of fitness in UCC § 2-315; (7) that buyer could not

recover for breach of express warranty under UCC § 2-313(1)(a) because it failed to prove that it had relied on statements in manufacturer-seller's brochure either prior to or contemporaneously with making of parties' contract; and (8) that since buyer had no right under UCC § 2-601(a) to reject two unused and undamaged trailers, manufacturer-seller was not required to retake them or to refund their purchase price to buyer. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

Where seller sold tractor and trailer units all over United States, selling about 1,000 trucks in good business year, and exported to countries, particularly Singapore, Malaysia, Mexico, and Central America, proof established that buyers and ultimate customers were likewise experienced in buying and selling dump-trailers and their utilization respectively, therefore seller, under 75-2-104 was merchant in that he customarily dealt in buying and selling of tractors. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

A provision in an agreement between plaintiff subcontractor and defendant general contractor set out in a letter sent by plaintiff to defendant whereby plaintiff, in confirming an oral agreement, stated that defendant would pay for all steel as billed in the event that defendant was not awarded a contract on a construction project, is, standing alone, a contract for the sale of goods. While defendant is not a steel merchant, since it is not in the business of buying and selling steel, defendant, like plaintiff, is nonetheless a "merchant" "having knowledge or skill peculiar to the practices or goods involved in the transaction" (Uniform Commercial Code, § 2-104, subd [1]) for purposes of the merchant exception to the Statute of Frauds, which makes an oral contract for the sale of goods between merchants enforceable against a party who receives written confirmation of the existing oral agreement and does not give "written notice of objection to its contents" within 10 days after it is received. (Uniform Commercial Code, § 2-201, subd [2].) Accordingly, based on all the evidence, defendant is bound by an oral agreement to purchase

the steel from plaintiff. *Pecker Iron Works, Inc. v. Sturdy Concrete Co. Inc.*, 96 Misc. 2d 998 (1978).

In action for seller's refusal to deliver corn and soybeans to buyer, evidence was sufficient to show that seller had held himself out, within meaning of UCC § 2-104(1), as having knowledge or skill peculiar to corn and soybeans, so as to constitute seller a "merchant" under exception to statute of frauds contained in UCC § 2-201(2). *Currituck Grain, Inc. v. Powell*, 38 N.C. App. 7, 246 S.E.2d 853 (1978).

Where buyer, on July 23, 1973, telephoned grain seller about buying wheat and seller said he might let buyer have 40,000 bushels, subject to buyer's sending written confirmation of contract for seller's approval; where such written confirmation, because of error by buyer, was sent to incorrect address and not received by seller until August 17, 1973; where seller, on July 31, 1973, informed buyer by phone that change should be made in contract, and buyer sent written confirmation of such change to incorrect address; and where seller, on August 21, 1973, wrote buyer that seller was repudiating contract because of provision in confirmation of contract giving buyer option to cancel, (1) buyer and seller were "merchants" under UCC § 2-104(1); (2) buyer's written confirmation of contract, which seller did not receive until August 17, 1973, was not received within reasonable time under UCC § 2-201(2); (3) seller's objection on August 21, 1973 to buyer's confirmation of contract, because of clause giving buyer option to cancel agreement, was made within ten-day period prescribed by UCC § 2-201(2); and (4) seller never admitted existence of valid contract so as to permit its enforcement under UCC § 2-201(3)(b). *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. Colo. 1977).

Manufacturer which advertised in trade journals that it possessed expertise in field and would design conveyor-stacker equipment for use in a purchaser's business was "merchant" under UCC § 2-104(1). *Barney Mach. Co. v. Continental M.D.M., Inc.*, 434 F. Supp. 596 (W.D. Pa. 1977).

Mere fact that lender accepted late payments from automobile purchaser on five different occasions did not operate as waiver of conditional sales contract provisions relating to timeliness of installment payments, in view of contract language to effect that waiver or indulgence of any default or failure to exercise any right under contract would not be construed as agreement to modify terms of instrument or to operate as waiver of any subsequent default, and particularly in view of fact that on one occasion purchaser obtained written 90-day extension of due date of note from lender; contract provision in question was not rendered inoperative by UCC § 2-209(2), even though contract provision was not separately set out and separately executed by borrower, since UCC provision applies only to merchants and there was no evidence in record that automobile purchaser was "merchant" as defined in UCC § 2-104(1). *Trust Co. v. Montgomery*, 136 Ga. App. 742, 222 S.E.2d 196 (1975).

Lessor of car wash systems, which had handled over forty lease transactions within period of several months, was not "merchant" within meaning of UCC § 2-104, where it did not build, manufacture or sell any equipment or machines of kind involved in transaction, but rather was in business of purchasing or financing purchase of equipment specifically selected and specified by an approved lessee. *All-States Leasing Co. v. Bass*, 96 Idaho 873, 538 P.2d 1177, 91 A.L.R.3d 863 (1975).

Where prior to sale in question defendants had sold all cattle they raised or fed to packers, sale to third defendant was first sale to non-packer and "was forced by financial difficulties," and was dealing in different classification of stock than cow and calf for resale, defendants were not merchants under UCC, although third defendant, who was trader and bought and resold, and acted as agent for sales of cow and calf units, was well as steers, heifers, feeders, and other "goods," was merchant. *Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. N.M. 1972).

One is not entitled to summary judgment as having bought goods free of any security interest because of purchase in ordinary course of business from mer-

chant entrusted with goods under UCC §§ 2-403, 9-307, where status of seller as "merchant" has been assumed or concluded. *Greater S. Distrib. Co. v. Usry*, 124 Ga. App. 525, 184 S.E.2d 486 (1971).

Where plaintiff bought truck from a merchant in the ordinary course of business, without knowledge of a security agreement entered into by the seller and later assigned to a bank, in repossessing the truck after the sale, bank was liable for conversion and damages. *Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338 (1968).

When it is apparent from the record that both parties customarily dealt in the goods involved, it is clear that they are merchants. *Reich v. Helen Harper, Inc.*, 3 U.C.C. Rep. Serv. 1048 (1966, NY Civ Ct).

A wholesaler and retailer, being clearly merchants as defined in this section, the requirement of subsection (2) is satisfied when the retailer receives invoices on the wholesaler's letterhead stating the quantity and price terms of goods sold and sends no written objections within 10 days after their receipt. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

3. —Farmers as.

Farmers whose particular factual situation falls into the definition of merchant contained in § 75-2-104 may be a merchant class. *Vince v. Broome*, 443 So. 2d 23 (Miss. 1983).

The average farmer with no particular knowledge or experience in selling, buying, or dealing in future community transactions, who sells only the crops he raises to local elevators for cash or who places his grain in storage under one of the federal loan programs, is not a "merchant" within the meaning of the exception to the statute of frauds contained in UCC § 2-201(2). Although through training and years of experience, a farmer may well possess or acquire special knowledge, skill, and expertise in the production of grain crops, this does not make him a professional in business, within the meaning of UCC § 2-104(1) and Official Comments 1 and 2, who is equal in the marketplace with a grain-buying and selling company whose officers, agents, and employees are constantly conversant with

the daily fluctuations in the commodity market, the many factors that affect that market, and its intricate practices and procedures. *Terminal Grain Corp. v. Freeman*, 270 N.W.2d 806, 25 U.C.C. Rep. Serv. 1 (S.D. 1978) (holding, in buyer's action for farmer's failure to deliver grain under oral contract of sale, that since farmer was not a "merchant" within meaning of exception to statute of frauds contained in UCC § 2-201(2) defense of statute of frauds set forth in UCC § 2-201(1) barred any recovery by buyer).

Farmer was merchant under UCC § 2-104 and thus came within "merchant exception" to UCC statute of frauds with respect to oral contract for delivery of soybeans where, *inter alia*, farmer had sold large quantities of corn, as well as smaller quantities of potatoes and soybeans under forward contracts for five or six years, where farmer had traded on Chicago Board Trade and kept up with market news, and where there was nothing to indicate that method of making forward contracts for corn differed in any respect from those for soybeans. *Continental Grain Co. v. Harbach*, 400 F. Supp. 695 (N.D. Ill. 1975).

Sellers of soybeans, who breached oral agreement to deliver soybeans to plaintiff buyer, were "merchants" under UCC § 2-104(1) and were liable, under exception to statute of frauds contained in UCC § 2-201(2), for their breach of such oral agreement when they failed to object within ten days to buyer's written confirmation of the oral contract where evidence showed that sellers, despite their contention that they were merely farmers and not merchants, (1) had acted in such a way as to cause others to believe that they had special knowledge and skill in grain dealing, (2) had advertised themselves as grain dealers, and (3) had, in addition to selling their own crops, bought crops of others and sold such crops to wholesalers. *Cargill, Inc. v. Gaard*, 84 Wis. 2d 138, 267 N.W.2d 22 (1978).

In action for seller's refusal to deliver corn and soybeans to buyer, evidence was sufficient to show that seller had held himself out, within meaning of UCC § 2-104(1), as having knowledge or skill peculiar to corn and soybeans, so as to consti-

tute seller a "merchant" under exception to statute of frauds contained in UCC § 2-201(2). *Currituck Grain, Inc. v. Powell*, 38 N.C. App. 7, 246 S.E.2d 853 (1978).

Farmer was merchant within UCC § 2-104 definition in that he was professional in business of growing and selling crops he raised, his livelihood depended on expertise with which he sold, as well as raised, crops and to that end he stayed informed as to market prices and was knowledgeable in business of selling; thus, he was bound by oral contract for sale of wheat where he received written confirmation of contract from buyer and did not give written objection to any of its terms within ten days of receipt as provided by UCC § 2-201(2). *Nelson v. Union Equity Coop. Exch.*, 548 S.W.2d 352, 95 A.L.R.3d 471 (Tex. 1977).

Seller was not "merchant," as defined by UCC § 2-104(1), with respect to sale of corn and therefore was not bound to oral contract under UCC § 2-201(2), even though buyer sent confirmation notice to seller following oral agreement, since seller was not in business of selling corn but, rather, conducted cattle feeding operation, growing grain for that purpose and selling grain only when it was surplus to cattle feeding needs. However, seller's delivery of corn in approximate quantity called for in oral agreement, and its acceptance by buyer, constituted part performance under UCC § 2-201(3)(c) sufficient to take contract out of statute of frauds even though such conduct was consistent with making of spot sale at current market price. *Gerner v. Vasby*, 75 Wis. 2d 660, 250 N.W.2d 319, 97 A.L.R.3d 897 (1977).

Where buyer of soybeans sent written confirmation of oral contract to farmer and where farmer sold no crops or livestock except those which he raised, had limited experience in selling crops and no other business experience, and had not done business previously with buyer, farmer-seller did not come within definition of merchant under UCC § 2-104 and thus was not subject to statute of frauds exception relating to transactions between merchants. *Sand Seed Serv., Inc. v. Poeckes*, 249 N.W.2d 663 (Iowa 1977).

In action by grain buyer against farmer to recover damages for farmer's failure to

deliver corn and soybeans under alleged oral contract, farmer's affidavit in support of his motion for summary judgment did not establish that he was casual or inexperienced seller in corn and soybeans, the "goods involved in the transaction," thereby establishing that he was not a merchant and thus entitled to defense of statute of frauds, notwithstanding he received written confirmation of contract from buyer, where affidavit established farmer's prior experience in trucking from 1960 to 1970, that he farmed during 1970, 1971 and 1974 and that one-half his gross income in 1971 and 1972 derived from livestock, but where affidavit did not establish whether farmer had ever negotiated with grain dealers prior to 1974, whether he had ever sold corn or soybeans previously, or whether he had knowledge of customs and practices peculiar to marketing of these grains. *Currituck Grain, Inc. v. Powell*, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Farmer who had been engaged in farming for 34 years, who had approximately 180 acres of corn and 150 acres of soybeans under cultivation, and who, for period of at least five years, had sold his crops to grain elevators both in "cash sales" and "future contracts" was "merchant" within meaning of UCC § 2-104(1); thus, written confirmations of two oral agreements for sale of soybeans, sent by buyers to farmer were sufficient under UCC § 2-201. *Sierens v. Clausen*, 60 Ill. 2d 585, 328 N.E.2d 559 (1975).

Written confirmation of oral contracts for sale of soybeans satisfied statute of frauds where experienced farmer who had sold grain for at least five years on both cash and future contracts bases was a merchant familiar with practices, customs, and usages of grain business and commodities market. *Sierens v. Clausen*, 60 Ill. 2d 585, 328 N.E.2d 559 (1975).

Oral contract for purchase and sale of cotton was unenforceable against cotton farmer under UCC § 2-201, notwithstanding farmer received written confirmation of contract from buyer and failed to make any objection thereto, since farmer was not "merchant" within meaning of UCC § 2-104; farmer does not solely by his occupation hold himself out as

being professional cotton merchant within meaning of UCC § 2-104(2) and, although there was evidence that farmer was knowledgeable seller, there was no evidence that he ever sold anyone's cotton but his own and this was not sufficient to make him dealer within meaning of UCC § 2-104(1). *Loeb & Co. v. Schreiner*, 294 Ala. 722, 321 So. 2d 199 (1975).

Farmers who regularly sold their crops to grain companies over period of several years were merchants within meaning of UCC § 2-104(1). *Campbell v. Yokel*, 20 Ill. App. 3d 702, 313 N.E.2d 628 (5th Dist. 1974).

A farmer is not a merchant as defined in subdivision (1) of this section; and the term "merchant" as there defined has its roots in the law merchant concept of a professional in business. *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 395 S.W.2d 555 (1965).

4. —Warranties.

In action against sellers of used automobile and repairman to recover for personal injuries suffered by plaintiffs when they were struck by automobile while it was being driven by buyer, plaintiffs could not recover from sellers on theory that there was express warranty from sellers to buyer that automobile was free from defects, including defects from repair of automobile, since plaintiffs had no contract relation with sellers and were not within scope of UCC § 2-318; nor did they come within judicial exception to privity requirement inasmuch as sellers were neither merchants within meaning of UCC § 2-104(1), nor engaged in business of selling automobiles. Similarly, plaintiffs could not recover against repairman on breach of warranty theory, there being no privity of contract between plaintiff and repairman, and any warranties, express or implied, that repairman might have given sellers did not extend to plaintiffs. *Lemley v. J & B Tire Co.*, 426 F. Supp. 1376 (W.D. Pa. 1977).

Although seller was unfamiliar with "hoedads" (i.e., forestry tool used for planting seedling trees) and had not previously manufactured hoedad collars, seller did hold itself out, by operating foundry, as having skill in "practice" of casting iron and presumably in selection of materials

to be used in manufacturing castings; inasmuch as transaction involved selection of type of metal appropriate for hoedad collars, seller was merchant within meaning of UCC § 2-104. Likewise, for purposes of UCC § 2-314, seller was merchant "with respect to goods of that kind," i.e., castings, seller having in past assisted buyer in choosing particular type of metals to fulfil various tasks in its manufacture of castings. Furthermore, since ordinary purpose of custom-made castings depended on their designated use, since seller knew that castings were to join handle and blade in tree-planting impact tools which occasionally would strike rock but since castings were not fit for this purpose, warranty of merchantability was breached. *Valley Iron & Steel Co. v. Thorin*, 278 Or. 103, 562 P.2d 1212 (1977).

Sale of repossessed boat by bank did not give rise to implied warranty of merchantability under UCC § 2-314 where there was no evidence that bank was "merchant" within meaning of UCC § 2-104(1), there being no evidence that bank dealt in kind of goods involved in transaction—boats—or that it held itself as having knowledge or skill peculiar to such goods, but rather record indicated sale of boat was no more than isolated transaction by bank; nor did sale give rise to implied warranty of fitness for particular purpose within UCC § 2-315, although buyer told bank officer he "was thinking about buying a boat to put into charter service" where there was no evidence that buyer relied upon bank's skill or judgment, or that bank possessed such skill or judgment, that boat was fit for particular purpose of charter service use. *Donald v. City Nat'l Bank*, 295 Ala. 320, 329 So. 2d 92 (1976).

Manufacturer of blow-molded plastic products was "merchant" within meaning of UCC § 2-104(9) with respect to plastic wiglet cases, notwithstanding manufacturer produced variety of plastic goods, and wiglet cases produced by manufacturer were subject to implied warranty of merchantability. However, since allegedly defective handle housing walls were result of specifications supplied by distributor that ordered cases and since distributor, who was informed buyer who designed

product in issue and held mechanical and design patents covering similar cases, examined 15 pre-production cases, inspecting handles and handle housing by lifting cases and shaking them, any implied warranty of merchantability with respect to handle housings was precluded. *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017 (D. Conn. 1975).

In action for breach of implied warranty of merchantability, brought against installer of home heating and air conditioning system for damages resulting from failure of condensate removal pump to function properly, jury question was presented on issue whether installer was "merchant" within meaning of UCC § 1-104 and UCC § 2-314; fact that installer testified knowledgeably about workings and installation of condensate pumps and that he had recommended that a particular pump be installed in system, supported inference that he had installed and sold other pumps during his years in heating and air conditioning business, but also supported inference that condensate pump sale in question was only one that he had ever made. *Storey v. Day Heating & Air Conditioning Co.*, 56 Ala. App. 81, 319 So. 2d 279 (Civ. App. 1975).

Since seller of used airplane was not merchant as defined in Code § 2-104, there could be no implied warranties attributed to him in sale of airplane. *Downs v. Shouse*, 18 Ariz. App. 225, 501 P.2d 401 (1972).

5. Financing agency.

Equipment lease transactions were security agreements under UCC § 1-201(37), and leasing corporation was "financing agency" and not seller of equipment under UCC § 2-104(2), where persons desirous of purchasing equipment or machinery applied to corporation for purchase money loan, corporation made commitments to advance money necessary for payment to manufacturer plus sales tax, equipment was shipped by manufacturer directly to purchaser and invoice was sent to corporation, purchaser and corporation thereupon entered into security agreements in form of equipment leases with options to purchase at nominal extra charge, UCC financing statements were thereupon executed and deliv-

ered to purchaser and filed by corporation, corporation did not select or inspect any equipment, corporation did not maintain warehouse for storage of equipment or machinery, corporation did not carry leased property as assets on books or take any depreciation deductions, and corporation never took possession of any of leased equipment at end of leased term. In re Sherwood Diversified Services, Inc., 382 F. Supp. 1359 (S.D.N.Y. 1974).

6. Between merchants.

In action by subcontractor against general contractor based on oral agreement that defendant would be liable for steel purchased by plaintiff for construction project that ultimately was not awarded to defendant, court held (1) that while defendant was not a steel merchant because it was not in business of buying and selling steel, it nevertheless was a "merchant" under broad language of UCC § 2-104(1) and (3); and (2) that as a result, merchants' exception in UCC § 2-201(2) to statute of frauds applied and removed oral contract sued on from operation of the statute, since plaintiff had sent letter to defendant confirming parties' oral agreement, such letter was received by defendant, and defendant had failed to give plaintiff, within ten days of receipt of letter, written notice of defendant's objection to letter's contents, as required by UCC § 2-201(2). *Pecker Iron Works, Inc. v. Sturdy Concrete Co. Inc.*, 96 Misc. 2d 998 (1978).

Experienced farmer, who previously sold soy beans, kept abreast of soy bean

market, and sold livestock and other farm products from time to time, was "chargeable with the knowledge or skill of merchants" referred to UCC § 2-104(3) in selling his current crop of soy beans; thus, where he offered to sell 1,500 bushels of soy beans for \$5 per bushel in cash, and purchaser orally accepted offer and immediately sent him written confirmation, stating terms and standards to be met, and providing that failure to make timely correction was acknowledgement and acceptance of contract as stated, and farmer made no response but sold his soy beans to another, he was liable to purchaser for damages suffered from his breach of the contract. *Ohio Grain Co. v. Swisshelm*, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973).

Where plaintiff automobile dealer sold car to second dealer who in turn sold car to defendant buyer, who 15 years previously had had experience as automobile dealer, transaction was not "between merchants" as contemplated by Code § 2-104(3), so as to charge buyer with "knowledge or skill of merchants"; and, although buyer accepted automobile without instrument of title as required by Motor Vehicle Title and Registration Law, and accepted new automobile from non-franchised dealer without receiving manufacturer's certificate of origin to that vehicle, buyer took title to car free from plaintiff dealer's claim, under Code § 2-403(2) and (3). *Couch v. Cockroft*, 490 S.W.2d 713 (Tenn. Ct. App. 1972).

RESEARCH REFERENCES

ALR. Electricity, gas, or water furnished by public utility as "goods" within provisions of Uniform Commercial Code, Article 2 on Sales. 48 A.L.R.3d 1060.

Farmers as "merchants" within provisions of UCC Article 2, dealing with sales, 95 A.L.R.3d 484.

Am Jur. 10 Am. Jur. 2d, Banks §§ 653, 655.

67 Am. Jur. 2d, Sales §§ 64, 66, 68.

73 Am. Jur. 2d, Statutes §§ 60, 144.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:11. (Complaint, petition, or decla-

ration; breach of contract between merchants; failure to repudiate written confirmation of oral contract).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:171 et seq. (Merchant transactions).

CJS. 77 C.J.S., Sales §§ 1 et seq.

Law Reviews. 1983 Mississippi Supreme Court Review: Farmer as merchant. 54 Miss. L. J. 113, March, 1984.

§ 75-2-105. Definitions: transferability; “goods”; “future” goods; “lot”; “commercial unit.”

(1) “Goods” means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Chapter 8) and things in action. “Goods” also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107) [Section 75-2-107].

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are “future” goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller’s interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) “Lot” means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) “Commercial unit” means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

SOURCES: Codes, 1942, § 41A:2-105; Laws, 1966, ch. 316, § 2-105, eff March 31, 1968.

Cross References — General definitions, see § 75-1-201.

Goods to be severed from realty, see § 75-2-107.

Statute of frauds, see § 75-2-201.

Special property and insurable interest in existing and future goods, see § 75-2-501.

Investment securities, see § 75-8-101 et seq.

JUDICIAL DECISIONS

1. In general.
2. Goods.
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1. In general.

Under the Uniform Commercial Code as adopted in Pennsylvania there is no requirement that a contract be evidenced by a single instrument, and if the parties wish, they may express their agreement

in more than one writing, and in such circumstances the several documents are to be interpreted together, each one contributing, to the extent of its worth, to the ascertainment of the true intent of the parties, and this rule was held applicable to an agreement for the sale of securities. *Stern & Co. v. State Loan & Fin. Corp.*, 238 F. Supp. 901 (D. Del. 1965).

The instant section was referred to in a case involving an agreement for the purchase and sale of an airplane and an oral modification of such contract, in connection with the proposition that both the original contract and the modifications would, by virtue of § 2-102 of the instant chapter be governed by article 2 thereof. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

The sales article of the Commercial Code does not apply to an agreement for the purchase and sale of the capital stock of a corporation. *In re Carter*, 390 Pa. 365, 134 A.2d 908 (1957).

2. Goods.

Since UCC does not distinguish between new and used goods, implied warranty of merchantability applies to sale of used motor vehicle. *Beck Enters., Inc. v. Hester*, 512 So. 2d 672 (Miss. 1987).

Under UCC § 2-105(1), term "goods" has a very extensive meaning and embraces every species of property which is not real estate, choses in action, investment securities, or the like. *Duffee v. Judson*, 251 Pa. Super. 406, 380 A.2d 843 (1977).

Where materials manufactured by seller were sent from seller's plant to dam site, materials constituted goods under definition of UCC § 2-105(1) in that they were movable at time of identification to contract; thus, transaction was governed by UCC article 2. *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 400 F. Supp. 273 (E.D. Wis. 1975).

Statute relating to identification of specific goods before interest in goods passes does not by any means forbid sale of fungible goods without specific identification. *Quality Fruit Buyers, Inc. v. Killarney Fruit Co.*, 269 So. 2d 424 (Fla. App. 1972).

Application of UCC is limited to all things which are movable or severable

from realty; UCC does not apply to lumber, bricks, cement and other like building materials unless resultant structure remains personality. *Vernali v. Centrella*, 28 Conn. Supp. 476, 266 A.2d 200 (1970).

"Goods" has a very extensive meaning and embraces every species of property which is not real estate, except, perhaps, choses in action, investment securities, and the like. *Buckley v. New York Post Corp.*, 260 F. Supp. 282 (D. Conn. 1966), *rev'd on other grounds*, 373 F.2d 175, 20 A.L.R.3d 942 (2d Cir. Conn. 1967).

3. Particular property as constituting goods.

UCC applies to sales of natural gas, and therefore governs sales contract between oil company and royalty owners in certain Mississippi oil and gas leases; in action by royalty owners seeking unrecovered payments from oil company under leases, gas underground is future goods pursuant to § 75-2-105, and thus no particular gas is sold until it is identified or brought to surface; accordingly, under § 75-2-107(1), contracts are contracts to sell and only become effective as sales when gas is severed from land; where sales contract itself provides that title to gas passes when gas is delivered, gas was not sold until it was produced, and accordingly, basis of royalty should be market value at well at time of production and delivery. *Piney Woods Country Life Sch. v. Shell Oil Co.*, 726 F.2d 225 (5th Cir. 1984), *reh'g denied*, 750 F.2d 69 (5th Cir. 1984), *cert. denied*, 471 U.S. 1005, 105 S. Ct. 1868, 85 L. Ed. 2d 161 (1985).

Livestock are "goods" within the meaning of § 75-2-105, and are covered under the law governing commercial transactions. *Vince v. Broome*, 443 So. 2d 23 (Miss. 1983).

Timber, whether cut or to be cut, falls within the definition of "goods" contained in § 75-2-105(1), and by virtue of § 75-2-107(2), the Sales Article of the Mississippi Uniform Commercial Code expressly applies to timber sales. *Bay Springs Forest Prods., Inc. v. Wade*, 435 So. 2d 690 (Miss. 1983).

Computer hardware and software package agreement, under which defendant was to install completed system and train plaintiff's employees in its use, where-

upon plaintiff would take over complete supervision of system, was agreement for sale of "goods" rather than "services." *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), rev'd on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

In action for seller's breach of contract to sell investment securities that buyer had contracted to resell to third person, which breach caused buyer to make "cover" purchase of other securities to effect such resale, court held (1) that although UCC Art 8 contains no provision for buyer's remedies against seller for breach of contract to purchase securities, and although UCC § 2-105(1) expressly excludes investment securities from definition of "goods" for purposes of UCC Art 2, nevertheless, as indicated by Official Comment 1 to UCC § 2-105, buyer's remedies in Art 2 for breach of contract also apply by analogy to investment security transactions; (2) that under UCC § 2-712(2), buyer was entitled to recover as damages difference between cost of cover and contract price of securities in suit, plus incidental and consequential damages; and (3) that benefits that had accrued to buyer as result of its trading of its interest in securities in suit before seller's breach were not relevant to buyer's measure of damages for such breach. *G.A. Thompson & Co. v. Wendell J. Miller Mtg. Co.*, 457 F. Supp. 996 (S.D.N.Y. 1978).

In action to recover amount paid to travel bureau for arranging itinerary and supplying tour for African safari, which plaintiff was unable to take because of defendant's failure to supply tour operator with plaintiff's overseas address while plaintiff was on business trip prior to time tour was to start, defense contention that plaintiff had merely purchased tickets for trip, and that tickets were goods or "things" within meaning of UCC § 2-105(1), was not sustainable because plaintiff had actually contracted for trip and defendant's services as travel agent, instead of only goods or things, and Uniform Commercial Code was therefore inapplicable. *Rosen v. DePorter-Butterworth Tours, Inc.*, 62 Ill. App. 3d 762, 379 N.E.2d 407 (3d Dist. 1978).

Bridge design plans were not "goods" as defined in UCC § 2-105(1), and, thus,

implied warranty provisions of Uniform Commercial Code §§ 2-314 and 2-315, did not apply to cause of action based on defect in plans. *Department of Transp. v. Bethlehem Steel Corp.*, 28 Pa. Commw. 214, 368 A.2d 888 (1977).

In action by feed company on installment sales contracts and security agreements providing for loan to enable defendant to purchase two hog-feeder houses from plaintiff's alleged agent, where houses were defective because they caused pigs placed therein for fattening to become sick and to die, and where plaintiff claimed that it merely financed purchase of such houses and did not sell them to defendant, (1) evidence supported finding that plaintiff's alleged agent was its agent in fact and that plaintiff was bound by agent's acts, including agent's sale of hog houses to defendant; (2) fact that plaintiff acted as financing agency in defendant's purchase of such houses did not preclude finding that plaintiff was also seller of such houses; (3) houses were goods within meaning of UCC § 2-105(1); (4) defendant, by affirmative defense incorporated by reference in counterclaim, gave plaintiff notice of breach of implied warranty of fitness of goods for particular purpose, which notice was required by UCC § 2-607(3)(a); and (5) whether such implied warranty of fitness, which was in force at time of sale, was breached by plaintiff was question of fact to be determined by trial court on remand of case. *Thompson Farms, Inc. v. Corno Feed Prods.*, 173 Ind. App. 682, 366 N.E.2d 3, 4 A.L.R.4th 58 (1977).

Notwithstanding contract specified that buyer had thirty days to inspect fabricated pipe, which constituted goods within meaning of UCC § 2-105, trial court erred in holding buyer's performance bond liable by reason of buyer's failure to reject allegedly defective pipe within thirty days of delivery: (1) under UCC § 2-607, buyer was required to notify seller of breach of warranty within a reasonable time after actual or constructive discovery of defects; (2) UCC § 1-204 provides that whenever UCC requires action within reasonable time, any time which is not manifestly unreasonable may be fixed by agreement; (3) seller guaranteed workmanship and

material in contract provided claim was made within one year from shipment; and (4) buyer made claim within one year following shipment. *United States Fid. & Guar. Co. v. North Am. Steel Corp.*, 335 So. 2d 18 (Fla. App. 1976).

Plaintiff who contracted to compile, edit and publish pamphlets and other printed materials for defendants was entitled to benefit of four year statute of limitations under UCC § 2-725, since printed pamphlets and related materials were goods within meaning of UCC § 2-105(1) and since UCC statute of limitations prevailed over general statute of limitations in action based on contract for sale of goods. *Lake Wales Publishing Co. v. Florida Visitor, Inc.*, 335 So. 2d 335 (Fla. App. 1976).

Question of law was presented on issue of whether water supplied to customer was "goods" within meaning of UCC. *Moody v. City of Galveston*, 524 S.W.2d 583 (Tex. Civ. App. 1975), *ref. n.r.e.* (Nov. 5, 1975).

Installed sauna heater described in bill of sale as personal property remained "goods" within meaning of UCC § 2-105 where intention to make sauna heater a fixture constituting a permanent accession to real estate did not affirmatively and plainly appear. *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975).

Purchase of horse, apparently for recreational use, was covered by UCC Article 2 even though it was possibly casual sale. *Key v. Bagen*, 136 Ga. App. 373, 221 S.E.2d 234 (1975).

Definition of "goods" in UCC § 2-105(1) clearly excludes interests of oil and gas lessee. *Casper v. Neubert*, 489 F.2d 543 (10th Cir. Okla. 1973).

Contract for sale of cordwood business, including hardwood stumpage growing on defendant's land and certain equipment used in cutting and hauling wood, was transaction in "goods" governed by Sales Article of UCC, even though written contract was headed "Sale of Wood Business." *Melms v. Mitchell*, 266 Or. 208, 512 P.2d 1336, 65 A.L.R.3d 376 (1973).

Where plaintiff raised sod on several prior occasions and apparently treated it as commercial product, and sod owed its existence to annual maintenance and fer-

tilization, sod was personalty, and sale of sod was within coverage of UCC. *Barron v. Edwards*, 45 Mich. App. 210, 206 N.W.2d 508 (1973).

Although UCC § 2-105(1) defines "goods" as excluding investment securities, the New York courts, nevertheless, have held that Article 2 applies to the sale of securities. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

Investment securities are expressly excluded from Sales Article of UCC. *Lineberger v. Welsh*, 290 A.2d 847 (Del. Ch. 1972).

Bareboat charter for period of 18 months is not sale as defined in UCC, and is not kind of lease which has been held to come within Code as "analogous" to sale. *Neubros Corp. v. Northwestern Nat'l Ins. Co.*, 359 F. Supp. 310 (E.D.N.Y. 1972).

The sale of photographs is the sale of "goods" within UCC § 2-105. *Carpel v. Saget Studios, Inc.*, 326 F. Supp. 1331 (E.D. Pa. 1971).

Shares of cooperative stock relative to proprietary lease are "goods" within UCC § 2-105 definition. *Silverman v. Alcoa Plaza Assocs.*, 37 A.D.2d 166 (1st Dep't 1971).

Milk comes within Code definition of "goods". *Spiering v. Fairmont Foods Co.*, 424 F.2d 337 (7th Cir. Ill. 1970).

Compressor, included among sold chattels located on railroad premises, was within goods definition since "movable at the time of identification to the contract for sale." *National Compressor Corp. v. Carrow*, 417 F.2d 97 (8th Cir. Mo. 1969).

When a blood bank sells blood to a hospital for its use in treating patients there is a sale within Article 2 of the Code. *Jackson v. Muhlenberg Hosp.*, 96 N.J. Super. 314, 232 A.2d 879 (1967), *rev'd* on other grounds, 53 N.J. 138, 249 A.2d 65 (1969).

United States coins having a numismatic value in excess of the value expressed on their face and pledged as collateral to secure a bank loan are to be considered as "goods" within the meaning of the UCC, and not solely as a medium of exchange. *In re Midas Coin Co.*, 264 F. Supp. 193 (E.D. Mo. 1967), *aff'd*, 387 F.2d 118 (8th Cir. Mo. 1968).

If the intent of the parties is to treat a diner as personal property it will be governed by Article 2 of the Code. *Conte v. Styli*, 26 Mass. App. Dec. 73 (1963).

4. —Aircraft and watercraft.

An aircraft is "goods" under UCC § 2-105(1). *McCullum Aviation, Inc. v. CIM Assocs.*, 446 F. Supp. 511 (S.D. Fla. 1978).

Ships are "goods" within meaning of UCC § 2-105(1). *Puamier v. Barge BT 1793*, 395 F. Supp. 1019 (E.D. Va. 1974).

Ships are "goods" within meaning of UCC § 2-105(1); thus, UCC § 2-401 governed passage of title in connection with sale of tugboat and barge where tugboat and barge were to be delivered at boatyard where they were moored and title passed under UCC § 2-401(3)(b) at time when contract for sale was made. *Puamier v. Barge BT 1793*, 395 F. Supp. 1019 (E.D. Va. 1974).

Ships are "goods" within meaning of Sales Article of UCC. *R.C. Craig, Ltd. v. Ships of the Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972).

Aircraft is movable property and therefore subject to UCC Article 2 under UCC § 2-105 definition of goods. *Kiecker v. Pacific Indem. Co.*, 5 Wash. App. 871, 491 P.2d 244 (1971).

5. —Assets included in sale of business.

Alleged contract for transfer of assets of automobile dealership including, inter alia, parts, work in progress, vehicles, receivables and contracts covering services, was sale of goods within meaning of UCC § 2-105, notwithstanding some of the assets to be transferred were not goods within meaning of that provision. *De Filippo v. Ford Motor Co.*, 516 F.2d 1313 (3d Cir. Pa. 1975), cert. denied, 423 U.S. 912, 96 S. Ct. 216, 46 L. Ed. 2d 141 (1975).

Oral contract for sale of automobile dealership was unenforceable under UCC § 2-105 where its subject matter included goods worth more than \$500; fact that seller substituted written offer to sell for signing by parties, instead of contract for sale, did not remove transaction from Statute of Frauds where seller did not intentionally fail to disclose that document buyers were signing had been

changed to offer. *De Filippo v. Ford Motor Co.*, 378 F. Supp. 456 (E.D. Pa. 1974), rev'd, 516 F.2d 1313 (3d Cir. Pa. 1975), cert. denied, 423 U.S. 912, 96 S. Ct. 216, 46 L. Ed. 2d 141 (1975).

In action arising out of sale of sporting goods business, sale of inventory as part of transaction amounted to sale of "goods" under UCC § 2-105(1) and UCC § 2-607(3)(a) requirement that buyer must within reasonable time notify seller of breach, governed buyer's claim, made 14 months after sale, that seller had fraudulently overstated inventory. *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wash. App. 551, 519 P.2d 278 (1974), review denied, 83 Wash. 2d 1014 (1974).

Sale of laundry and drycleaning business which was nothing more than sale of equipment, furniture, and other movables of business and which did not involve non-goods such as goodwill or real property, was a transaction in goods and came within scope of Article 2 of UCC; thus, where buyer breached contract to purchase laundry and drycleaning business and seller elected to resell business at private sale, but failed to give buyer notice of intention to resell, of time, place and manner of resale or of seller's intention to sue buyer for difference between contract price and amount ultimately realized on resale, seller was not entitled to recover difference between resale price and contract price as provided in UCC § 2-706, but was entitled to measure of damages prescribed by UCC § 2-708(1). *Miller v. Belk*, 23 N.C. App. 1, 207 S.E.2d 792 (1974).

Office equipment and furniture of a radio station are goods governed by the Code even though the entire radio station and all of its assets are sold as a going concern. *Foster v. Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. N.M. 1967).

The license, good will, real estate, studios, and transmission equipment of a radio station are not goods within Article 2. *Foster v. Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. N.M. 1967).

6. —Crops.

Crops are included within definition of "goods" in UCC § 2-105(1). *Kimball*

County Grain Coop. v. Yung, 200 Neb. 233, 263 N.W.2d 818 (1978).

Although statute of frauds under UCC § 2-201 was applicable to contract for sale of soybeans which constituted goods within meaning of UCC § 2-105 and also constituted under UCC § 2-107 growing crops capable of severance, seller was prohibited from asserting statute of frauds as defense in action on contract where seller admitted that contract was made. *Cargill, Inc., Commodity Mktg. Div. v. Hale*, 537 S.W.2d 667 (Mo. Ct. App. 1976).

Where plaintiff entered into oral contracts with defendant cotton growers for sale of their cotton crops, each involving more than \$500 worth of cotton: (1) under UCC §§ 2-105 and 2-107, sale of cotton was sale of goods and, under UCC § 1-201, was not enforceable unless there was writing sufficient to indicate contract for sale had been made, signed by party against whom enforcement was sought; (2) oral contracts between plaintiff and defendants did not come within agency or broker exception to statute of frauds where there were two separate, independent sets of contracts under which defendants agreed to sell to plaintiff, and plaintiff independently contracted to sell to mills; (3) although exception to statute of frauds exists under UCC § 2-201(3)(b) if party against whom enforcement is sought admits in his pleadings, testimony or otherwise in court that contract for sale was made, such exception did not apply in present case since defendants denied under oath that agreement for sale was made with plaintiff and, although trial court made credibility determination adverse to defendants' testimony, such finding did not constitute finding that "admission" exception applied; (4) defendants were not estopped to assert defense of statute of frauds merely because plaintiff had acted in reliance on oral agreement. *Cox v. Cox*, 292 Ala. 106, 289 So. 2d 609 (1974).

7. —Electricity.

Electricity is "goods", so that 4-year limitations statute of UCC § 2-725 applies to action to recover for damages to electric appliances from supply of excessive voltage. *Helvey v. Wabash County*

REMC, 151 Ind. App. 176, 278 N.E.2d 608, 48 A.L.R.3d 1055 (1972).

Electricity is not a "good" as defined by UCC § 2-105. *Buckeye Union Fire Ins. Co. v. Detroit Edison Co.*, 38 Mich. App. 325, 196 N.W.2d 316 (1972).

8. —Mobile homes and modular home units.

Mobile home that was movable and not permanently affixed to foundation at time of its identification to contract of sale was included within definition of "goods" contained in UCC § 2-105(1). *Duffee v. Judson*, 251 Pa. Super. 406, 380 A.2d 843 (1977).

Acquisition of ownership of motor vehicle is governed by Ohio UCC Art 2 on sales, and not Ohio Certificate of Motor Vehicle Title Act, because motor vehicles and house trailers fall within definition of "goods" contained in Ohio UCC § 2-105(1). *Fuqua Homes, Inc. v. Evanston Bldg. & Loan Co.*, 52 Ohio App. 2d 399, 370 N.E.2d 780, 23 U.C.C. Rep. Serv. 19 (1977) (observing that although perfection of security interest in motor vehicle is governed by Ohio UCC Art 9, plaintiff was asserting ownership interest, and not security interest, in trailer involved in suit).

Modular home units, which were movable at time of sale to buyer and until their subsequent assembly and installation on realty for use as house, were "goods" within meaning of Ohio UCC § 2-105(1). *Fuqua Homes, Inc. v. Evanston Bldg. & Loan Co.*, 52 Ohio App. 2d 399, 370 N.E.2d 780 (1977).

In action by manufacturer of mobile home against dealer and purchaser of unit arising when dealer failed to pay manufacturer purchase price, mobile home fell within definition of "goods" under UCC § 2-105 and purchaser was entitled to protection from manufacturer's claim under UCC § 9-307(a) where purchaser, who took title from merchant entrusted with goods under UCC §§ 2-401 and 2-403, qualified as buyer in ordinary course of business under UCC § 1-201(9), notwithstanding purchaser's failure to request certificate of title of purchase. *Apeco Corp. v. Bishop Mobile Homes, Inc.*, 506 S.W.2d 711 (Tex. Civ. App. 1974), writ ref'd n.r.e., (June 12, 1974).

The Special Term was in error in holding that a mobile home was consumer goods and not a motor vehicle within the meaning of UCC § 9-302, which requires that a financing statement must be filed to perfect a security interest therein. *Recchio v. Manufacturers & Traders Trust Co.*, 35 A.D.2d 769 (4th Dep't 1970).

9. Future goods.

In action by seller of one million gallon water tank against buyer for repudiation of sales contract, in which buyer counter-claimed for breach of contract, water tank constituted goods within meaning of UCC § 2-105(1) even though tank was not in existence when contract was executed. However, under sales contract which required payment 30 days after completion of tank, knowledge by seller that buyer had not completed loan negotiations were not "reasonable grounds for insecurity" within meaning of UCC § 2-609 justifying seller's demand of buyer for personal guarantee or for escrow of entire purchase price. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. Ill. 1976).

Where cotton farmer entered into contract with cotton merchants to sell cotton crop to be produced on 800 acres, where farmer was obligated by terms of lease to pay one-fourth of his cotton crop as rent, and where as result of flood conditions farmer was only able to plant 717 acres rather than expected 1066 acres, cotton merchants were entitled to whole crop and lessor's remedies, if any, were against lessee; when read together UCC §§ 2-102, 2-105 and 2-107 indicated that forward contracts for sale of yet to be grown cotton fell within § 2-402(1) which subordinates rights of seller's unsecured creditors in subject matter to those of buyer. *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572 (5th Cir. 1976).

Transactions in crops are within scope of UCC, and contracts for future delivery of crops, whether or not presently planted, are contemplated. *R.N. Kelly Cotton Merchant, Inc. v. York*, 494 F.2d 41 (5th Cir. Ga. 1974).

Contract for sale of unplanted cotton crop was valid contract for sale of goods for future delivery under UCC § 2-105(2) notwithstanding goods were not in exist-

ence at time of execution of contract. *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

Contract to sell future cotton crop was sale of goods within scope of Article 2 of UCC. *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. Ga. 1974).

Contract for sale of crop was not invalid merely because contract was executed before crop in question was planted. *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

10. Contracts for goods and services.

In action to enforce oral agreement by subcontractor to provide and install school lockers, chalkboards and tack boards, where quoted price did not distinguish between cost of goods supplied and installation charges, subcontractor did not sustain his burden of proving that service aspect of contract was merely incidental to sale of goods aspect, as defined in UCC §§ 2-106(1) and 2-105, and, thus, he failed to sustain his burden of proving that UCC § 2-201 statute of frauds was applicable to contract and barred its enforcement. *Glover Sch. & Office Equip. Co. v. Dave Hall, Inc.*, 372 A.2d 221 (Del. Super. 1977).

Where contract for purchase and installation of prefabricated overhead doors charged lump sum for equipment and installation making it a nondivisible mixed contract, contract was for sale of goods as defined in UCC § 2-105 as service element did not dominate subject matter even though overhead doors were useless without performance of installation services; thus UCC statute of limitations governed. *Meyers v. Henderson Constr. Co.*, 147 N.J. Super. 77, 370 A.2d 547 (L. Div. 1977).

Sod, trees and shrubs sold by nurseryman were goods within meaning of UCC § 2-105(1); thus, contract for sale and installation of trees and shrubs and sale and placing of substantial amount of sod was contract for sale of goods governed by four-year statute of limitations contained in UCC § 2-725(1), notwithstanding contract in question also involved rendering of substantial amount of services. *Burton v. Artery Co.*, 279 Md. 94, 367 A.2d 935 (1977).

Where design services which steel supplier provided under contract were incidental to basic purpose of contract, which was provision of structural steel to be used in construction of container handling facility, essence of transaction was sale of goods and supplier's action for breach of contract was barred by 4-year statute of limitations of UCC § 2-725; fact that specially designed product to fulfill needs of project was required did not negate characterization of transaction as sale of goods. *Belmont Indus., Inc. v. Bechtel Corp.*, 425 F. Supp. 524 (E.D. Pa. 1976).

Contract for sale of various bowling alley equipment, including, inter alia, lanes and ball returns, to be delivered and installed by seller, who warranted that lanes would be free from defects in workmanship and materials and that they would meet "all ABC specifications," was a "transaction in goods" under UCC § 2-102 and came within Article 2 of Code, despite fact that contract involved substantial amounts of labor; items sold under contract were "goods" as defined in UCC § 2-105(1) since they were all items of tangible property, normally in flow of commerce, portable at time of contract;

contract was not construction contract, outside Code coverage, nor was it excluded from coverage merely because it was "mixed" contract for goods and services. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. Iowa 1974).

There is no "sale" to a beauty parlor customer of materials used in giving her treatments, for the materials used in the performance of such services are patently incidental to the treatment itself and do not constitute a purchase of an article by the customer. *Epstein v. Giannattasio*, 25 Conn. Supp. 109, 197 A.2d 342 (1963).

11. Commercial unit.

Where contract of sale stated quantity as all film at certain location and described it as approximately 250,000 pounds, and where agreed price was not lot price but 19 cents per pound, pound was "commercial unit" under UCC § 2-105(6) since it appeared to be unit used by parties and since evidence did not establish that division of material into such units would materially impair its character or value on market or in use. *Askco Eng'g Corp. v. Mobil Chem. Corp.*, 535 S.W.2d 893 (Tex. Civ. App. 1976).

RESEARCH REFERENCES

ALR. Electricity, gas, or water furnished by public utility as "goods" within provisions of Uniform Commercial Code, Article 2 on Sales. 48 A.L.R.3d 1060.

What constitutes "goods" within scope of UCC Article 2. 4 A.L.R.4th 912.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services. 5 A.L.R.4th 501.

Acceptance of some "commercial units" of goods purchased under UCC § 2-601(c). 41 A.L.R.4th 396.

Am Jur. 21 Am. Jur. 2d, Crops § 63.

67 Am. Jur. 2d, Sales §§ 32, 45, 63, 240 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:3. (Answer; defense; contract for sale of investment securities not within Commercial Code provisions relating to sales).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:4. (Instruction to jury; "goods" as including growing crops).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:181 et seq. (Goods and units).

2 Am Law Prod Liab 3d, Warranty Remedies § 18:15.

CJS. 77 C.J.S., Sales §§ 12 et seq.

In action by feed company on installment sales contracts and security agreements providing for loan to enable defendant to purchase two hog-feeder houses from plaintiff's alleged agent, where houses were defective because they caused pigs placed therein for fattening to become sick and to die, and where plaintiff claimed that it merely financed purchase of such houses and did not sell them to defendant, (1) evidence supported finding that plaintiff's alleged agent was its agent in fact and that plaintiff was bound by agent's acts, including agent's sale of hog houses to defendant; (2) fact that plaintiff acted as financing agency in defendant's purchase of such houses did not preclude

finding that plaintiff was also seller of such houses; (3) houses were goods within meaning of UCC § 2-105(1); (4) defendant, by affirmative defense incorporated by reference in counterclaim, gave plaintiff notice of breach of implied warranty of fitness of goods for particular purpose, which notice was required by UCC § 2-607(3)(a); and (5) whether such implied warranty of fitness, which was in force at time of sale, was breached by plaintiff was question of fact to be determined by trial court on remand of case. *Thompson Farms, Inc. v. Corno Feed Prods.*, 173 Ind.

App. 682, 366 N.E.2d 3, 4 A.L.R.4th 58 (1977).

Plaintiff who contracted to compile, edit and publish pamphlets and other printed materials for defendants was entitled to benefit of four year statute of limitations under UCC § 2-725, since printed pamphlets and related materials were goods within meaning of UCC § 2-105(1) and since UCC statute of limitations prevailed over general statute of limitations in action based on contract for sale of goods. *Lake Wales Publishing Co. v. Florida Visitor, Inc.*, 335 So. 2d 335 (Fla. App. 1976).

§ 75-2-106. Definitions: “contract”; “agreement”; “contract for sale”; “sale”; “present sale”; “conforming to contract”; “termination”; “cancellation.”

(1) In this chapter unless the context otherwise requires “contract” and “agreement” are limited to those relating to the present or future sale of goods. “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (Section 2-401) [Section 75-2-401]. A “present sale” means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are “conforming” or conform to the contract when they are in accordance with the obligations under the contract.

(3) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

SOURCES: Codes, 1942, § 41A:2-106; Laws, 1966, ch. 316, § 2-106, eff March 31, 1968.

Cross References — Obligation of good faith, see § 75-1-203.

Course of dealing and usage of trade, see § 75-1-205.

Course of performance or practical construction, see § 75-2-208.

Cure by seller of improper tender or delivery, see § 75-2-508.

JUDICIAL DECISIONS

1. In general; contract for sale.
2. Sale.

3. Present sale.
4. Conforming to contract.

5. Termination or cancellation of contract.
6. Warranties.

1. In general; contract for sale.

Contract governing rental of video monitoring equipment for use in grocery store, evidenced by instrument entitled "lease agreement," referring to parties as "lessor" and "lessee," maintaining title in lessor, and disclaiming warranties, did not constitute buy and sell agreement or security agreement, and thus did not support allegations by lessee that inoperability of equipment amounted to breach of warranty and justified default in lease payments. *Briscoe's Foodland, Inc. v. Capital Assocs.*, 502 So. 2d 619 (Miss. 1986).

With respect to a contract for the sale of a computer system, although the ideas or concepts involved in the custom-designed software remain the seller's intellectual property, the buyer purchases the product of those concepts. Thus, although the product requires efforts to produce, it is nevertheless a product which, although intangible, is more readily characterized as "goods," rather than "services," since intangibles may be "goods" under UCC § 2-106(1). *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), rev'd on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

In action by buyer of computer system for damages for system's failure to function properly, court held (1) that parties' designation under UCC § 1-105(1) of Massachusetts law to govern their sales contract was immaterial, since buyer's breach-of-contract claims were governed by limitation period contained in UCC § 2-725(1), which had been adopted by both New York and Massachusetts; (2) that contract in suit was not one for performance of services, as alleged by buyer, but was one for purchase of goods within meaning of UCC § 2-106(1); (3) that action was not timely commenced by buyer, since breach had occurred in January, 1971 and buyer did not commence suit until August 14, 1975, which was more than four years after cause of action accrued; (4) that UCC § 2-725(2), which deals with warranty that explicitly extends to future performance and provides

that discovery of breach must await such performance, did not apply, since warranty under UCC § 2-725(2) must expressly refer to the future and implied warranty alleged by buyer, by its very nature, did not do so; and (5) that seller's attempts to repair computer system did not toll running of statute of limitations prescribed by UCC § 2-725(1). *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), rev'd on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

As indicated in UCC §§ 2-102 and 2-106(1), the Uniform Commercial Code applies only to transactions in goods and not to service or repair contracts. *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

Contract for sale of trucks was not contract for sale of goods and, thus, was not governed by four-year statute of limitations contained in UCC § 2-725(1) where contract was executed simultaneously with contract for sale of truck manufacturing plant and where contract for sale of trucks was merely incidental and collateral to main object of effecting transfer of truck manufacturing plant. *Dynamics Corp. of Am. v. International Harvester Co.*, 429 F. Supp. 341 (S.D.N.Y. 1977).

In action by materialman against property owner to recover for materials delivered to subcontractor where it was alleged that owner orally agreed to "guarantee" payment for materials previously delivered to subcontractor, in consideration for which materialman agreed to continue furnishing materials to job and to forebear from filing claim of lien against owner's real property, enforcement of alleged oral "guarantee" contract was not barred by statute of frauds, UCC § 2-201; materials supplied at instance of owner after promise sued on were delivered pursuant to new agreement and were "received and accepted" within contemplation of UCC § 2-201(3)(c) and thus statute of frauds was inapplicable as to them; with respect to materials supplied before "guarantee" contract sued on, they were not delivered pursuant to "contract for sale" within definition thereof in UCC § 2-106 and statute was thus inapplicable as to them. *Jim & Slim's Tool Supply, Inc. v. Metro Commu-*

nities Corp., 328 So. 2d 213 (Fla. App. 1976).

Building subcontract for electrical work under which subcontractor had obligation to furnish exterior unit switchgear was not "contract for sale" within meaning of UCC § 2-106(1); thus, UCC § 2-209(1) was inapplicable and alleged modification for which no consideration was given was ineffective. *J & R Elec. Div. of J.O. Mory Stores, Inc. v. Skoog Constr. Co.*, 38 Ill. App. 3d 747, 348 N.E.2d 474 (4th Dist. 1976).

Contract for construction of anhydrous ammonia plant was intended by parties as one for provision of services, exclusively, not contract of sale, where, inter alia, throughout contract plaintiff was denominated "Owner", not buyer, and defendant was denominated "Contractor", not seller, where contract placed ultimate control of purchasing decision in hands of plaintiff, not defendant, and where, under terms of contract that "title to all machinery and equipment and supplies for the work shall, as between Owner and Contractor, be in Owner," defendant never had title to any component part of the plant, including defective converter. *Nitrin, Inc. v. Bethlehem Steel Corp.*, 35 Ill. App. 3d 577, 342 N.E.2d 65 (1st Dist. 1976).

Contract to sell future cotton crop was sale of goods within scope of Article 2 of UCC. *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. Ga. 1974).

Customer's contract with broker for purchase of stock was contract of agency, rather than contract for sale under UCC § 2-106, and UCC § 8-319 [Repealed] statute of frauds pertaining to contract for sale of securities was therefore inapplicable. *Hutton v. Zaferson*, 509 S.W.2d 950 (Tex. Civ. App. 1974), *writ ref'd n.r.e.*, (Oct. 2, 1974).

Contract under which subcontractor was obligated to "furnish and erect" structural steel for construction of bridge was contract for rendition of services, a work, labor and materials contract, rather than contract for sale of goods, the steel beams involved. *Schenectady Steel Co. v. Bruno Trimpoli Gen. Constr. Co.*, 43 A.D.2d 234 (3d Dep't 1974), *aff'd*, 34 N.Y.2d 939, 359 N.Y.S.2d 560, 316 N.E.2d 875 (1974).

Agreement to furnish all concrete for slab and to furnish all labor to pour and finish was contract for sale within meaning of § 2-106, though including agreement for work and labor. *Port City Constr. Co. v. Henderson*, 48 Ala. App. 639, 266 So. 2d 896 (Civ. App. 1972).

Contract with interior decorator to re-furnish room was contract for sale not service where price for new furniture "would include compensation for plaintiff's interior decorating services," and recitation in contract that these services would "be performed for a nominal fee" was mere surplusage. *Norman Schuman Interiors, Inc. v. Sacks*, 479 S.W.2d 200 (Mo. Ct. App. 1972).

Transaction between manufacturer of woolen cloth and supplier of card waste according to which manufacturer stored card waste until it was needed in its mill operation, and was billed only when goods were actually used, created no contract for sale by passage of title for price. *Meinhard-Commercial Corp. v. Hargo Woolen Mills*, 112 N.H. 500, 300 A.2d 321 (1972).

Contract providing that upon satisfactory completion of machine meeting defendant's specifications, defendant would purchase machine and plaintiff would sell both machine and exclusive right to use ideas and improvements involved therein; held, contract was one for sale of goods. *Knisely v. Burke Concrete Accessories, Inc.*, 2 Wash. App. 533, 468 P.2d 717 (1970), *review denied*, 78 Wash. 2d 994 (1970).

Agreement by which defendant was to pick up, advertise, and sell furniture owned by plaintiff was not in writing; amount involved was in excess of \$500; relationship between plaintiff and defendant was that of principal-factor rather than buyer-seller; held, agreement was not "contract for sale of goods." *Blank v. Dubin*, 258 Md. 678, 267 A.2d 165 (1970).

Alleged oral contract under which A had for over 30 years distributed and sold baked goods produced by B held to be contract for sale of goods within Article 2 so as to require reasonable notice before termination under Code § 2-309(3); contention that this was "sales distribution" arrangement rejected. *Mastrian v. Wil-*

liam Freihofer Baking Co., 45 Pa. D. & C.2d 237 (1968).

2. Sale.

Computer hardware and software package agreement, under which defendant was to install completed system and train plaintiff's employees in its use, whereupon plaintiff would take over complete supervision of system, was agreement for sale of "goods" rather than "services." Triangle Underwriters, Inc. v. Honeywell, Inc., 457 F. Supp. 765 (E.D.N.Y. 1978), rev'd on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

In prosecution for peddling goods without a license, defendants' contention that they were not guilty of "selling" goods because their activities had involved only giving of lollypops to passersby with simultaneous request for money, which was to be used on behalf of a church, could not be sustained in view of UCC § 2-106(1), which provides that a "sale" consists in passing of title to goods from seller to buyer on payment of a price. People v. Wood, 93 Misc. 2d 25 (1978).

In action against lessee of two refrigerator display cases for accelerated rent allegedly due lessor for lessee's breach of lease agreement, court held, on affirming judgment for lessee, (1) that transaction was sale within meaning of UCC § 2-106(1), since shipping order executed simultaneously with alleged "lease" gave lessee option to obtain, at no further cost, title to refrigerator cases at end of lease, (2) that waiver of any warranties of merchantability or fitness for particular purpose in lease agreement was not conspicuous under UCC § 2-316(2) and thus was ineffective, and (3) that lessee did not lose right to rescind sale agreement by failure to give lessor adequate opportunity to "cure" under UCC § 2-508(1), since replacement refrigerator cases purchased elsewhere by lessee were not installed until more than one month after lessor's attempt to cure defective cases sold to lessee. Transcontinental Refrigeration Co. v. Figgins, 179 Mont. 12, 585 P.2d 1301 (1978).

Where contract for purchase of burglar alarm system specifically stated that the materials were to remain the property of the "seller," there was no sale within

meaning of Uniform Commercial Code. Craig v. American Dist. Tel. Co., 91 Misc. 2d 1063 (1977).

To be buyer in ordinary course of business, so as to take free of security interest created by seller, there must be a sale which under UCC § 2-106(1) consists in passing of title from seller to buyer for a price. Moreover, under UCC § 2-401, title passes at time of physical delivery of goods to buyer, unless it is otherwise explicitly agreed. Integrity Ins. Co. v. Marine Midland Bank-Western, 90 Misc. 2d 868 (1977).

In action to enforce oral agreement by subcontractor to provide and install school lockers, chalkboards and tack boards, where quoted price did not distinguish between cost of goods supplied and installation charges, subcontractor did not sustain his burden of proving that service aspect of contract was merely incidental to sale of goods aspect, as defined in UCC §§ 2-106(1) and 2-105, and, thus, he failed to sustain his burden of proving that UCC § 2-201 statute of frauds was applicable to contract and barred its enforcement. Glover Sch. & Office Equip. Co. v. Dave Hall, Inc., 372 A.2d 221 (Del. Super. 1977).

Personal services to be rendered by plaintiff in developing defendant's nursing home constituted "price" of stock agreed to be transferred by defendant in exchange for plaintiff's services, so as to cause agreement to come with definition of "sale" in UCC § 2-106(1) as "passing of title from the seller to the buyer for a price." Burns v. Gould, 172 Conn. 210, 374 A.2d 193 (1977).

Reasonable interpretation of term "net sales value of production," as used in business interruption insurance policy, did not require attributing to it technical definition of "sale" as that term is defined in UCC § 2-106(1). Travelers Indem. Co. v. Kassner, 322 So. 2d 80 (Fla. App. 1975), cert. denied, 333 So. 2d 41 (Fla. 1976).

Furnishing of blood to patient by blood banks and hospital was adjunct to services performed by hospital in endeavor to restore patient's health and thus was not "sale" giving rise to any warranty of fitness or merchantable quality. Consequently, actions for breach of warranty against blood banks and hospital were not

maintainable. *Jennings v. Roosevelt Hosp.*, 83 Misc. 2d 1 (1975).

In action by purchasers of new homes against contractor who built homes and seller of bricks used therein for damages resulting from defective brick: (1) contracts between purchasers and contractor did not provide for "sale" as that term is used in UCC Article 2 and, thus, were not governed by four-year statute of limitations contained in § 2-725, but rather by general six-year limitations for breach of contract; (2) conversely, only relationship between purchasers and seller of bricks was that of buyers and seller, which was governed by UCC Article 2, and, since more than four years passed between respective purchases from seller and alleged breach of warranty, action was barred. *DeMatteo v. White*, 233 Pa. Super. 339, 336 A.2d 355 (1975).

Contract to install, service and maintain vending machines on defendant's premises did not effect passing of title, and was not "sale" to which UCC would apply. *George F. Mueller & Sons v. Northern Ill. Gas Co.*, 12 Ill. App. 3d 362, 299 N.E.2d 601 (1st Dist. 1973).

Sale of truck took place when buyer took possession of truck from seller, and title effectively passed to buyer, even though buyer did not have possession of certificate of title. *Bunch v. Signal Oil & Gas Co.*, 505 P.2d 41 (Colo. Ct. App. 1972).

Where plaintiff obtained wrinkle cream, which was subject of breach of warranty action, as result of purchasing \$5 of cosmetics, transaction was sale rather than gift. *Sheppard v. Revlon, Inc.*, 267 So. 2d 662 (Fla. App. 1972).

Blood transfusion was sale of "goods" so as to be subject to strict liability. *Reilly v. King County Cent. Blood Bank, Inc.*, 6 Wash. App. 172, 492 P.2d 246, 10 U.C.C. Rep. Serv. 342 (1971) (note that transfusions in issue occurred prior to UCC amendment declaring that under certain circumstances blood transfusions are not covered by any implied warranty).

Seller of machinery and equipment shipped grinding machine to itself, in care of manufacturer of machine parts who was to demonstrate and sell machine to third-party buyer at fixed price with title to pass to latter on payment in full to

seller with manufacturer to receive 10% of invoice price as commission; held, transaction was not a sale but a price-fixing consignment. *Columbia Int'l Corp. v. Kempler*, 46 Wis. 2d 550, 175 N.W.2d 465, 40 A.L.R.3d 1066 (1970).

Shrimp, chicken, and loin ribs offered for sale and sold in buckets but fried or otherwise cooked after a customer places an order and after such frying or other cooking packaged or wrapped in the bucket container fall within the terms of subd 5 of § 193 of the Agriculture and Markets Law since according to the terms of subd 1 of the above statute a sale consists in the passing of title from the seller to the buyer for a price and according to the terms of § 2-401, subd 2, unless otherwise explicitly agreed title passes to the buyer at the time at which the seller completes his performance with reference to the physical delivery of the goods. *Wickham v. Levine*, 47 Misc. 2d 1 (1965), aff'd, 24 A.D.2d 1035, 264 N.Y.S.2d 785 (3 Dep't 1965), aff'd, 23 N.Y.2d 923, 298 N.Y.S.2d 507, 246 N.E.2d 357 (1969).

When auctioneer sold automobile in customary manner by accepting buyer's check and remitting to seller amount of sale price less commission, auctioneer was agent for seller until car was sold and did not "buy" car from seller and "resell" it to buyer; therefore auctioneer was not entitled to possession of automobile when buyer's payment check was dishonored. *Tulsa Auto Dealers Auction v. North Side State Bank*, 431 P.2d 408 (Okla. 1966).

Plaintiff's purchase of stock from a named individual at the request of defendant would serve as consideration for defendant's agreement to transfer common stock purchase warrants to the plaintiff; and the transaction between plaintiff and defendant constituted a "sale" within the meaning of the Uniform Commercial Code, which to be enforceable must be in writing. *Mortimer B. Burnside & Co. v. Havener Sec. Corp.*, 25 A.D.2d 373 (1st Dep't 1966).

There is no "sale" to a beauty parlor customer of materials used in giving her treatments, for the materials used in the performance of such services are patently incidental to the treatment itself and do not constitute a purchase of an article by

the customer. *Epstein v. Giannattasio*, 25 Conn. Supp. 109, 197 A.2d 342 (1963).

For the purpose of a criminal prosecution for selling narcotics, it is sufficient to show a participation in the commerce and it is not necessary to show that there was an actual transfer of title. *State v. Weissman*, 73 N.J. Super. 274, 179 A.2d 748, 93 A.L.R.2d 1001 (App. Div. 1962), certification denied, 37 N.J. 521, 181 A.2d 782 (1962).

The transfer of title is an implicit element of a sale under the Code. *State v. Weissman*, 73 N.J. Super. 274, 179 A.2d 748, 93 A.L.R.2d 1001 (App. Div. 1962), certification denied, 37 N.J. 521, 181 A.2d 782 (1962).

An oral agreement between property owners and a handyman whereby the handyman agreed to purchase a heating unit for owners and install it in the owners' building did not create between the parties a relationship of buyer and seller, so as to entitle the owners to a recovery against the handyman on the ground of a breach of implied warranty of merchantability and of fitness for the purpose. *Victor v. Barzaleski*, 19 Pa. D. & C.2d 698 (1959).

In *National Dairy Products Corp. v. Gleeson* (1958) 16 Pa D & C.2d 390, the court, in determining whether there was a taxable sale at retail when motor vehicles owned by two corporations were transferred, as part of a plan of merger, to a third surviving corporation, quoted UCC § 2-106(1) defining a sale as "the passing of title from the seller to the buyer for a price." *National Dairy Prods. Corp. v. Gleeson*, 16 Pa. D. & C.2d 390 (1959).

This section made no substantial change in the definition of a sale of goods under the Uniform Sales Act, wherein it was stated that "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." *E.I. Du Pont De Nemours & Co. v. Kaufman & Chernick, Inc.*, 337 Mass. 216, 148 N.E.2d 634 (1958).

Sale of machines was consummated in Ohio, where the sales contract therefor was negotiated, acknowledged and accepted in Ohio by defendant's sales agents, the machines were manufactured

at defendant's plant in that state, and shipped to purchaser in Michigan, *f. o. b.* city of manufacture. *Welding Eng'rs, Inc. v. Aetna-Standard Eng'g Co.*, 84 Ohio Law Abs. 283, 169 F. Supp. 146, 119 U.S.P.Q. 489 (W.D. Pa. 1958).

Transfer of title took place on delivery to the carrier where goods were manufactured by the seller and shipped *F. O. B.* from his city to the buyer's city. *Welding Eng'rs, Inc. v. Aetna-Standard Eng'g Co.*, 84 Ohio Law Abs. 283, 169 F. Supp. 146, 119 U.S.P.Q. 489 (W.D. Pa. 1958).

The word "sales," as used in the statute prescribing venue for an action for damages where sales infringe a patent, is to be given the same meaning as under the Uniform Commercial Code. *Welding Eng'rs, Inc. v. Aetna-Standard Eng'g Co.*, 84 Ohio Law Abs. 283, 169 F. Supp. 146, 119 U.S.P.Q. 489 (W.D. Pa. 1958).

The "passage of title" concepts of the Uniform Commercial Code have no application to zoning regulations, in determining whether a building is a warehouse or a store for retail sales on the premises. *Sears, Roebuck & Co. v. Power*, 390 Pa. 206, 134 A.2d 659 (1957).

3. Present sale.

Contracts under which farmers delivered soybeans to warehouseman for storage and subsequent sale at price to be agreed on at later date, and pursuant to which weight tickets or statement sheets were issued as receipts with words "hold," "stored," or "on storage" appearing on such receipts together with name of individual farmer, were bailments and not present sales with price to be fixed in the future within meaning of UCC § 2-106(1), UCC § 2-204(3), and UCC § 2-305(1), since such code sections did not contemplate farmers' right at their discretion to require a return of the same or equivalent fungible goods. *NYTCO Servs., Inc. v. Wilson*, 351 So. 2d 875, 23 U.C.C. Rep. Serv. 25 (Ala. 1977) (stating that fact that weight tickets and statement sheets issued as receipts had words indicating that soybeans were being stored also refuted contention that transactions were sales).

Transaction whereby seller, who was indebted to buyer, agreed to sell tractor to buyer in return for cancellation of seller's indebtedness constituted present, binding

and completed sale, and title to tractor passed to buyer at time of execution of contract of sale, notwithstanding sales agreement provided that tractor would remain on seller's premises until needed by buyer and during that period of time seller would have right to sell tractor, and written agreement between seller and buyer was adequate as contract of sale under UCC since it contained date, identified buyer and seller and specified exactly model, make and serial number of tractor, listed amount and nature of consideration and was signed by agent of both parties. *Ace Supply, Inc. v. Rocky-Mountain Mach. Co.*, 96 Idaho 183, 525 P.2d 965 (1974).

An Illinois florist who receives interstate telegraphic orders for retail sales of flowers in Illinois is a seller, his sales are present sales made in the state whether the contract is unilateral or bilateral, and title to the flowers passes in Illinois, and the sale is not one for resale which would be true if the seller were the out-of-state florist who telegraphs the order; and the Illinois florist is subject to that state's retailers' occupational tax on such sales. *O'Brien v. Isaacs*, 32 Ill. 2d 105, 203 N.E.2d 890 (1965).

4. Conforming to contract.

In replevin action by buyer against seller to obtain possession of Ferrari sports car of limited availability ordered for buyer from another dealer, where order form and bill of sale identified car by name, year of manufacture, model number, and serial number, and stated that car was "used" car and that buyer had made \$15,000 deposit on purchase price of \$17,500; where half of such deposit was paid by buyer's personal check (on which was written name of car, year of manufacture, and serial number) and other half by cashier's check issued by bank making loan to buyer, which check was made payable to joint order of both buyer and seller and which contained restrictive indorsement requiring "payee" to record first lien on car in bank's favor; where car, when received by seller from other dealer, proved to be virtually new racing vehicle, not intended for highway use, that seller wished to retain for himself; and where seller informed buyer that he would try to

locate another Ferrari for him, sale was governed by UCC Art 2 and buyer was entitled to maintain replevin action, despite seller's contention that since car was "new" it was not what buyer had ordered, since (1) under UCC § 2-209, parties had modified their prior oral agreement concerning sale of "used" car by entering into written agreement, evidenced by purchase order and bill of sale prepared by seller, which identified car sold by make, year of manufacture, model number, and serial number; (2) parties' modification of prior oral agreement also was evidenced by seller's acceptance of buyer's personal check and by negotiation by both seller and buyer of bank cashier's check bearing restrictive indorsement; (3) under UCC § 2-106(2), car delivered to seller conformed to modified contract; (4) buyer had right under UCC § 2-601(b) and § 2-606(1)(a) to accept car that did not conform to purchase order, had delivery been tendered by seller; and (5) since car was identified to contract by purchase order and bill of sale which were in buyer's possession, title to car passed to buyer under UCC § 2-401(3)(a), even though seller retained vehicle. *Tatum v. Richter*, 280 Md. 332, 373 A.2d 923 (1977).

Contract for sale of crop was not invalid merely because contract was executed before crop in question was planted. *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

The delivery of a generator to a job site, while identifying the goods to the contract, did not amount to a delivery of goods or the performance of obligations conforming to the contract, and could not constitute such a delivery and performance until the generator had been installed, started up, and field tests completed to the satisfaction of the government as was called for by the contract. Until then, risk of loss remained with the seller regardless of where title may have stood. *William F. Wilke, Inc. v. Cummins Diesel Engines, Inc.*, 252 Md. 611, 250 A.2d 886 (1969).

5. Termination or cancellation of contract.

Right to cancel contract under UCC § 2-703(f) and § 2-106(4) differs from right to terminate under UCC § 2-106(3),

and does not arise out of any termination provision in the agreement. Thus, where manufacturer of automobile air conditioners cancelled distributorship agreement with distributor because of distributor's chronic overdue balances and failure to pay note, manufacturer did not have to resort to termination procedures in distributorship agreement, and distributor could not claim unlawful termination of such agreement. *Frigiking, Inc. v. Century Tire & Sales Co.*, 452 F. Supp. 935 (N.D. Tex. 1978).

A contract for the sale of from 10,000 to 50,000 tons of coal at a fixed price over a one-year period which provided that the seller might terminate the agreement by written notice, was effectively terminated by a letter in which the seller announced it would deliver no more than 10,000 tons, and seller was released from all future obligations thereunder. *United States v. P. & D. Coal Mining Co.*, 251 F. Supp. 1005 (W.D. Ky. 1964), *aff'd*, 358 F.2d 619 (6th Cir. Ky. 1966).

6. Warranties.

A cause of action, which was based on breach of warranty and premised on the alleged sale by physicians of an unsafe drug to a decedent, alleges, notwithstanding the use of the term "sold", that the drug was furnished to the decedent as an incidental part of the services rendered in the course of medical treatment and, under the circumstances, there was no sale within the meaning of the Uniform Commercial Code so as to give rise to any express or implied warranties. Accordingly, the cause of action was properly dismissed. *Osborn v. Kelley*, 61 A.D.2d 367 (3d Dep't 1978).

In action against pharmacist and physician to recover damages for stroke allegedly suffered as result of oral contraceptive drug available only by prescription, implied warranties of merchantability under UCC § 2-314 and of fitness under UCC § 2-315 were not applicable to transaction with pharmacist, since pharmacist filled prescription as issued by physician. Furthermore, physician was not "seller" within meaning of UCC § 2-106(1) by virtue of issuing prescription for oral contraceptive drug and, thus, he was not subject to liability on theory of breach of

implied warranties of merchantability under UCC § 2-314 and of fitness under UCC § 2-315. *Batiste v. American Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (1977), *cert. denied*, 292 N.C. 466, 233 S.E.2d 921 (1977).

In action by purchaser of new automobile against dealer seeking revocation of acceptance and damages, contract provision between dealer and purchaser to effect that there were no warranties express or implied made by either dealer or manufacturer, other than manufacturer's warranty against defective materials, although sufficient to exclude all warranties by dealer except implied warranty of merchantability, did not eliminate implied warranty of merchantability in manner required by UCC § 2-316, and evidence that automobile battery was defective as result of poor materials or poor workmanship was sufficient to establish breach of warranty of merchantability; however, there was no evidence that such nonconformity substantially impaired value of car to purchaser as required by UCC § 2-608 before he could revoke his acceptance of automobile and recover price paid; thus, purchaser's remedy was action for damages and, since purchaser failed to present evidence to support award based on proper measure of damages, i.e., value of automobile in its non-conforming condition at time and place of acceptance, purchaser was not entitled to recover damages. *Bill McDavid Oldsmobile, Inc. v. Mulcahy*, 533 S.W.2d 160 (Tex. Civ. App. 1976).

In action by customer against self-service food store on theory of breach of warranty under UCC § 2-314, for injuries sustained when soft drink bottle exploded while customer was placing it on check-out counter, directed verdict in favor of store was erroneous where evidence established that store placed goods on shelves with specified price mark and customer removed bottle with intent to pay for it; such acts constituted a contract to sell within UCC § 2-106(1), giving rise to warranty protection, even though customer had not yet paid for goods and title had not yet passed. *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976).

Contract documents under which refrigeration units were leased to defendant for term of four years, at specified monthly rental, and which gave defendant option to purchase equipment at termination of four-year lease upon payment of nominal sum (i.e., amount of sales tax on transaction), constituted contract for sale of goods subject to provisions of Uniform Commercial Code. Contract being one for sale of goods there was implied warranty of soundness by plaintiff-seller under UCC § 2-314 and defendant-purchaser was entitled to benefit thereof unless such implied warranty was excluded in accordance with provisions of UCC § 2-316. Repair clause which made lessee-purchaser responsible for necessary repairs, maintenance, operation and replacements, whatever its effect, was not effective to exclude implied warranty of fitness by seller. *Mid-Continent Refrigerator Co. v. Way*, 263 S.C. 101, 208 S.E.2d 31 (1974).

Lease agreement leasing automobile for period of 24 months, though it placed burden of repairs, taxes, insurance, etc. upon lessee, was not sale as defined by UCC § 2-106, and provisions of UCC § 2-316 governing exclusion or modification of warranties did not apply; thus, provisions of lease agreement that eliminated any implied warranty of law and the right to recover particular damages claimed against owner-lessor or assignee were effective, notwithstanding lease agreement did meet requirements of UCC § 2-316. *Mays v. Citizens & S. Nat'l Bank*, 132 Ga. App. 602, 208 S.E.2d 614 (1974).

In action by drug user seeking to recover damages for personal injuries resulting from bloodclot that allegedly developed as result of plaintiff's use of defendant's oral contraceptive, plaintiff failed to state cause of action against manufacturer under UCC § 2-715 for breach of warranty; since defendant gave allegedly defective product to plaintiff's physician as free sample and there was no payment by physician to defendant, (1) there was no sale which would form basis of cause of action, and, furthermore, (2) there was no privity between the parties. *Allen v. Ortho Pharmaceutical Corp.*, 387 F. Supp. 364 (S.D. Tex. 1974).

In action by plaintiff to recover for breach of agreement termed a "lease," under which defendant agreed to lease business machines from plaintiff for 60-month-term, with title to pass to defendant at end of term, implied warranties of merchantability and fitness under UCC §§ 2-314 and 2-315 were held applicable to transaction whether it was deemed lease or bailment agreement. *Quality Acceptance Corp. v. Million & Albers, Inc.*, 367 F. Supp. 771 (D. Wyo. 1973).

The express warranty provisions of UCC § 2-313 and the warranty of fitness implied by UCC § 2-315 are parts of Article 2 of the UCC, which is clearly limited to sales of goods, and which will not be applied, in action to recover for injuries caused by runaway golf cart, to bailment for hire. *Bona v. Graefe*, 264 Md. 69, 285 A.2d 607, 48 A.L.R.3d 660 (1972).

RESEARCH REFERENCES

ALR. Contract for co-operative marketing as agency or sale. 12 A.L.R.2d 130.

Electricity, gas, or water furnished by public utility as "goods" within provisions of Uniform Commercial Code, Article 2 on Sales. 48 A.L.R.3d 1060.

What constitutes a transaction, a contract for sale, or a sale within scope of UCC Article 2. 4 A.L.R.4th 85.

Applicability of UCC Article 2 to mixed contracts for sale of goods and services. 5 A.L.R.4th 501.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 36, 89.

50 Am. Jur. 2d, Letters of Credit § 3, 5, 10, 19.

67 Am. Jur. 2d, Sales §§ 10, 80 et seq., 166, 167, 176.

68 Am. Jur. 2d, Secured Transactions §§ 13, 31, 106.

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:91. (Instruction to jury; "sale" defined).

6 Am. Jur. Pl & Pr Forms (Rev), Secured Transactions, Form 9:92. (Instruction to jury; "contract for sale" defined).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:201 et seq. (Existence and terms of agreement).

CJS. 77 C.J.S., Sales §§ 1 et seq., 126 et seq.

Law Reviews. Note, Uniform Commercial Code — Should the U.C.C. Fur-

nish Rules of Decision in Equipment Leasing Controversies? 7 Miss. C. L. Rev. 209, Spring, 1987.

§ 75-2-107. Goods to be severed from realty; recording.

(1) A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale.

SOURCES: Codes, 1942, § 41A:2-107; Laws, 1966, ch. 316, § 2-107; Laws, 1977, ch. 452, § 3, eff from and after April 1, 1978.

Cross References — "Goods" as including identified things attached to realty, see § 75-2-105.

Statute of frauds, see § 75-2-201.

Secured transactions, see §§ 75-9-101 et seq.

Recording of deeds and conveyances, generally, see §§ 89-5-1, 89-5-3.

JUDICIAL DECISIONS

1. In general.
2. Minerals or the like.
3. Structures.
4. Timber (prior to 1977 amendment).
5. Crops or timber.
6. Recording.

1. In general.

In *Dean Vincent, Inc. v. Redisco, Inc.* (1962) 232 Or 170, 373 P2d 995, it was stated that under the applicable law and under the thereafter applicable Uniform Commercial Code "the determination of the character of the goods sold as to

whether real or personal property is left to the common law"; the conclusion reached was that wall to wall carpeting constitutes a fixture. *Dean Vincent, Inc. v. Redisco, Inc.*, 232 Or. 170, 373 P.2d 995 (1962).

2. Minerals or the like.

UCC applies to sales of natural gas, and therefore governs sales contract between oil company and royalty owners in certain Mississippi oil and gas leases; in action by royalty owners seeking unrecovered payments from oil company under leases, gas underground is future goods pursuant to

§ 75-2-105, and thus no particular gas is sold until it is identified or brought to surface; accordingly, under § 75-2-107(1), contracts are contracts to sell and only become effective as sales when gas is severed from land; where sales contract itself provides that title to gas passes when gas is delivered, gas was not sold until it was produced, and accordingly, basis of royalty should be market value at well at time of production and delivery. *Piney Woods Country Life Sch. v. Shell Oil Co.*, 726 F.2d 225 (5th Cir. 1984), reh'g denied, 750 F.2d 69 (5th Cir. 1984), cert. denied, 471 U.S. 1005, 105 S. Ct. 1868, 85 L. Ed. 2d 161 (1985).

In an action to recover the purchase price for the sale of borrow material from plaintiff seller's land, the oral contract was not barred by the statute of frauds § 75-2-107, where the oral contract constituted a revocable license to the purchaser which permitted it to remove the borrow material from the seller's land for a stated consideration, where the seller did not revoke the license, and where the purchaser allegedly removed the borrow material but refused to pay for it. *Bell v. Hill Bros. Constr. Co.*, 419 So. 2d 575 (Miss. 1982).

Statute of frauds in UCC § 2-201(1) did not apply to oral contract under which buyer of "borrow material" (fill soil), instead of seller, was to remove such material from seller's land, since UCC § 2-107(1)—which declares that contract for sale of "minerals or the like" is contract for sale of "goods" if such minerals are to be severed by seller—applies, as stated in Official Comment 1, only when minerals are to be severed by seller. As a result, oral contract for sale of "borrow material" in suit was governed by statute of frauds affecting realty. *Bell v. Hill Bros. Constr. Co.*, 419 So. 2d 575 (Miss. 1982).

UCC § 2-107(1) applies only if the minerals are to be severed by the seller. If the buyer is to sever, such transactions are considered to be contracts affecting land to which the statute-of-frauds section of the Uniform Commercial Code (UCC § 2-201) does not apply, although such contracts must conform to the statute of frauds that affects the transfer of interests in land. *De Luca v. C.W. Blakeslee &*

Sons, 174 Conn. 535, 391 A.2d 170, 25 U.C.C. Rep. Serv. 38 (1978) (holding that UCC § 2-107(1) did not apply to contract between landowner and highway contractor for sale of fill soil that was to be severed from seller's land by contractor-buyer).

Contract for sale of natural gas was contract for sale of "goods" under Ohio version of UCC § 2-107(1), even though Ohio had not adopted 1972 amendment to UCC § 2-107(1) which adds phrase "including oil and gas" to statute's language. *Columbia Gas Transmission Corp. v. Larry H. Wright, Inc.*, 12 Ohio Op. 3d 95, 443 F. Supp. 14 (S.D. Ohio 1977).

Seller's remedies of UCC do not apply to vendors of oil and gas leases: (1) remedies provided in UCC §§ 2-703 and 2-706 are inapposite to protect seller of oil and gas lease, (2) definition of "goods" in UCC § 2-105(1) clearly excludes interests of oil and gas lessee, and (3) UCC § 2-107(1), dealing with goods to be severed from realty, provides that contract for sale of timber, minerals or like is contract for sale of goods within article 2, if they are to be severed by seller, but both Official Comment and Oklahoma Code Comment to § 2-107 recognize that Code applies only if timber, minerals, etc., are to be severed by seller. *Casper v. Neubert*, 489 F.2d 543 (10th Cir. Okla. 1973).

3. Structures.

Under UCC § 2-107(1), oral agreement whereby buyer agreed to pay sellers \$500 in exchange for which buyer or his agents would be permitted to enter upon sellers' land for purpose of dismantling and carrying off structure was not contract for sale of goods since buyer rather than seller was to sever structure from land; thus, statute of frauds relating to interests in real property was applicable and alleged contract was unenforceable in absence of signed writing. *Rosen v. Hummel*, 47 A.D.2d 782 (3d Dep't 1975).

Sale of structure to be removed from appropriated land is within purview of Code provision relating to goods to be severed from realty and therefore provisions of Code § 2-401 are not applicable. *Jonus v. Taddio*, 61 Misc. 2d 176 (1969).

4. Timber (prior to 1977 amendment).

Contract for sale of cordwood business, including hardwood stumpage growing on

defendant's land and certain equipment used in cutting and hauling wood, was transaction in "goods" governed by Sales Article of UCC, even though written contract was headed "Sale of Wood Business." *Melms v. Mitchell*, 266 Or. 208, 512 P.2d 1336, 65 A.L.R.3d 376 (1973).

Agreement between seller and buyer for sale and purchase of standing timber did not involve sale of goods movable at time of identification to contract and sale aspect of transaction was not covered by Article 2 of Code. *Barry v. Bank of N.H.*, 112 N.H. 226, 293 A.2d 755 (1972).

5. Crops or timber.

In action between timber companies wherein plaintiff charged that defendant fraudulently induced plaintiff to purchase certain property by orally promising that defendant, which had previously acquired timber rights to such property, would sell or trade timber to plaintiff after plaintiff subsequently purchased property, alleged promise to convey timber rights was contract for sale of "goods" subject to statute of frauds and sales provisions of UCC. *T.K. Stanley, Inc. v. Scott Paper Co.*, 793 F. Supp. 707 (S.D. Miss. 1992), *aff'd*, 5 F.3d 529 (5th Cir. 1993).

Oral contract allegedly made between wood dealer and mill did not come within brokerage exception to statute of frauds because dealer actually acquired interest in wood; promissory estoppel is not available as exception to statute of frauds applicable to such an agreement. *Futch v. James River-Norwalk, Inc.*, 722 F. Supp. 1395 (S.D. Miss. 1989), *aff'd*, 887 F.2d 1085 (5th Cir. 1989).

Oral contract to supply timber to paper mill was contract for sale of timber not a brokerage contract and was therefore unenforceable due to lack of writing evidencing contract; agreement did not fall within any exceptions to UCC Statute of Frauds. *Futch v. James River-Norwalk, Inc.*, 722 F. Supp. 1395 (S.D. Miss. 1989), *aff'd*, 887 F.2d 1085 (5th Cir. 1989).

Timber, whether cut or to be cut, falls within the definition of "goods" contained in § 75-2-105(1), and by virtue of § 75-2-107(2), the Sales Article of the Mississippi Uniform Commercial Code expressly applies to timber sales. *Bay Springs Forest*

Prods., Inc. v. Wade, 435 So. 2d 690 (Miss. 1983).

Although statute of frauds under UCC § 2-201 was applicable to contract for sale of soybeans which constituted goods within meaning of UCC § 2-105 and also constituted under UCC § 2-107 growing crops capable of severance, seller was prohibited from asserting statute of frauds as defense in action on contract where seller admitted that contract was made. *Cargill, Inc., Commodity Mktg. Div. v. Hale*, 537 S.W.2d 667 (Mo. Ct. App. 1976).

Where cotton farmer entered into contract with cotton merchants to sell cotton crop to be produced on 800 acres, where farmer was obligated by terms of lease to pay one-fourth of his cotton crop as rent, and where as result of flood conditions farmer was only able to plant 717 acres rather than expected 1066 acres, cotton merchants were entitled to whole crop and lessor's remedies, if any, were against lessee; when read together UCC §§ 2-102, 2-105 and 2-107 indicated that forward contracts for sale of yet to be grown cotton fell within § 2-402(1) which subordinates rights of seller's unsecured creditors in subject matter to those of buyer. *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572 (5th Cir. 1976).

Transactions in crops are within the scope of UCC, and contracts for future delivery of crops, whether or not presently planted, are contemplated. *R.N. Kelly Cotton Merchant, Inc. v. York*, 494 F.2d 41 (5th Cir. Ga. 1974).

Where plaintiff entered into oral contracts with defendant cotton growers for sale of their cotton crops, each involving more than \$500 worth of cotton: (1) under UCC §§ 2-105 and 2-107, sale of cotton was sale of goods and, under UCC § 1-201, was not enforceable unless there was writing sufficient to indicate contract for sale had been made, signed by party against whom enforcement was sought; (2) oral contracts between plaintiff and defendants did not come within agency or broker exception to statute of frauds where there were two separate, independent sets of contracts under which defendants agreed to sell to plaintiff, and plaintiff independently contracted to sell to mills; (3) although exception to statute of

frauds exists under UCC § 2-201(3)(b) if party against whom enforcement is sought admits in his pleadings, testimony or otherwise in court that contract for sale was made, such exception did not apply in present case since defendants denied under oath that agreement for sale was made with plaintiff and, although trial court made credibility determination adverse to defendants' testimony, such finding did not constitute finding that "admission" exception applied; (4) defendants were not estopped to assert defense of statute of frauds merely because plaintiff had acted in reliance on oral agreement. *Cox v. Cox*, 292 Ala. 106, 289 So. 2d 609 (1974).

Contract to sell future cotton crop was sale of goods within scope of Article 2 of UCC. *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. Ga. 1974).

Where plaintiff raised sod on several prior occasions and apparently treated it as commercial product, and sod owed its existence to annual maintenance and fertilization, sod was personalty, and sale of sod was within coverage of UCC. *Barron v. Edwards*, 45 Mich. App. 210, 206 N.W.2d 508 (1973).

6. Recording.

It was not necessary to record sale of citrus fruit in order to provide constructive notice to others of nature of buyer's interest in crop; sale constituted constructive severance of crops from land, and creditor was not entitled to position of secured creditor as against buyer where he did not rely on public records in extending credit to seller. *Exchange Nat'l Bank v. Alturas Packing Co.*, 269 So. 2d 733 (Fla. App. 1972).

RESEARCH REFERENCES

ALR. Size and kind of trees contemplated by contracts or deeds in relation to standing timber. 72 A.L.R.2d 727.

Validity, construction, and effect of contract between grower of vegetable or fruit crops, and purchasing processor, packers, or canner. 87 A.L.R.2d 732.

Electricity, gas, or water furnished by public utility as "goods" within provisions of Uniform Commercial Code, Article 2 on Sales. 48 A.L.R.3d 1060.

What constitutes "goods" within scope of UCC Article 2. 4 A.L.R.4th 912.

Oil and gas rights: rights of royalty owners to take-or-pay settlements. 57 A.L.R.5th 753.

Am Jur. 21 Am. Jur. 2d, Crops §§ 7, 63, 64.

52 Am. Jur. 2d, Logs and Timber §§ 55, 56.

54 Am. Jur. 2d, Mines and Minerals §§ 201, 202.

67 Am. Jur. 2d, Sales §§ 47, 240-244, 394.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:30. (Instruction to

jury; "notice" and "knowledge" of a fact defined).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:1. (Complaint, petition, or declaration; breach of contract in sale of growing timber; dead timber delivered to plaintiff's mill).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:4. (Instruction to jury; "goods" as including growing crops).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:5. (Instruction to jury; "goods" as including timber to be cut).

12 Am. Jur. Legal Form 2d, Logs and Timber §§ 168:11 et seq. (contracts for sale of standing timber).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code; Article 2 — Sales, §§ 253:251 et seq. (Goods to be severed from realty).

2 Am Law Prod Liab 3d, Warranty Remedies § 18:26.

Law Reviews. Ogletree, A primer concerning industrial timber litigation with emphasis upon Mississippi law. 59 Miss. L. J. 387, Fall 1989.

PART 2.

FORM, FORMATION AND READJUSTMENT OF CONTRACT.

SEC.

- 75-2-201. Formal requirements; statute of frauds.
- 75-2-202. Final written expression; parol or extrinsic evidence.
- 75-2-203. Seals inoperative.
- 75-2-204. Formation in general.
- 75-2-205. Firm offers.
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§ 75-2-201. Formal requirements; statute of frauds.

(1) Except as otherwise provided in this section, a contract for the sale of goods for the price of five hundred dollars (\$500.00) or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten (10) days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-606) [§ 75-2-606].

SOURCES: Codes, 1942, § 41A:2-201; Laws, 1966, ch. 316, § 2-201, eff March 31, 1968.

Cross References — Statute of frauds, generally, see §§ 15-3-1 et seq.

Parole or extrinsic evidence, see § 75-2-202.

Terms of acceptance additional to or different from those offered or agreed upon, see § 75-2-207.

Modification of written contract, see § 75-2-209.

Price payable in money, goods, realty, or otherwise, see § 75-2-304.

Application of section to “or return” term of contract, see § 75-2-326.

Requirement of buyer’s signature in home solicitation sales, see § 75-66-5.

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A. In general.

1. Generally.

In action between timber companies wherein plaintiff charged that defendant fraudulently induced plaintiff to purchase

certain property by orally promising that defendant, which had previously acquired timber rights to such property, would sell or trade timber to plaintiff after plaintiff subsequently purchased property, alleged promise to convey timber rights was contract for sale of "goods" subject to statute of frauds and sales provisions of UCC. *T.K. Stanley, Inc. v. Scott Paper Co.*, 793 F. Supp. 707 (S.D. Miss. 1992), *aff'd*, 5 F.3d 529 (5th Cir. 1993).

A writing is required by the Code to give a claimant any rights in personal property of another having a value in excess of \$500. *Traska v. DeGennaro*, 38 Wash. C. R. 50 (Pa. 1958) [court rejected the claim that the plaintiff and defendant were partners as to certain equipment].

2. Relationship with other laws.

In action by plaintiff timber company against defendant timber company alleging that defendant fraudulently induced plaintiff to purchase certain property by orally promising that defendant, which had previously acquired timber rights on such property, would sell or trade such timber to plaintiff after plaintiff subsequently purchased such property, plaintiff's fraudulent inducement claim was barred even if it could have been raised under state's general statute of frauds, because alleged promise to convey timber rights was contract for sale of "goods" subject to statute of frauds. *T.K. Stanley, Inc. v. Scott Paper Co.*, 793 F. Supp. 707 (S.D. Miss. 1992), *aff'd*, 5 F.3d 529 (5th Cir. 1993).

Under principle that pre-UCC law is applicable unless displaced by particular provisions of Code, UCC statute of frauds, rather than general statute of frauds, applies to alleged oral agreement and subsequent confirmatory letter, where general statute of frauds and UCC provision are in conflict and mandate different results. *H & W Indus., Inc. v. Formosa Plastics Corp., USA*, 860 F.2d 172 (5th Cir. 1988), *reh'g denied*, 863 F.2d 882 (5th Cir. 1988).

Although UCC § 1-103 allows principle of estoppel to supplement UCC provisions, grain farmer was not estopped from asserting statute of frauds, UCC § 2-201, as defense to alleged oral contract for sale of 40,000 bushels of grain where there was no evidence of fraud, positive misrepresentation

or unconscionable conduct akin to fraud chargeable to farmer. *Farmers Coop. Ass'n v. Cole*, 239 N.W.2d 808 (N.D. 1976).

Portions of Uniform Commercial Code relating to course of dealings or trade usage (1-205) were not intended to be applied in manner to defeat Code's statute of frauds requirements and, at best, evidence of custom or usage in trade may be used to explain ambiguous portions of an agreement; thus, potato farmer could not introduce evidence of usage or course of dealings within trade to substantiate oral agreement with potato buyer. *Dangerfield v. Markel*, 222 N.W.2d 373 (N.D. 1974).

Statute of frauds requirement that written memorandum be "subscribed" which was not fulfilled by initials at top thereof should not be confused with Uniform Commercial Code requirement that writing be "signed." *Steinberg v. Universal Maschinenfabrik GMBH*, 24 A.D.2d 886 (2d Dep't 1965), *aff'd*, 18 N.Y.2d 943, 277 N.Y.S.2d 142, 223 N.E.2d 567 (1966).

B. Scope.

3. In general.

Availability of statute of frauds set forth in UCC § 2-201(1) is limited to cases in which contractual obligation is basis of recovery sought by plaintiff. *Acuri v. Figlioli*, 91 Misc. 2d 831 (1977).

4. Bulk transfers.

Alleged agreement concerning sale of corporation could not be considered "contract for sale of goods" so as to be within coverage of UCC statute of frauds, although corporation may have owned "goods." *Olympic Junior, Inc. v. David Crystal, Inc.*, 463 F.2d 1141 (3d Cir. N.J. 1972) (applying New York and New Jersey law, since similarity between laws of two states made it unnecessary to choose between them).

Trial court's conclusion that writing existed which indicated contract for sale of business had been made, and manifestations that seller who was being charged with breach had authenticated writing, provided proper basis for finding that contract was outside Code § 2-201. *Interstate United Corp. v. White*, 388 F.2d 5 (10th Cir. Okla. 1967).

5. Farm goods.

In an action to recover the purchase price for the sale of borrow material from the plaintiff seller's land, the statute of frauds § 75-2-201 did not apply to the oral contract, where the contract provided for the purchaser rather than the seller to sever the borrow material from the land. *Bell v. Hill Bros. Constr. Co.*, 419 So. 2d 575 (Miss. 1982).

Statute of frauds, UCC § 2-201, applied to contract for sale of corn crop for future delivery. *Farmers Coop. Elevator Co. v. Johnson*, 90 S.D. 36, 237 N.W.2d 671 (1976).

The sale of a horse is governed by the Uniform Commercial Code covering sales of goods. *Presti v. Wilson*, 348 F. Supp. 543 (E.D.N.Y. 1972).

6. Franchise agreements.

In action for breach of oral contract creating exclusive mobile home dealership, trial court erred in granting summary judgment for defendant on ground that contract was unenforceable under UCC § 2-201(1) because it was nothing more than contract for sale of goods worth \$500 or more, since exclusive sales agency agreement is more than mere sales contract. *Apache Trailer Sales, Inc. v. Redman Indus., Inc.*, 117 Ariz. 504, 573 P.2d 904, 22 U.C.C. Rep. Serv. 1089 (Ct. App. 1977) (also describing agreement in suit as one of continuation, rather than one of several separate buy-and-sell agreements).

7. Lease or bailment.

Contract was lease arrangement and was not covered by Uniform Commercial Code provisions relating to warranties where one party agreed to lease certain hens, known as "Parent Stock," and eggs therefrom, known as "Hatching Eggs," to other party for purpose of producing offspring, where contract provided that first party retained title to "Parent Stock" and "Hatching Eggs" and other party was precluded from selling or otherwise disposing of same without express written consent of first party, and where contract additionally provided for termination by either party on written notice at least 30 days in advance. *DeKalb Agresearch, Inc. v.*

Abbott, 391 F. Supp. 152 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1162 (5th Cir. Ala. 1975).

8. Mixed sales and service.

Although a number of changes to contract involved acquisition of goods for installation in residence, all were related to overall construction project which was conceived by original contract; thus arrangement between homebuilders and contractor was for performance of service and did not fall within ambit of Mississippi statute of frauds provision applicable to sales transactions. In *re* *Levingston*, 119 B.R. 935 (Bankr. N.D. Miss. 1990).

Oral contract to supply timber to paper mill was contract for sale of timber not a brokerage contract and was therefore unenforceable due to lack of writing evidencing contract; agreement did not fall within any exceptions to UCC Statute of Frauds. *Futch v. James River-Norwalk, Inc.*, 722 F. Supp. 1395 (S.D. Miss. 1989), *aff'd*, 887 F.2d 1085 (5th Cir. 1989).

In contracts that involve both the sale of goods and the rendition of services, the predominant feature of the contract controls with respect to the applicability of the statute of frauds set forth in UCC § 2-201(1). Thus, where a contract for the sale of goods and the rendition of services is essentially one for the sale of goods, it is subject to the statute. *Anderson Constr. Co. v. Lyon Metal Prods., Inc.*, 370 So. 2d 935 (Miss. 1979).

In action to enforce oral agreement by subcontractor to provide and install school lockers, chalkboards and tack boards, where quoted price did not distinguish between cost of goods supplied and installation charges, subcontractor did not sustain his burden of proving that service aspect of contract was merely incidental to sale of goods aspect, as defined in UCC §§ 2-106(1) and 2-105, and, thus, he failed to sustain his burden of proving that UCC § 2-201 statute of frauds was applicable to contract and barred its enforcement. *Glover Sch. & Office Equip. Co. v. Dave Hall, Inc.*, 372 A.2d 221 (Del. Super. 1977).

UCC § 2-201 statute of frauds provision was applicable to contract which contained element of service, i.e. collection of waste by plaintiff, where principal object of agreement was sale of waste by defen-

dant to plaintiff. *Huyler Paper Stock Co. v. Information Supplies Corp.*, 117 N.J. Super. 353, 284 A.2d 568 (L. Div. 1971).

9. Option or sale on approval.

Transaction in which plaintiff purchased gems from company and received contemporaneous oral promise that he could return gems for complete refund at offices of company's New York City franchisee is "sale on approval" under UCC § 2-326 since gems were delivered to plaintiff "primarily for use" and therefore, UCC § 2-201 is applicable to transaction. *Kristinus v. H. Stern Com. E Ind. S.A.*, 466 F. Supp. 903 (S.D.N.Y. 1979).

Option given to purchaser of car wash franchise which included equipment and accessories to make certain changes in times purportedly sold will not in itself make alleged contract unenforceable. *Hankins v. American Pac. Sales Corp.*, 7 Wash. App. 316, 499 P.2d 214 (1972).

10. Persons protected.

Auto rental agency brought detinue action against bank; bank had obtained autos in question upon foreclosure of chattel mortgages executed by used car dealer; held, UCC statute of frauds did not apply to used car dealer's testimony, inasmuch as bank was not party to sales transaction, was not seeking to enforce contract, and had no rights controlled by contract. *Blowers v. First Nat'l Bank*, 45 Ala. App. 485, 232 So. 2d 666 (Civ. App. 1970).

11. Real estate transactions.

Statute of frauds in UCC § 2-201(1) did not apply to oral contract under which buyer of "borrow material" (fill soil), instead of seller, was to remove such material from seller's land, since UCC § 2-107(1)—which declares that contract for sale of "minerals or the like" is contract for sale of "goods" if such minerals are to be severed by seller—applies, as stated in Official Comment 1, only when minerals are to be severed by seller. As a result, oral contract for sale of "borrow material" in suit was governed by statute of frauds affecting realty. *Bell v. Hill Bros. Constr. Co.*, 419 So. 2d 575 (Miss. 1982).

UCC § 2-107(1) applies only if the minerals are to be severed by the seller. If the buyer is to sever, such transactions are

considered to be contracts affecting land to which the statute-of-frauds section of the Uniform Commercial Code (UCC § 2-201) does not apply, although such contracts must conform to the statute of frauds that affects the transfer of interests in land. *De Luca v. C.W. Blakeslee & Sons*, 174 Conn. 535, 391 A.2d 170, 25 U.C.C. Rep. Serv. 38 (1978) (holding that UCC § 2-107(1) did not apply to contracts between landowner and highway contractor for sale of fill soil that was to be severed from seller's land by contractor-buyer).

Where parties to contract for sale of realty and personalty of ranch orally agreed to constructively sever irrigation system motor and pump and to consider it as subject to oral agreement at buy and sell price of \$7,500, transaction pertaining to pump and motor was not subject to statute of frauds. *Martin v. McCaige*, 261 Or. 99, 492 P.2d 770 (1972).

12. Service contracts.

Contract to employ plaintiff to provide labor, material and equipment necessary to perform masonry work involved in construction of private hospital did not fall within provisions of UCC § 2-201(1). *Lusalon, Inc. v. Thomas O'Connor & Co.*, 3 Mass. App. Ct. 734, 325 N.E.2d 599 (1975).

13. —Real estate salespersons.

Agreement between real estate broker and dealer in modular homes was in nature of agreement for procuring purchaser of personal property, i.e. in nature of a finder's agreement, and was not agreement for sale of goods; thus, UCC § 2-201(1) statute of frauds was not applicable. *Selected Listings Co. v. Humiston*, 135 Vt. 106, 370 A.2d 1297 (1977).

This section is inapplicable to an oral contract between a housebuilder and an agent under which the latter was to receive a 5% commission on any building contracts he might obtain. *Brown v. Lee*, 242 Ark. 122, 412 S.W.2d 273 (1967).

14. Term of agreement.

Sale of gems and contemporaneous promise to repurchase them for complete refund at offices of New York City franchise is to be viewed as single contract and

therefore UCC § 2-201 does not render that contract unenforceable since promise to repurchase by its term was to be performed within 1 year. *Kristinus v. H. Stern Com. E Ind. S.A.*, 466 F. Supp. 903 (S.D.N.Y. 1979).

C. Writing.

15. In general; necessity.

Writing must meet 3 requirements to satisfy statute of frauds: be sufficient to indicate that a contract for sale has been made between the parties, be signed by the party against whom enforcement is sought, and specify a quantity. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

In breach-of-warranty action for damages by buyer of allegedly defective dump trailers against manufacturer-seller, court held (1) that buyer and its ultimate Mexican customers were "merchants" within meaning of UCC § 2-104(1); (2) that seller was "merchant" within meaning of both UCC § 2-104(1) and § 2-314(1); (3) that telephoned order for 20 additional trailers was not enforceable under statute of frauds in UCC § 2-201(1) because it did not come within exceptions to such statute contained in UCC § 2-201(3); (4) that "specially manufactured goods" exception in UCC § 2-201(3)(a) applies only when seller, rather than buyer, seeks to escape statute-of-fraud defense; (5) that since three trailers purchased under valid written contract were put to improper use by buyer's Mexican customers, rather than being used for their "ordinary purposes," no breach of implied warranty of merchantability under UCC § 2-314(1) and (2)(c) occurred; (6) that use of trailers for improper purposes, rather than for their stated "particular purpose," prevented recovery under implied warranty of fitness in UCC § 2-315; (7) that buyer could not recover for breach of express warranty under UCC § 2-313(1)(a) because it failed to prove that it had relied on statements in manufacturer-seller's brochure either prior to or contemporaneously with making of parties' contract; and (8) that since buyer had no right under UCC § 2-601(a) to reject two unused and undamaged trailers, manufacturer-seller was not required to retake them or to refund their purchase

price to buyer. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

Alleged agreement by seller of cotton module builders that it would sell module trailers in combination with the module builders, even if such agreement could have been proved by buyer, would not have been enforceable where buyer produced no writing sufficient to satisfy statute-of-fraud requirement of UCC § 2-201(1). *FMC Fin. Corp. v. Reed*, 592 F.2d 238 (5th Cir. 1979).

In breach of contract action by subcontractor against both supplier and manufacturer of air compressors for failure to make delivery, where (1) on September 13, 1977, supplier gave subcontractor oral quotation of \$89,000 for five compressors in issue, (2) on previous day (September 12), supplier had obtained both an oral quotation and an estimate sheet, signed by manufacturer's agent, that listed price for two compressors, and agent orally stated that three more could be furnished at same unit price, so that total price for five compressors would be \$80,000, (3) on September 13, 1977, subcontractor used supplier's quotation of \$89,000 to make successful bid for contract sought by it, (4) on September 26, 1977, manufacturer, after finding out that its competitors charged higher prices for compressors, issued revised price quotation to supplier and offered to sell five compressors in suit for \$113,000, (5) on October 24, 1977, supplier, ignoring manufacturer's revised quotation, issued purchase order to manufacturer for five compressors at manufacturer's original quotation of \$80,000, (6) on November 7, 1977, manufacturer advised supplier that it would not furnish compressors at its original quotation, (7) on October 6, 1977, at meeting between subcontractor and supplier, supplier told subcontractor that it could not sell compressors for \$89,000, but subcontractor nevertheless gave supplier purchase order for compressors at such price, and (8) on supplier's failure to deliver compressors, subcontractor purchased them elsewhere for \$121,000 and sought to recover \$32,000 as difference between supplier's original quotation of \$89,000 and subcontractor's cover price, court held (1) that

manufacturer was not liable to subcontractor on either theory of vicarious responsibility for supplier's acts or theory that subcontractor was third-party beneficiary of contract between supplier and manufacturer, (2) that manufacturer's answer to supplier's cross claim did not contain unqualified admission of facts that, under exception to statute of frauds contained in UCC § 2-201(3)(b), would remove alleged oral contract between supplier and manufacturer from statute of frauds, (3) that manufacturer's estimate sheet of September 12, 1977 was not, as claimed by supplier, writing sufficient to indicate that contract of sale had been made within meaning of statute of frauds in UCC § 2-201(1), but was at best mere offer that had been effectually revoked by manufacturer under UCC § 2-205 at time when manufacturer had right to revoke it, (4) that such revocation had occurred before supplier attempted to place purchase order for compressors with manufacturer, and (5) that as between subcontractor and supplier, there was no writing of any kind within meaning of statute of frauds in UCC § 2-201(1) on which subcontractor could rely to avoid the statute, and also no admission of facts by supplier that would constitute contract enforceable under admissions exception to the statute contained in UCC § 2-201(3)(b). *Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc.*, 463 F. Supp. 543 (N.D. Miss. 1978).

In action arising out of agreement to provide city with municipal personnel ordinance for fixed fee, necessary elements of valid, binding contract, whether in terms of services contract or one for sale of goods, were present where UCC § 2-201(1) requirement that there be writing sufficient to indicate that contract has been made was met and where plaintiff commenced performance of its obligations within reasonable time as required by UCC § 2-309. *National Civil Serv. League v. City of Santa Fe*, 370 F. Supp. 1128 (D.N.M. 1973).

16. Modification of writing; oral.

Although UCC § 2-209(3) provides that statute of frauds (UCC § 2-201) must be satisfied if contract as modified is within its provisions, under UCC § 2-209(4) at-

tempted oral modification may operate as waiver of statute of frauds and, once waived, there is no barrier to oral modification of terms of written contract; thus, trial court erred in granting summary judgment for defendant seller on ground that he had effectively terminated written sales agreement pursuant to cancellation provision where there was attempted oral modification of agreement to eliminate seller's right of cancellation which raised material issues of fact as to (1) whether there was waiver of statute of frauds, (2) whether there was oral modification of agreement removing seller's right of cancellation, and (3) whether seller's purported retraction of waiver pursuant to UCC § 2-209(5) met notice requirements. *Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F.2d 292 (3d Cir. Pa. 1973).

In reclamation action by lessor to recover air conditioning units, trustee of bankrupt lessee should not have been permitted to introduce oral evidence, contradictory of unambiguous written lease agreement, suggesting that oral option had been granted to lessee to purchase units upon termination of lease, since effect of such evidence was "enforcement" of lessee's right under alleged oral agreement, and as such was improper in absence of "some writing sufficient to indicate that contract for sale has been made between the parties." *In re Financial Computer Sys.*, 474 F.2d 1258 (9th Cir. Cal. 1973).

Alleged oral truck franchise agreement was unenforceable against truck manufacturer under statute of frauds, where purchase order documents submitted by plaintiff were devoid of any terms which could serve as evidence of franchise relationship, and where standard form contracts allegedly signed by manufacturer contained series of conditions precedent which plaintiff had not shown to have been satisfied. *Artman v. International Harvester Co.*, 355 F. Supp. 482 (W.D. Pa. 1973).

Where a contract is required to be in writing, its terms cannot be modified orally. *Edelstein v. Carole House Apts., Inc.*, 220 Pa. Super. 298, 286 A.2d 658 (1971).

Where there was oral agreement, collateral and contemporaneous with written agreement, between parties as to manner of feeding yearling steers intended for future delivery, and where trial court found that written contract was not intended by parties as complete and exclusive statement of all terms of agreement, statute of frauds was no bar to admissibility of oral agreement. *Conner v. May*, 444 S.W.2d 948 (Tex. Civ. App. 1969), writ ref'd n.r.e., (Dec. 31, 1969).

17. —Written.

Under Uniform Commercial Code § 2-204 a liberal construction with respect to the formation of contracts of sale is mandated, and where the buyer of prepared meals signed a letter of intent containing price, time delivery, quantity, and quality terms; the conduct of the parties evidenced their contractual intention, notwithstanding the buyer's addition of a paragraph indicating that a detailed contract containing complete specifications as to quality and quantity and protective provision in event the quality of the produce or service fell below established standards was to be completed in the future. *Graulich Caterer, Inc. v. Hans Holterbosch, Inc.*, 101 N.J. Super. 61, 243 A.2d 253 (App. Div. 1968).

A printed form which was otherwise complete and unambiguous is rendered ambiguous by the handwritten notation made by the salesman on one of the blank lines of the form of "thirty-day warranty." *Leveridge v. Notaras*, 433 P.2d 935 (Okla. 1967).

18. Sufficiency; specificity.

The parties entered into an enforceable contract where the dealer accepted the buyer's downpayment on a car, and integration of the documents, some of which the parties executed jointly or individually, indicated an agreement on a specific car for sale, its retail price, the interest rate and various coverages, and thus was sufficient to meet the requirements of the statute of frauds. *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475 (5th Cir. 1995).

Statute of frauds can be met through the integration of several documents, each of which alone might not be sufficient to meet the statute's 3 requirements for suf-

ficiency. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

In order for a confirmatory writing under UCC § 2-201(2) to be "sufficient against the sender," it must satisfy the requirements of UCC § 2-201(1). These requirements are: (1) the writing must evidence a contract, (2) it must be signed by the sender, and (3) it must specify a quantity. *Perdue Farms, Inc. v. Motts, Inc.*, 25 U.C.C. Rep. Serv. 9, 25 U.C.C. Rep. Serv. 33 (applying Mississippi UCC; holding that writing sent in confirmation of oral contract for purchase of poultry qualified as confirmatory writing under UCC § 2-201(2)).

Where (1) seller on August 3d orally offered to sell buyer 15,000 tons of fertilizer, which offer was valid until 2:00 p.m. on August 3d, (2) on morning of August 3d, as requested by buyer, seller sent buyer same offer by telex, (3) at 10:00 a.m. on August 3d, after seller had sent and relinquished control over its firm offer by telex, buyer allegedly accepted such offer orally, and (4) buyer thereafter sent seller responsive telex while seller's firm offer was still valid and such telex included certain terms, including terms as to payment and loading, that were not in seller's offer, court held (1) that inclusion in buyer's telex of payment and loading provisions not mentioned in seller's offer was not, under UCC § 2-207(1), necessarily fatal to buyer's alleged acceptance, (2) that under UCC § 2-207(2), term "plus or minus 10 percent at buyer's option," although it might have materially altered the contract, did not by itself invalidate the alleged acceptance, (3) that on the other hand, since UCC § 2-207 does require definite expression of acceptance before its provisions can apply, it might be that buyer's responsive telex, taken as a whole, did not represent agreement between the parties on even price and quantity of seller's fertilizer, and (4) that if a contract had been formed, it was enforceable under statute of frauds set forth in UCC § 2-201(1) because document signed by seller as party to be charged was its firm offer in its August 3d telex and buyer's oral acceptance of that written offer was responsive thereto, insofar as satisfying statute of frauds was concerned, and clearly showed

that oral evidence offered by buyer rested on a real transaction. *Ore & Chem. Corp. v. Howard Butcher Trading Corp.*, 455 F. Supp. 1150, 24 U.C.C. Rep. Serv. 823 (E.D. Pa. 1978) (applying New York and Pennsylvania UCC; holding, on cross-motions for summary judgment, that validity of buyer's acceptance depended on issues of fact to be resolved at the trial).

Where (1) buyer placed order for new Corvette on form furnished by dealer, (2) such form described car, listed its purchase price, provided for delivery to buyer as soon as possible, and also stated that order was not binding until accepted by dealer, (3) buyer, but not dealer, signed such order form and gave dealer check for \$1,000 deposit on vehicle, (4) dealer on same day placed written order form, (3) that order form sent by dealer to manufacturer was sufficient memorandum of contract to satisfy statute of frauds set forth in UCC § 2-201(1), and (4) that even assuming absence of a sufficient memorandum under UCC § 2-201(1), buyer's part payment on the indivisible contract operated under UCC § 2-201(3)(c) to take contract out of statute of frauds. *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

Written agreement for sale of boat which was somewhat vague in many details, but which was signed by seller and buyer and referred to "Leisure Craft" boat that was "to be paid at terms below," constituted a sufficient writing with respect to statute-of-frauds provisions of UCC § 2-201(1) & (2), and parol evidence was admissible to supply missing portions of such contract. *Hatley v. Frey*, 145 Ga. App. 658, 244 S.E.2d 604 (1978).

Transaction whereby seller, who was indebted to buyer, agreed to sell tractor to buyer in return for cancellation of seller's indebtedness constituted present, binding and completed sale, and title to tractor passed to buyer at time of execution of contract of sale, notwithstanding sales agreement provided that tractor would remain on seller's premises until needed by buyer and during that period of time seller would have right to sell tractor, and written agreement between seller and buyer was adequate as contract of sale under UCC since it contained date, iden-

tified buyer and seller and specified exactly model, make and serial number of tractor, listed amount and nature of consideration and was signed by agent of both parties. *Ace Supply, Inc. v. Rocky-Mountain Mach. Co.*, 96 Idaho 183, 525 P.2d 965 (1974).

Documents that look toward some sale in the future do not constitute a sufficient writing to satisfy the statute of frauds provision especially with respect to the specificity with which the terms and conditions of all promises constituting the contract are set forth. In re *Flying W Airways, Inc.*, 341 F. Supp. 26 (E.D. Pa. 1972).

All that is required is that the writing afford a basis for believing that the offered oral evidence rests upon a real transaction. *Harry Rubin & Sons v. Consolidated Pipe Co. of Am.*, 396 Pa. 506, 153 A.2d 472 (1959).

19. —Error or omission.

Where contract for sale of grain omitted delivery date, such omission did not involve statute of frauds problem as parties orally agreed that seller had option to deliver within 2 months period; where seller refused to deliver corn, buyer's remedy for nondelivery under UCC § 2-711 was for damages, this being difference between contract price for corn and market price at date of breach. *Cargill, Inc. v. Fickbohm*, 252 N.W.2d 739 (Iowa 1977).

Terms with respect to time and place of payment or delivery may be omitted from written instrument; in such event payment for goods sold is due at time and place of buyer's receipt of goods, even though place of shipment is also place of delivery. *Southwest Eng'g Co. v. Martin Tractor Co.*, 205 Kan. 684, 473 P.2d 18 (1970).

A sales order for cable signed by the purchaser's employee containing the name of the seller, the name of the shipper, the quantity, description, and weight of the cable, and notations of the purchaser's order number and the seller's sales number is not violative of the statute of frauds for the reason that it failed to state the price and the price could be proved by parol. *Julian C. Cohen Salvage Corp. v. Eastern Elec. Sales Co.*, 205 Pa. Super. 26, 206 A.2d 331 (1965).

20. —Memoranda.

A (1) memorandum from vice president of retail sales of wristwatch-selling company showing that seller's salesperson was authorized to offer buyer, a Mississippi corporation operating jewelry counters in department stores throughout southeast, a discounted price on certain wristwatches made by defendant, and (2) defendant's order form, taken together with (2) internal memorandum from a clerical employee in the employ of the defendant in charge of inventory control, announcing that a new promotion code had been set up to cover "a special order from [the plaintiff]", provided sufficient evidence to satisfy statute of frauds. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

Where a letter from a prospective seller to a prospective buyer adopted the position that no contract of sale had been formed, on the asserted basis that the seller's employee expressed a condition precedent to acceptance of the offer, namely, procuring the approval of her superiors, and where the letter contained the statement made by that employee that "we will take care of it", signifying acceptance on the part of the seller notwithstanding any secret intentions the seller's employee failed to express, the letter constituted a memorandum or writing evidencing a contract for the sale of goods, which was signed by the party against whom enforcement was sought, and it specified a quantity; thus, under § 75-2-201(1), the trial judge erred in sustaining the seller's motion to dismiss on the basis of the statute of frauds. *Franklin County Coop. v. MFC Servs. (A.A.L.)*, 441 So. 2d 1376 (Miss. 1983).

Where (1) buyer placed order for new Corvette on form furnished by dealer, (2) such form described car, listed its purchase price, provided for delivery to buyer as soon as possible, and also stated that order was not binding until accepted by dealer, (3) buyer, but not dealer, signed such order form and gave dealer check for \$1,000 deposit on vehicle, (4) dealer on same day placed written order form, (3) that order form sent by dealer to manufacturer was sufficient memorandum of contract to satisfy statute of frauds set

forth in UCC § 2-201(1), and (4) that even assuming absence of a sufficient memorandum under UCC § 2-201(1), buyer's part payment on the indivisible contract operated under UCC § 2-201(3)(c) to take contract out of statute of frauds. *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

UCC § 2-201(1) makes only three invariable requirements as to the memorandum: (1) it must evidence a contract for the sale of goods; (2) it must be "signed," a word that includes any authentication that identifies the party to be charged; and (3) it must specify a quantity. *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

In action for bank's breach of contract to sell plaintiff a repossessed truck tractor, signed letter to plaintiff from bank's vice president which stated that although bank would not extend credit to plaintiff, bank would sell tractor to plaintiff for \$6,800 cash, constituted, in conjunction with plaintiff's offer to bank of money order for \$6,800, sufficient memorandum of alleged contract under UCC § 2-201(1). *Veik v. Tilden Bank*, 200 Neb. 705, 265 N.W.2d 214, 23 U.C.C. Rep. Serv. 1134 (1978) (where bank refused to sell tractor for sum originally agreed on).

UCC § 2-201(1) contains only three definite and invariable requirements as to the memorandum: (1) it must evidence a contract for the sale of goods; (2) it must be "signed," which includes any authentication that identifies the party to be charged; and (3) it must specify a quantity. *Veik v. Tilden Bank*, 200 Neb. 705, 265 N.W.2d 214 (1978).

Under UCC § 2-201(1), absence of memorandum in writing is merely defense to action to enforce executory contract for sale of goods; it is not basis for rescission of executed contract and completed sale. *Vom Lehn v. Astor Art Galleries, Ltd.*, 86 Misc. 2d 1 (1976).

Under UCC § 2-201, memorandum functions only as evidence of contract and need not contain every term. *Kerner v. Hughes Tool Co.*, 56 Cal. App. 3d 924 (2d Dist. 1976).

Oral agreement to extend credit entered into at time buyer purchased used car from seller, paid seller partial down pay-

ment, and executed partially completed bill of sale, but prior to time parties executed conditional sales contract, constituted valid and binding contract under statute of frauds: (1) bill of sale was sufficient written memorandum to take sale of car out of operation of statute under UCC § 2-201(1); (2) oral agreement to extend credit was collateral to sale and inducement for entire bargain; (3) terms of oral agreement to extend credit were consistent with and additional to written bill of sale under UCC § 2-202(b); and (4) conduct of parties indicated firm commitment to extend credit under UCC § 2-201(3)(c). *Hardin v. Cliff Pettit Motors, Inc.*, 407 F. Supp. 297 (E.D. Tenn. 1976).

21. —Purchase orders or the like.

In an action seeking to recover on unpaid invoices for the purchase of cattle, the defendant was not entitled to summary judgment where the codefendant alleged that the defendant and codefendant entered into a partnership agreement to purchase, raise and sell cattle for a profit; if such an arrangement existed, the receipt by the codefendant of invoices for the cattle would be sufficient to refute the defendant's assertion of the statute of frauds. *Mississippi Livestock Producers Ass'n v. Hood*, 758 So. 2d 447 (Miss. Ct. App. 2000).

Subsection (2) of this section does not allow seller of wristwatches to reject an offer by buyer made within 10 days after seller received copy of buyer's purchase order; subsection (2) provides merchants with a method of satisfying statute of frauds when an oral contract has been formed but signature of party to be charged is lacking, by contrast, subsection (2) cannot be invoked to excuse a breach of that contract in the present case, in which there were 2 writings signed by seller's representatives which, together with the unsigned seller order form, were sufficient to establish written contract. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

In proceeding to stay arbitration, trial court did not err in refusing to instruct jury, as requested by seller, to effect that mere receipt of purchase order including arbitration clause, without returning it, did not constitute agreement to arbitrate,

unless preceded by oral agreement. *S. Kornblum Metals Co. v. Intsel Corp.*, 47 A.D.2d 523 (2d Dep't 1975), *aff'd*, 38 N.Y.2d 376, 379 N.Y.S.2d 826, 342 N.E.2d 591 (1976).

Under UCC § 2-201, an agreement is enforceable only to the extent of the goods shown in the writing which is relied upon to establish the contract, and hence the purchase invoices, even if deemed to meet the statutory requirement of a writing, cannot support a claim for damages to future goods. *Huyler Paper Stock Co. v. Information Supplies Corp.*, 117 N.J. Super. 353, 284 A.2d 568 (L. Div. 1971).

22. —Quantity.

In action by supplier against subcontractor for latter's alleged breach of contract to purchase limestone, which district court had ruled was contract to purchase specific quantity of limestone, court held (1) that contract was supported by consideration and thus was enforceable, (2) that contract satisfied statute-of-fraud's requirement in UCC § 2-201(1) as to presence of "quantity term" in the agreement, since by incorporating certain bid documents by reference, it obligated supplier to furnish limestone "of a grade and quality to conform to specified requirements" in such bid documents, (3) that as a result of provisions in incorporated bid documents, the contract, instead of being agreement for fixed amount of limestone, was a requirements contract within meaning of UCC § 2-306(1), (4) that subcontractor did not breach such contract by directing supplier not to supply any limestone at all, since subcontractor had no requirements as result of decision by National Parks Service not to use limestone on project that subcontractor was working on, and (5) that although limiting language of UCC § 2-306(1) would seem to prevent subcontractor from reducing its requirements to zero, such language did not in fact preclude a good-faith reduction in a party's requirements that was highly disproportionate to such party's normal prior requirements or stated estimates. *R.A. Weaver & Assocs. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 190 U.S. App. D.C. 418 (1978).

In order for a confirmatory writing under UCC § 2-201(2) to be "sufficient

against the sender," it must satisfy the requirements of UCC § 2-201(1). These requirements are: (1) the writing must evidence a contract, (2) it must be signed by the sender, and (3) it must specify a quantity. *Perdue Farms, Inc. v. Motts, Inc.*, 25 U.C.C. Rep. Serv. 9, 25 U.C.C. Rep. Serv. 33 (applying Mississippi UCC; holding that writing sent in confirmation of oral contract for purchase of poultry qualified as confirmatory writing under UCC § 2-201(2)).

One page form marketing agreement between association of independent fishermen and cannery was unenforceable under UCC § 2-201 where contract omitted any mention of quantity of fish to be purchased and where there was no quantity provision in any writing between parties to furnish basis for explanation by parol evidence. *Alaska Indep. Fishermen's Mktg. Ass'n v. New England Fish Co.*, 15 Wash. App. 154, 548 P.2d 348 (1976).

Enforcement of contract between hosiery manufacturer and buyer under which manufacturer agreed to accept returns of certain merchandise for credit in exchange for buyer's promise to purchase sufficient amount of hosiery to exhaust such credits, was barred by statute of frauds, UCC § 2-201, although writings between parties evidenced ongoing buyer-seller relationship predicated on a "real transaction," where writings failed to state quantity of hosiery necessary to exhaust credits and where it was impossible to determine total quantity necessary to exhaust credits, since amounts of credits and purchases varied with styles of hosiery returned and purchased. *Doral Hosiery Corp. v. Sav-A-Stop, Inc.*, 377 F. Supp. 387 (E.D. Pa. 1974).

In action by supplier against homeowners to recover unpaid balance for materials supplied to contractor in construction of home, documents signed by homeowners under which they agreed to accept liability for materials delivered to contractor, but which did not show any quantity of goods being sold, was not sufficient to satisfy UCC § 2-201. *Lowe's Cos. v. Lipe*, 20 N.C. App. 106, 201 S.E.2d 81 (1973).

Where it was obvious that reference to volume of four and one-half to five million

feet was merely an estimate constituting "all" of hemlock logs in area known to defendant, there is no inconsistency between references to "all" and to specific amount in different portions of letter which would disqualify it as confirmation of oral contract under UCC § 2-201(2). *Fort Hill Lumber Co. v. Georgia-Pacific Corp.*, 261 Or. 431, 493 P.2d 1366 (1972).

Agreement "to furnish all concrete for slab" was not insufficient as description of quantity to satisfy requirements of statute of frauds, since term "all the concrete for slab" meant in effect that quantity of concrete to be delivered and poured was that which was required for slab, and parol evidence ultimately produced undisputably indicated location and identity of slab referred to. *Port City Constr. Co. v. Henderson*, 48 Ala. App. 639, 266 So. 2d 896 (Civ. App. 1972).

In a dispute as to the existence of a contract to sell a valuable coin collection, a letter written by the defendant which failed to indicate the existence of a contract and the quantity of coins to be sold failed to satisfy the requirements of the Statute of Frauds. *Oswald v. Allen*, 285 F. Supp. 488 (S.D.N.Y. 1968), *aff'd*, 417 F.2d 43 (2d Cir. N.Y. 1969).

23. —Quantity; "output" contracts.

Where contracts for sale of cotton between buyer and cotton growers specified that buyer would purchase, and grower would sell, cotton grown during 1973 crop year on specified acreage, with projected yield of certain number of pounds of cotton per acre, quantity terms of contracts were not only sufficiently definite to satisfy UCC statute of frauds provision, § 2-201, but also were sufficient to meet standards of definiteness required by UCC § 2-204(3) for enforceability. *Riegel Fiber Corp. v. Anderson Gin Co.*, 512 F.2d 784 (5th Cir. Ala. 1975).

Contracts for sale of cotton under which buyer agreed to buy all cotton produced by seller on specified acreage at specified price for specified grades were "output" contracts, as defined in UCC § 2-306(1), for sale of all of farmers' cotton produced by them during crop year 1973, were not vague and indefinite as to quantity and subject matter, and were sufficient to satisfy requirements of statute of frauds,

UCC § 2-201(1). Furthermore, specific performance of contracts was available to buyers since parties stipulated that cotton involved was unique. *R.L. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 214 S.E.2d 360 (1975).

Contract for sale of growing cotton, which were "goods" within contemplation of UCC § 2-105(1), met requirements of statute of frauds provision of UCC § 2-201(1) where both parties signed writing, quantity was sufficiently shown for "output" contract for sale of all defendants' cotton produced on their 825 acres under UCC § 2-306(1), and document indicated that agreement to sell had been made. *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974).

24. Signature.

In order for a confirmatory writing under UCC § 2-201(2) to be "sufficient against the sender," it must satisfy the requirements of UCC § 2-201(1). These requirements are: (1) the writing must evidence a contract, (2) it must be signed by the sender, and (3) it must specify a quantity. *Perdue Farms, Inc. v. Motts, Inc.*, 25 U.C.C. Rep. Serv. 9, 25 U.C.C. Rep. Serv. 33 (applying Mississippi UCC; holding that writing sent in confirmation of oral contract for purchase of poultry qualified as confirmatory writing under UCC § 2-201(2)).

Where (1) seller on August 3d orally offered to sell buyer 15,000 tons of fertilizer, which offer was valid until 2:00 p.m. on August 3d, (2) on morning of August 3d, as requested by buyer, seller sent buyer same offer by telex, (3) at 10:00 a.m. on August 3d, after seller had sent and relinquished control over its firm offer by telex, buyer allegedly accepted such offer orally, and (4) buyer thereafter sent seller responsive telex while seller's firm offer was still valid and such telex included certain terms, including terms as to payment and loading, that were not in seller's offer, court held (1) that inclusion in buyer's telex of payment and loading provisions not mentioned in seller's offer was not, under UCC § 2-207(1), necessarily fatal to buyer's alleged acceptance, (2) that under UCC § 2-207(2), term "plus or minus 10 percent at buyer's option," although it might have materially altered the con-

tract, did not by itself invalidate the alleged acceptance, (3) that on the other hand, since UCC § 2-207 does require definite expression of acceptance before its provisions can apply, it might be that buyer's responsive telex, taken as a whole, did not represent agreement between the parties on even price and quantity of seller's fertilizer, and (4) that if a contract had been formed, it was enforceable under statute of frauds set forth in UCC § 2-201(1) because document signed by seller as party to be charged was its firm offer in its August 3d telex and buyer's oral acceptance of that written offer was responsive thereto, insofar as satisfying statute of frauds was concerned, and clearly showed that oral evidence offered by buyer rested on a real transaction. *Ore & Chem. Corp. v. Howard Butcher Trading Corp.*, 455 F. Supp. 1150, 24 U.C.C. Rep. Serv. 823 (E.D. Pa. 1978) (applying New York and Pennsylvania UCC; holding, on cross-motions for summary judgment, that validity of buyer's acceptance depended on issues of fact to be resolved at the trial).

Where contract between supplier and contractor was orally modified and where supplier sent letter of confirmation to contractor who did not object thereto, claim for modified price of additional materials was not barred by UCC § 2-201; typewritten signature on letter of confirmation sent by supplier met definition of "signed" under UCC § 1-201(39). *A & G Constr. Co. v. Reid Bros. Logging Co.*, 547 P.2d 1207 (Alaska 1976).

Purchase order unsigned by party against whom it was sought to be enforced was not such writing as would satisfy statute of frauds. *LTV Aerospace Corp. v. Bateman*, 492 S.W.2d 703 (Tex. Civ. App. 1973), ref. n.r.e. (July 11, 1973).

There was no merit to defendant's contention that a writing was unenforceable because it was not signed by plaintiff, since the statute requires only the signature of the party against whom enforcement is sought. *Whirlpool Corp. v. Regis Leasing Corp.*, 29 A.D.2d 395 (1st Dep't 1968).

Under this section, unsigned invoice describing goods and stating terms of payment, received following delivery of goods, was not enforceable. *Evans Implement*

Co. v. Thomas Indus., Inc., 117 Ga. App. 279, 160 S.E.2d 462, 5 U.C.C. Rep. Serv. 124 (1968) (recognizing rule; invoice held admissible evidence in absence or raising of issue of statute of frauds by pleading or by objection).

It is immaterial whether the writing is signed by the party who is seeking enforcement of the contract. *Fyre-Safety, Inc. v. Yerger Bros.*, 56 Lanc. L. Rev. 311 (Pa. 1959).

The Code continues the requirement that there be a signed writing in order to validate certain sales. *Traska v. DeGennaro*, 38 Wash. C. R. 50 (Pa. 1958).

25. —Agent's authority.

In action for breach of alleged contract to sell store to plaintiff, where (1) only writing offered as note or memorandum of such contract was letter from plaintiff to defendant's attorney containing certain terms of proposed sale, (2) letter did not mention any duties to be performed by plaintiff in return for right to purchase store, and (3) defendant's president struck out words "consented to" at bottom of letter and wrote signed note on such letter to defendant's attorney stating that terms in letter were subject to attorney's legal advice, court held (1) that as matter of law, signature of defendant's president on letter was not made with intent to authenticate letter as memorandum of preexisting oral contract or to bind defendant to terms contained in letter, and (2) letter therefore failed as matter of law to satisfy statute of frauds contained in UCC § 2-201(1). *Cohn v. Geon Intercontinental Corp.*, 62 A.D.2d 1161 (4th Dep't 1978).

Where plaintiff entered into oral contracts with defendant cotton growers for sale of their cotton crops, each involving more than \$500 worth of cotton: (1) under UCC §§ 2-105 and 2-107, sale of cotton was sale of goods and, under UCC § 2-201, was not enforceable unless there was writing sufficient to indicate contract for sale had been made, signed by party against whom enforcement was sought; (2) oral contracts between plaintiff and defendants did not come within agency or broker exception to statute of frauds where there were two separate, independent sets of contracts under which defendants agreed to sell to plaintiff, and plain-

tiff independently contracted to sell to mills; (3) although exception to statute of frauds exists under UCC § 2-201(3)(b) if party against whom enforcement is sought admits in his pleadings, testimony or otherwise in court that contract for sale was made, such exception did not apply in present case since defendants denied under oath that agreement for sale was made with plaintiff and, although trial court made credibility determination adverse to defendants' testimony, such finding did not constitute finding that "admission" except applied; (4) defendants were not estopped to assert defense of statute of frauds merely because plaintiff had acted in reliance on oral agreement. *Cox v. Cox*, 292 Ala. 106, 289 So. 2d 609 (1974).

In action on contract to furnish certain construction stone, evidence was sufficient to show that contract was enforceable under statute of frauds, where authorized office of buyer had sent to seller telegram which was writing sufficient to indicate that contract for sale had been made between parties and signed by party against whom enforcement was sought, and officer also admitted in his testimony that contract for sale was made. *Providence Granite Co. v. Joseph Rugo, Inc.*, 362 Mass. 888, 291 N.E.2d 159 (1972).

Although owner-auctioneer of goods was under disability to sign memorandum of sale to gratify statute of frauds and bind buyer as party to be charged, this disability did not carry over to auctioneer's agent who, by buyer's bid made in open and regular course of auction, was authorized to sign buyer's name to such memorandum. *Romani v. Harris*, 255 Md. 389, 258 A.2d 187 (1969).

D. Confirmation as Between Merchants.

26. In general.

In seller's action for buyer's breach of contract to purchase seller's product line of floor sweepers and also, on "pay-as-used basis," inventory for such product line, (1) seller's oral acceptance by telephone of buyer's written offer, in conjunction with seller's written confirmation of its acceptance and buyer's failure to object in writing to contents of confirmation within ten days after it was received, satisfied excep-

tion to statute of frauds contained in UCC § 2-201(2) and rendered contract enforceable, (2) contract was binding, even though both parties expected that it would be reduced to formal writing by their attorneys, (3) seller was entitled to recover contract price under UCC § 2-709(1)(b) because seller, after buyer refused to perform, was unable to resell sweeper line at reasonable price to another person, and (4) buyer's liability for sweeper-line inventory, which buyer had purchased on "pay-as-used basis," was analogous to good-faith liability of a buyer under a requirements contract provided for in UCC § 2-306(1). *Lambert Corp. v. Evans*, 575 F.2d 132 (7th Cir. Wis. 1978).

Before the merchant sending the confirmatory writing can invoke UCC § 2-201(2), he must show (1) that both parties are merchants; (2) that the writing was in confirmation of the contract and sufficient against the sender; (3) that the writing was received by the other merchant within a reasonable time after the contract was made; (4) that the merchant receiving the writing had reason to know its contents; and (5) that the merchant receiving the writing did not give written notice of objection within ten days after the date on which the writing was received. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

UCC § 2-201(2) is a new addition to the statute of frauds and provides merchants with an alternative method of satisfying the writing requirement of UCC § 2-201(1). Under UCC § 2-201(2), if the merchant sending the confirmatory writing has met the prerequisites of the subsection, and if the merchant receiving the writing has not given written notice of objection within ten days of its receipt, the confirmatory writing satisfies the statute of frauds set forth in UCC § 2-201(1), even through the receiving merchant did not sign it. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

To be effective, the written notice of objection required by UCC § 2-201(2) must be given by the receiving merchant within ten days of his receipt of the confirmatory writing. However, it is not necessary that the sending merchant receive such notice. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

UCC § 2-201(2) does not by itself transform a confirmation into a contract. Instead, a written confirmation which is followed by the recipient's failure to respond within ten days after the confirmation is received merely negates, as between merchants, the defense of the statute of frauds, and the party who claims a contract must still prove it. *McCubbin Seed Farm, Inc. v. Tri-Mor Sales, Inc.*, 257 N.W.2d 55, 22 U.C.C. Rep. Serv. 599 (Iowa 1977) (holding in action for breach of contract to sell seed that defendant's evidence raised material question of fact as to existence of such contract, so as to preclude granting of plaintiff's motion for summary judgment).

As between merchants, subsection (2) significantly changes the former law by obviating the necessity of having a memorandum signed by the party sought to be charged. *Harry Rubin & Sons v. Consolidated Pipe Co. of Am.*, 396 Pa. 506, 153 A.2d 472 (1959).

Subsection (2) requires (a) that, within a reasonable time, there be a writing in confirmation of the oral contract; (b) that the writing be sufficient to bind the sender; (c) that such writing be received; (d) that no reply has been made thereto although the recipient had reason to know of its contents. *Harry Rubin & Sons v. Consolidated Pipe Co. of Am.*, 396 Pa. 506, 153 A.2d 472 (1959).

27. "Merchants".

Before the merchant sending the confirmatory writing can invoke UCC § 2-201(2), he must show (1) that both parties are merchants; (2) that the writing was in confirmation of the contract and sufficient against the sender; (3) that the writing was received by the other merchant within a reasonable time after the contract was made; (4) that the merchant receiving the writing had reason to know its contents; and (5) that the merchant receiving the writing did not give written notice of objection within ten days after the date on which the writing was received. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

A provision in an agreement between plaintiff subcontractor and defendant general contractor set out in a letter sent by plaintiff to defendant whereby plaintiff, in

confirming an oral agreement, stated that defendant would pay for all steel as billed in the event that defendant was not awarded a contract on a construction project, is, standing alone, a contract for the sale of goods. While defendant is not a steel merchant, since it is not in the business of buying and selling steel, defendant, like plaintiff, is nonetheless a "merchant" "having knowledge or skill peculiar to the practices or goods involved in the transaction" (Uniform Commercial Code, § 2-104, subd [1]) for purposes of the merchant exception to the Statute of Frauds, which makes an oral contract for the sale of goods between merchants enforceable against a party who receives written confirmation of the existing oral agreement and does not give "written notice of objection to its contents" within 10 days after it is received. (Uniform Commercial Code, § 2-201, subd [2].) Accordingly, based on all the evidence, defendant is bound by an oral agreement to purchase the steel from plaintiff. *Pecker Iron Works, Inc. v. Sturdy Concrete Co. Inc.*, 96 Misc. 2d 998 (1978).

In action for seller's refusal to deliver corn and soybeans to buyer, evidence was sufficient to show that seller had held himself out, within meaning of UCC § 2-104(1), as having knowledge or skill peculiar to corn and soybeans, so as to constitute seller a "merchant" under exception to statute of frauds contained in UCC § 2-201(2). *Currituck Grain, Inc. v. Powell*, 38 N.C. App. 7, 246 S.E.2d 853 (1978).

In action by buyer against seller of soybeans who refused to deliver after price rose, seller was not entitled to rely on statute of frauds defense where evidence was sufficient to support finding that seller was "merchant" within meaning of UCC § 2-201(b), and where oral agreement had been confirmed by written correspondence from buyer to seller. *Continental Grain Co. v. Martin*, 536 F.2d 592 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 1024, 97 S. Ct. 643, 50 L. Ed. 2d 625 (1976).

28. —Farmers; "merchants".

Sellers of soybeans, who breached oral agreement to deliver soybeans to plaintiff buyer, were "merchants" under UCC § 2-

104(1) and were liable, under exception to statute of frauds contained in UCC § 2-201(2), for their breach of such oral agreement when they failed to object within ten days to buyer's written confirmation of the oral contract where evidence showed that sellers, despite their contention that they were merely farmers and not merchants, (1) had acted in such a way as to cause others to believe that they had special knowledge and skill in grain dealing, (2) had advertised themselves as grain dealers, and (3) had, in addition to selling their own crops, bought crops of others and sold such crops to wholesalers. *Cargill, Inc. v. Gaard*, 84 Wis. 2d 138, 267 N.W.2d 22 (1978).

Farmer who was "merchant" under UCC § 2-201(2) could not recover for soybeans sold to defendant buyer where evidence showed that farmer and buyer had entered into contract for sale of 6,000 bushels of soybeans to buyer, that farmer had breached this contract by failing to deliver entire quantity of soybeans contracted for, and that amount that farmer sued for had been withheld by buyer as damages for loss sustained from farmer's breach. In such case, since plaintiff farmer was "merchant" under UCC § 2-201(2), and since he had received from buyer written contract calling for sale of 6,000 bushels of soybeans but had thrown such contract away without objecting in writing, within ten-day period specified by UCC § 2-201(2), to provision in contract calling for sale of "6,000" bushels of soybeans, oral contract involved in case was not barred by statute of frauds set forth in UCC § 2-201(1), but could be proved and relied on by buyer as defense. *Rush Johnson Farms, Inc. v. Missouri Farmers Ass'n*, 555 S.W.2d 61 (Mo. Ct. App. 1977).

Farmer was merchant within UCC § 2-104 definition in that he was professional in business of growing and selling crops he raised, his livelihood depended on expertise with which he sold, as well as raised, crops and to that end he stayed informed as to market prices and was knowledgeable in business of selling; thus, he was bound by oral contract for sale of wheat where he received written confirmation of contract from buyer and did not give written objection to any of its terms within ten

days of receipt as provided by UCC § 2-201(2). *Nelson v. Union Equity Coop. Exch.*, 548 S.W.2d 352, 95 A.L.R.3d 471 (Tex. 1977).

In action by grain buyer against farmer to recover damages for farmer's failure to deliver corn and soybeans under alleged oral contract, farmer's affidavit in support of his motion for summary judgment did not establish that he was casual or inexperienced seller in corn and soybeans, the "goods involved in the transaction," thereby establishing that he was not a merchant and thus entitled to defense of statute of frauds, notwithstanding he received written confirmation of contract from buyer, where affidavit established farmer's prior experience in trucking from 1960 to 1970, that he farmed during 1970, 1971 and 1974 and that one-half his gross income in 1971 and 1972 derived from livestock, but where affidavit did not establish whether farmer had ever negotiated with grain dealers prior to 1974, whether he had ever sold corn or soybeans previously, or whether he had knowledge of customs and practices peculiar to marketing of these grains. *Currituck Grain, Inc. v. Powell*, 28 N.C. App. 563, 222 S.E.2d 1 (1976).

Farmer was merchant under UCC § 2-104 and thus came within "merchant exception" to UCC statute of frauds with respect to oral contract for delivery of soybeans where, inter alia, farmer had sold large quantities of corn, as well as smaller quantities of potatoes and soybeans under forward contracts for five or six years, where farmer had traded on Chicago Board Trade and kept up with market news, and where there was nothing to indicate that method of making forward contracts for corn differed in any respect from those for soybeans. *Continental Grain Co. v. Harbach*, 400 F. Supp. 695 (N.D. Ill. 1975).

Farmer who had been engaged in farming for 34 years, who had approximately 180 acres of corn and 150 acres of soybeans under cultivation, and who, for period of at least five years, had sold his crops to grain elevators both in "cash sales" and "future contracts" was "merchant" within meaning of UCC § 2-104(1); thus, written confirmations of two oral

agreements for sale of soybeans, sent by buyers to farmer were sufficient under UCC § 2-201. *Sierens v. Clausen*, 60 Ill. 2d 585, 328 N.E.2d 559 (1975).

Written confirmation of oral contracts for sale of soybeans satisfied statute of frauds where experienced farmer who had sold grain for at least five years on both cash and future contracts bases was a merchant familiar with practices, customs, and usages of grain business and commodities market. *Sierens v. Clausen*, 60 Ill. 2d 585, 328 N.E.2d 559 (1975).

Farmers who regularly sold their crops to grain companies over period of several years were merchants within meaning of UCC § 2-104(1), and were barred from asserting statute of frauds in buyer's action for breach of an alleged oral contract for sale of soybeans where buyer sent written confirmation pursuant to UCC § 2-201(2). *Campbell v. Yokel*, 20 Ill. App. 3d 702, 313 N.E.2d 628 (5th Dist. 1974).

29. —Farmers; not "merchants".

The average farmer with no particular knowledge or experience in selling, buying, or dealing in future commodity transactions, who sells only the crops he raises to local elevators for cash or who places his grain in storage under one of the federal loan programs, is not a "merchant" within the meaning of the exception to the statute of frauds contained in UCC § 2-201(2). Although through training and years of experience, a farmer may well possess or acquire special knowledge, skill, and expertise in the production of grain crops, this does not make him a professional in business, within the meaning of UCC § 2-104(1) and Official Comments 1 and 2, who is equal in the marketplace with a grain-buying and selling company whose officers, agents, and employees are constantly conversant with the daily fluctuations in the commodity market, the many factors that affect that market, and its intricate practices and procedures. *Terminal Grain Corp. v. Freeman*, 270 N.W.2d 806, 25 U.C.C. Rep. Serv. 1 (S.D. 1978) (holding, in buyer's action for farmer's failure to deliver grain under oral contract of sale, that since farmer was not a "merchant" within meaning of exception to statute of frauds contained in UCC § 2-201(2) defense of

statute of frauds set forth in UCC § 2-201(1) barred any recovery by buyer).

Where buyer of soybeans sent written confirmation of oral contract to farmer and where farmer sold no crops or livestock except those which he raised, had limited experience in selling crops and no other business experience, and had not done business previously with buyer, farmer-seller did not come within definition of merchant under UCC § 2-104 and thus was not subject to statute of frauds exception relating to transactions between merchants. *Sand Seed Serv., Inc. v. Poeckes*, 249 N.W.2d 663 (Iowa 1977).

In action by grain broker against wheat farmer to enforce alleged oral contract for sale of wheat crop under UCC § 2-201(2): (1) farmer, who had been hay and grain farmer for 25 years, who did not buy and sell from or for anyone, other than what was produced on his own farm, and who did not maintain roadside stand or otherwise continuously offer his produce to public for sale, although he did keep conversant with market prices and each year negotiated and contracted to sell his crops to his best advantage, was not acting as "merchant" within meaning of UCC § 2-201(2); (2) however, even if it was assumed that he was "merchant," grain broker did not give notice of confirmation of purchase of grain within reasonable time where 12 days elapsed before any indication of confirmation was given during which time price of grain increased about one dollar per bushel and there was no apparent explanation for delay. *Lish v. Compton*, 547 P.2d 223 (Utah 1976).

Although farmer undoubtedly had special knowledge or skill in raising wheat, this factor, coupled with annual sales of wheat crops and purchases of seed wheat, did not qualify him as "merchant" with respect to sale of wheat where farmer sold only products he raised and there was no indication that any of these sales were other than cash sales to local grain elevators. *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976).

Oral contract for purchase and sale of cotton was unenforceable against cotton farmer under UCC § 2-201, notwithstanding farmer received written confirmation of contract from buyer and failed

to make any objection thereto, since farmer was not "merchant" within meaning of UCC § 2-104; farmer does not solely by his occupation hold himself out as being professional cotton merchant within meaning of UCC § 2-104(2) and, although there was evidence that farmer was knowledgeable seller, there was no evidence that he ever sold anyone's cotton but his own and this was not sufficient to make him dealer within meaning of UCC § 2-104(1). *Loeb & Co. v. Schreiner*, 294 Ala. 722, 321 So. 2d 199 (1975).

A farmer, not being a merchant as defined in subdivision (1) of section 2-104, cannot be bound under the provisions of subdivision (2) of this section for not returning to a grain company a proposed contract in writing which provided that the farmer sold to the company 5,000 bushels of soybeans. *Cook Grains, Inc. v. Fallis*, 239 Ark. 962, 395 S.W.2d 555 (1965).

30. Timeliness of confirmation.

Before the merchant sending the confirmatory writing can invoke UCC § 2-201(2), he must show (1) that both parties are merchants; (2) that the writing was in confirmation of the contract and sufficient against the sender; (3) that the writing was received by the other merchant within a reasonable time after the contract was made; (4) that the merchant receiving the writing had reason to know its contents; and (5) that the merchant receiving the writing did not give written notice of objection within ten days after the date on which the writing was received. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

Where seller of poultry under oral contract admitted receiving writing confirming such contract within eight days after contract allegedly was made, such receipt occurred within reasonable time under UCC § 2-201(2). *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

Receipt of written confirmation of oral contract for sale of wheat more than six months after contract was made, and only one day before last possible delivery date under such contract, was not, where there was no adequate excuse for such delay, receipt of confirmatory writing within rea-

sonable time under UCC § 2-201(2), and contract was unenforceable under UCC § 2-201(1). *Kimball County Grain Coop. v. Yung*, 200 Neb. 233, 263 N.W.2d 818 (1978).

Where in telephone conversation on July 31, 1973, seller agreed to sell and buyer agreed to buy 26,000 bushels of wheat and buyer's written confirmation of contract was received by seller on August 7, 1973; and where seller, on August 21, 1973, repudiated such contract (and also an earlier contract for sale of 40,000 bushels of wheat) because of clause in buyer's confirmation giving buyer option to cancel agreement, (1) buyer's confirmation of contract was received by seller within reasonable time under UCC § 2-201(2); (2) seller's objection to confirmation of contract on August 21, 1973, was not made within ten-day period prescribed by UCC § 2-201(2); (3) provision in buyer's confirmation giving buyer option to cancel was addition of material term to contract; and (4) since buyer's confirmation of contract was not predicated on seller's assent to such additional term, seller's receipt of buyer's confirmation within reasonable time constituted acceptance of contract under UCC § 2-207(1) and such additional term did not void contract, although seller was not bound by additional term. *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. Colo. 1977).

Provisions of UCC § 2-201(1) and (2) barred contractor's action against pump supplier for breach of alleged oral bid or contract to supply and sell pumps at specified price which contractor used in submitting bid on construction project: (1) throughout their dealings concerning pumps, parties were "merchants" within meaning of that term as used in UCC § 2-201(2), and thus supplier's telephonic bid in and of itself was subject to revocation by supplier during and awaiting a reasonable time for contractor's writing in confirmation of contract; (2) subsequent dispute between parties over actual terms and exceptions in supplier's telephonic bid, and especially supplier's letter proposing modifications of telephonic bid, constituted clear and decisive communicated revocation of telephonic bid prior to any "writing" from contractor as permit-

ted under UCC § 2-201(2); (3) however, assuming supplier's telephonic bid or offer in and of itself remained outstanding, contractor's subsequent letters fell short of constituting "confirmation of the contract" where letters spoke of future intended executed agreement incorporating "the price and terms of the bid you submitted;" (4) pump supplier was not estopped from relying on UCC § 2-201(1) merely because contractor relied on supplier's oral offer in submitting his bid or on theory that supplier was unjustly enriched. *C.R. Fedrick, Inc. v. Borg-Warner Corp.*, 552 F.2d 852 (9th Cir. Cal. 1977).

Where record indicated that both parties to oral contract for purchase and sale of sod were merchants, and that confirmatory memorandum was sent by buyer to seller to which seller did not object within 10-day period, factual question was presented as to whether buyer sent memorandum within reasonable time. *Barron v. Edwards*, 45 Mich. App. 210, 206 N.W.2d 508 (1973).

31. Delivery and receipt of confirmation.

Before the merchant sending the confirmatory writing can invoke UCC § 2-201(2), he must show (1) that both parties are merchants; (2) that the writing was in confirmation of the contract and sufficient against the sender; (3) that the writing was received by the other merchant within a reasonable time after the contract was made; (4) that the merchant receiving the writing had reason to know its contents; and (5) that the merchant receiving the writing did not give written notice of objection within ten days after the date on which the writing was received. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

UCC § 2-201(2) is intended to allow merchants to use confirmatory writings to satisfy the statute of frauds and to encourage the business practice of sending writings to confirm the terms of oral contracts. To preclude use of the presumption of receipt by mailing, and to limit the manner of proving receipt of the confirmatory writing by requiring that a merchant show by direct evidence—such as mailing by registered mail with return receipt requested—that the confirmatory writing

was actually received would seriously limit the utility of UCC § 2-201(2). *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

UCC §§ 2-201(2) and 1-201(26) do not prescribe any particular method for proving the receipt of a confirmatory writing. However, to prove such receipt, the sending merchant can rely on the presumption that a correctly addressed letter, which was properly mailed and was not returned undelivered to the sender, was delivered to the addressee. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

In action for balance due for sale of steel reinforcing bars, where (1) buyer alleged making of oral contract under which bars would be sold at fixed price of \$5.90 per 100 pounds until December 31, 1972, and thereafter at price no higher than \$6.35 throughout completion of buyer's construction job, but (2) evidence did not sustain buyer's claim that it had mailed letter confirming such contract and also comprehensive purchase order to seller, trial court did not err in holding that seller had not received any confirmation memoranda and that contract was therefore unenforceable under UCC § 2-201(1) and (2). *Wholesale Materials Co. v. Magna Corp.*, 357 So. 2d 296 (Miss. 1978), cert. denied, 439 U.S. 864, 99 S. Ct. 188, 58 L. Ed. 2d 174 (1978).

Where buyer, on July 23, 1973, telephoned grain seller about buying wheat and seller said he might let buyer have 40,000 bushels, subject to buyer's sending written confirmation of contract for seller's approval; where such written confirmation, because of error by buyer, was sent to incorrect address and not received by seller until August 17, 1973; where seller, on July 31, 1973, informed buyer by phone that change should be made in contract, and buyer sent written confirmation of such change to incorrect address; and where seller, on August 21, 1973, wrote buyer that seller was repudiating contract because of provision in confirmation of contract giving buyer option to cancel, (1) buyer and seller were "merchants" under UCC § 2-104(1); (2) buyer's written confirmation of contract, which seller did not receive until August 17,

1973, was not received within reasonable time under UCC § 2-201(2); (3) seller's objection on August 21, 1973 to buyer's confirmation of contract, because of clause giving buyer option to cancel agreement, was made within ten-day period prescribed by UCC § 2-201(2); and (4) seller never admitted existence of valid contract so as to permit its enforcement under UCC § 2-201(3)(b). *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. Colo. 1977).

Evidence established that seller received written confirmation of contract for sale of soybeans and, thus, that buyer satisfied statute of frauds under UCC § 2-201(2), notwithstanding buyer admitted it incorrectly addressed letter confirming contract and seller denied receiving letter, where letter was sent to small town about five miles from seller's town and, although seller was known in small town to which letter was sent, letter was not returned to buyer even though its return address was on envelope. *Pillsbury Co. v. Buchanan*, 37 Ill. App. 3d 876, 346 N.E.2d 386 (4th Dist. 1976).

32. Failure to object.

Before the merchant sending the confirmatory writing can invoke UCC § 2-201(2), he must show (1) that both parties are merchants; (2) that the writing was in confirmation of the contract and sufficient against the sender; (3) that the writing was received by the other merchant within a reasonable time after the contract was made; (4) that the merchant receiving the writing had reason to know its contents; and (5) that the merchant receiving the writing did not give written notice of objection within ten days after the date on which the writing was received. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

UCC § 2-201(2) is a new addition to the statute of frauds and provides merchants with an alternative method of satisfying the writing requirement of UCC § 2-201(1). Under UCC § 2-201(2), if the merchant sending the confirmatory writing has met the prerequisites of the subsection, and if the merchant receiving the writing has not given written notice of objection within ten days of its receipt, the confirmatory writing satisfies the statute

of frauds set forth in UCC § 2-201(1), even through the receiving merchant did not sign it. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

To be effective, the written notice of objection required by UCC § 2-201(2) must be given by the receiving merchant within ten days of his receipt of the confirmatory writing. However, it is not necessary that the sending merchant receive such notice. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

The merchant exception to the Statute of Frauds (Uniform Commercial Code, § 2-201, subd [2]) which makes an oral contract for the sale of goods between merchants enforceable against a party who signed nothing if that party received a written confirmation of the existing oral agreement and does not give "written notice of objection to its contents" within 10 days after it is received, merely deprives the recipient of the opportunity to raise the Statute of Frauds as a defense in the event of a failure to respond in writing within 10 days, and does not signify assent to the terms of the writing or mean that the terms of the writing are automatically accepted in the event of a failure to respond. It is up to the trier of facts to determine whether there was or was not an oral contract. *Pecker Iron Works, Inc. v. Sturdy Concrete Co. Inc.*, 96 Misc. 2d 998 (1978).

UCC § 2-201(2) merely makes an oral contract for the sale of goods enforceable against a party who has signed nothing, provided that such party has received a written confirmation of the existing oral agreement and failed to give written notice of objection to its contents within ten days after its receipt. Failure to object in writing within ten days does not signify assent to the terms of the writing; it merely deprives the recipient of the opportunity to raise the statute of frauds as a defense. Therefore, in such a case the trier of facts must determine whether or not there was an oral contract. *Pecker Iron Works, Inc. v. Sturdy Concrete Co. Inc.*, 96 Misc. 2d 998 (1978).

In action by subcontractor against general contractor based on oral agreement that defendant would be liable for steel purchased by plaintiff for construction

project that ultimately was not awarded to defendant, court held (1) that while defendant was not a steel merchant because it was not in business of buying and selling steel, it nevertheless was a "merchant" under broad language of UCC § 2-104(1) and (3); and (2) that as a result, merchants' exception in UCC § 2-201(2) to statute of frauds applied and removed oral contract sued on from operation of the statute, since plaintiff had sent letter to defendant confirming parties' oral agreement, such letter was received by defendant, and defendant had failed to give plaintiff, within ten days of receipt of letter, written notice of defendant's objection to letter's contents, as required by UCC § 2-201(2). *Pecker Iron Works, Inc. v. Sturdy Concrete Co. Inc.*, 96 Misc. 2d 998 (1978).

Timely objection was given within UCC § 2-201(2) where notice of objection was mailed on tenth day. *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz. App. 415, 493 P.2d 1220, 56 A.L.R.3d 1028 (1972).

Subsection (2) penalizes a party who fails to answer a written communication of a contract within ten days of the receipt of the writing by depriving such party of the defense of the statute of frauds. *Harry Rubin & Sons v. Consolidated Pipe Co. of Am.*, 396 Pa. 506, 153 A.2d 472 (1959).

33. —Seller.

In action by lessee of crane for defendant-lessor's refusal to sell crane to plaintiff under option in oral lease allegedly granting plaintiff right to purchase crane at "any time," where jury could have found (1) that parties had entered into oral lease during telephone conversation; (2) that such lease had actually given plaintiff option to purchase crane during "first six months of lease"; (3) that although written confirmation of oral lease, which plaintiff drafted and sent to defendant, did provide that plaintiff had option to purchase at "any time," defendant never signed confirmation document; and (4) that although defendant's first rental invoice to plaintiff did refer to order number on confirmation document, such reference did not constitute consent by defendant to proposed modification in confirmation document of purchase option in oral lease, plaintiff was

not entitled, under UCC § 2-201(2) and Comment 3 thereto, to ruling that defendant was liable as matter of law under provisions of confirmation document, even though defendant did not object to such provisions within ten days, since only effect of defendant's failure to object was to be deprived of defense of statute of frauds, which he had not raised, and plaintiff's burden of proving prior oral lease remained unaffected. Defendant was also not liable as matter of law under UCC § 2-207(2) because of plaintiff's insertion in document confirming oral lease of provision giving plaintiff option to purchase crane at "any time," since jury could have found that such provision constituted material alteration of option-to-purchase provision in oral lease. *Willamette-Western Corp. v. Lowry*, 279 Or. 525, 568 P.2d 1339 (1977).

In action by buyer against seller arising out of nondelivery of wheat under oral sales contract, original oral contract was not rendered unenforceable by UCC § 2-201 statute of frauds, where seller admitted existence of contract. Nor was oral modification of contract as to delivery date due to unavailability of elevator space rendered unenforceable by statute of frauds requirement under UCC §§ 2-209 and 2-201 where pursuant to UCC § 1-103 and 2-209, seller waived statute of frauds defense through his course of performance under UCC § 2-208 and 1-205 in delivering 36 truckloads of wheat well after original delivery date without making timely objection. *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 552 P.2d 63 (1976).

Oral contract between two elephant merchants for sale of elephant was enforceable under UCC § 2-201(2) where purchaser of elephant in writing confirmed terms of oral contract so as to bind himself and where seller of elephant never at any time made any written objection to letter. *Miller v. Kaye*, 545 P.2d 199 (Utah 1975).

In action for breach of oral contract to deliver dried citrus pulp for use in manufacture of cattle feed, seller's failure to respond to buyer's "Confirmation of Purchase" deprived it of defense under statute of frauds, but did not relieve buyer of

burden of establishing that oral contract was made under UCC § 2-201. *I.S. Joseph Co. v. Citrus Feed Co.*, 490 F.2d 185 (5th Cir. Fla. 1974), reh'g denied, 492 F.2d 1242 (5th Cir. Fla. 1974).

34. —Buyer.

Failure to object within ten days to erroneous prices in an invoice does not bind the buyer thereto as the "failure to object" concept is applicable to determining whether there is a contract initially although a writing would ordinarily be required by the statute of frauds provision. *Duralon Indus., Inc. v. Petal Sales Co.*, 4 U.C.C. Rep. Serv. 736 (1967, NY Sup).

35. —Buyer; arbitration agreements.

Where (1) buyer, after entering into oral contract for sale of fabrics, sent seller purchase order which did not provide for arbitration of contract disputes, (2) seller promptly sent buyer printed acknowledgement of order which contained provision for such arbitration, and (3) buyer, in suit concerning payments owed by it, contended that it had not agreed to arbitrate provision, court held (1) that case was governed by UCC § 2-207(2)(b), dealing with additional terms in acceptance or confirmation of a contract, instead of UCC § 2-201(2), since UCC § 2-201(2) deals only with question whether contract exists that is enforceable under statute of frauds and has no application to situation, such as that in instant case, where parties concede that contract does exist and dispute concerns only terms of such contract, and (2) since parties to instant dispute were merchants and arbitration clause was clearly a proposed additional term that materially altered contract within meaning of UCC § 2-207(2)(b), such clause did not become part of contract because of buyer's failure to agree to it expressly. *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 380 N.E.2d 239 (1978).

In view of common practice in textile industry to include arbitration provisions in written confirmations of all sales between merchants, it was incumbent upon textile buyers who received written confirmation to examine it and to make timely objection to allegedly unauthorized arbi-

tration clause contained therein; thus, upon failure of buyers to make such objection within 10 days and upon receipt of goods in accordance with their instructions they were bound to arbitrate when they attempted to cancel balance of contract. *C.M.I. Clothesmakers, Inc. v. A.S.K. Knits, Inc.*, 85 Misc. 2d 462 (1975).

Where buyer and seller met and agreed to terms for sale of yarn, seller's sales manager made written notes of terms agreed upon, such terms were later incorporated in written contract which also contained arbitration provision and which was mailed to buyer, and where contract form was not signed by buyer, but was retained by him until after goods were delivered, under UCC § 2-201(2), contract between parties was the instrument received by buyer, not written notes made by seller's sales manager, and, thus, buyer was bound by arbitration provision contained therein. *Loudon Mfg., Inc. v. American & Efrid Mills, Inc.*, 46 A.D.2d 637 (1st Dep't 1974).

Contract sent by seller to purchaser following oral orders stated that any controversy could be settled only by arbitration; held, this provision was binding where purchaser had not objected to contents of contract within ten days after receipt. *Trafalgar Square, Ltd. v. Reeves Bros.*, 35 A.D.2d 194 (1st Dep't 1970).

36. Signature on confirmation.

A purchaser's letter was a sufficient "writing in confirmation of the contract and sufficient against the sender" within the meaning of § 75-2-201(2), in spite of the seller's assertion that a confirmatory writing must be manually signed, where the letter was on the purchaser's letterhead which bore his address, and the letter referred to and recited the contract terms, requested execution of the previously-delivered forward contract, and included the typewritten name of the sender on the line where a manual signature is usually made. *Dawkins & Co. v. L & L Planting Co.*, 602 So. 2d 838 (Miss. 1992).

Oral agreement between seller and buyer's agent for sale of wheat was enforceable against seller where, following telephone call with seller, agent completed two written grain purchase contracts, which reflected terms of agreement,

signed contracts as agent of buyer and signed seller's name, where agent delivered copy of each contract a few days later to seller who noted terms of contracts and made no objections to them or to fact that his name had been signed by agent, and where seller within a few days thereafter asked for and received advance payment by check attached to memorandum which incorporated earlier contracts by referring specifically to their numbers; when seller accepted memorandum without objection to its contents and took further step of signing his name to check attached, he either signed sufficient memorandum of earlier oral contract, or he accepted offer made by buyer when its agent handed him written numbered contracts. *Cargill Inc. v. Wilson*, 166 Mont. 346, 532 P.2d 988 (1975).

37. Particular writings as confirmation.

UCC § 2-201(2) and the Official Comments thereto do not prescribe any particular form for a "writing in confirmation." *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

Where (1) seller on August 2nd orally offered to sell buyer 15,000 tons of fertilizer, which offer was valid until 2:00 p.m. on August 3rd, (2) on morning of August 3rd, as requested by buyer, seller sent buyer same offer by telex, (3) at 10:00 a.m. on August 3rd, after seller had sent and relinquished control over its firm offer by telex, buyer allegedly accepted such offer orally, and (4) buyer thereafter sent seller responsive telex while seller's firm offer was still valid and such telex included certain terms, including terms as to payment and loading, that were not in seller's offer, court held (1) that inclusion in buyer's telex of payment and loading provisions not mentioned in seller's offer was not, under UCC § 2-207(1), necessarily fatal to buyer's alleged acceptance, (2) that under UCC § 2-207(2), term "plus or minus 10 percent at buyer's option," although it might have materially altered the contract, did not by itself invalidate the alleged acceptance, (3) that on the other hand, since UCC § 2-207 does require definite expression of acceptance before its provisions can apply, it might be that buyer's responsive telex, taken as a

whole, did not represent agreement between the parties on even price and quantity of seller's fertilizer, and (4) that if a contract had been formed, it was enforceable under statute of frauds set forth in UCC § 2-201(1) because document signed by seller as party to be charged was its firm offer in its August 3 telex and buyer's oral acceptance of that written offer was responsive thereto, insofar as satisfying statute of frauds was concerned, and clearly showed that oral evidence offered by buyer rested on a real transaction. *Ore & Chem. Corp. v. Howard Butcher Trading Corp.*, 455 F. Supp. 1150, 24 U.C.C. Rep. Serv. 823 (E.D. Pa. 1978) (applying New York and Pennsylvania UCC; holding, on cross-motions for summary judgment, that validity of buyer's acceptance depended on issues of fact to be resolved at the trial).

In seller's action against merchant buyer for damages for nonpayment of accounts due for furniture sold, trial court committed error in refusing to admit, on ground that it was barred by statute of frauds set forth in UCC § 2-201, seller's evidence of goods ordered and delivered that consisted in part of signed check that buyer had sent to seller, which referred to specifically numbered invoice and had been accepted by seller and deposited in its bank account before being returned for insufficient funds, since check was sufficient under UCC § 2-201(3)(c) to take at least part of contract out of statute of frauds. Furthermore, seller's proffered copies of acknowledgments that it had sent to buyer, to which buyer had raised no objections whatever, also removed contract from operation of statute of frauds under UCC § 2-201(2) and Official Comment 3. *LEA Indus., Inc. v. Raelyn Int'l, Inc.*, 363 So. 2d 49 (App. 3 Dist. 1978).

Ordinarily, under UCC § 2-206(1)(a), an offer to make a contract invites acceptance in any manner that is reasonable under the circumstances. However, where (1) buyer's purchase order for pumps expressly provided for seller's acceptance in writing, (2) acceptance copy accompanying purchase order pointed out that order was not valid until buyer received acceptance copy from seller, and (3) purchase order did not invite acceptance by partial

performance, trial court erred in holding that seller's conduct in shipping some of the pumps ordered, more than a year after the date of the purchase order, amounted to acceptance. Furthermore, buyer's purchase order was not a confirmatory memorandum within the meaning of UCC § 2-201(2), since evidence did not show that parties had entered into an oral contract. *Nations Enters., Inc. v. Process Equip. Co.*, 40 Colo. App. 390, 579 P.2d 655 (1978).

Document which appeared to be invoice on form containing letterhead and identification markings of seller and which seemed to demonstrate party to whom merchandise was sold, date of sale, quantities and description of items and price, could be sufficient as writing in confirmation of oral contract under UCC § 2-201(2), notwithstanding document did not contain formal signature of seller. *Automotive Spares Corp. v. Archer Bearings Co.*, 382 F. Supp. 513 (N.D. Ill. 1974).

Periodic accountings prepared by seller of 1500 tons of hay and sent to buyer within 2 ½ months of oral agreement constituted confirming memoranda within UCC § 2-201(2) so as to remove oral contract from statute of frauds bar. *Azevedo v. Minister*, 86 Nev. 576, 471 P.2d 661 (1970).

38. —Letters.

UCC §§ 2-201(2) and 1-201(26) do not prescribe any particular method for proving the receipt of a confirmatory writing. However, to prove such receipt, the sending merchant can rely on the presumption that a correctly addressed letter, which was properly mailed and was not returned undelivered to the sender, was delivered to the addressee. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

Where seller's salesman offered to sell buyer 756 pairs of boots and, after discussion of price, buyer's president agreed to purchase, signed order which he prepared on his own order form and attached handwritten financial statements, where seller's salesman annexed to buyer's order inventory of boots which had been written on seller's order form, where seller's order form contained provision that all orders were subject to home office acceptance and

credit approval but buyer's president denied reading document and did not sign it, where seller refused to accept order because handwritten credit statement was not legible and forwarded letter to buyer acknowledging order by buyer's order number and requesting new credit statement, and where sale of boots to buyer was never completed by seller, buyer's cause of action for breach of contract was not barred by statute of frauds since buyer's written order was sufficient under UCC § 2-201(2), in confirmation of alleged oral contract reached after negotiations on price; seller not only did not object to order as required by § 2-201(2), but its letter in response acknowledged order and took contract out of statute of frauds. *GTP Leisure Prods., Inc. v. B-W Footwear Co.*, 55 A.D.2d 1009 (4th Dep't 1977).

Letter signed by president of plastics supplier which provided that supplier would maintain supply of certain plastics "in sufficient amounts to supply all of the plastic" for furniture manufacturer's use, satisfied requirements of statute of frauds and was binding on supplier. *Fortune Furn. Mfg. Co. v. Mid-South Plastic Fabric Co.*, 310 So. 2d 725 (Miss. 1975).

The use of the term "order" by merchant-buyer in a letter sufficiently complied with subsection (2) to remove an oral contract for merchandise from the statute of frauds, particularly since use of that term contemplated a binding contract, at least, on part of the merchant-buyer, and should have been interpreted in like manner by the seller. *Harry Rubin & Sons v. Consolidated Pipe Co. of Am.*, 396 Pa. 506, 153 A.2d 472 (1959).

39. —Telegrams.

Handwritten contract signed by both parties served as signed contract and memorandum of agreement to outfit and sell large fiberglass hulls, and satisfied statute of frauds; and telegram sent by defendants and referring to all written and verbal agreements with plaintiff constituted signed memorandum. *Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714 (Fla. Ct. App. 1972), cert. denied, 285 So. 2d 18 (Fla. 1973), 300 So. 2d 897 (Fla. 1974).

In action to recover for lost profits for contractor's refusal to accept deliveries of

stone, a telegram sent by the contractor's officer was a writing sufficient to indicate that a contract for sale had been made between the parties and signed by the party against whom enforcement was sought. *Providence Granite Co. v. Joseph Rugo, Inc.*, 362 Mass. 888, 291 N.E.2d 159 (1972).

E. Exceptions.

40. In general.

A farmer's oral agreement to sell soybeans was enforceable, even though the farmer did not subsequently sign the contract form, where (1) the farmer had booked produce with the buyer on 4 previous occasions, 2 of which involved contracts which the farmer never signed, and (2) the farmer had canceled an earlier contract with the buyer and had inquired into the possibility of canceling the soybean contract, which indicated his knowledge of the course of performance for such bookings. *Gooch v. Farmers Mktg. Ass'n*, 519 So. 2d 1214 (Miss. 1988).

Where there has been fully executed sale with elements of acceptance and receipt of subject matter by buyer and payment of purchase price and acceptance thereof by seller, transaction is outside statute of frauds. *Hickman v. Bross*, 58 Pa. D. & C.2d 137 (1972).

41. Specially manufactured goods.

In breach-of-warranty action for damages by buyer of allegedly defective dump trailers against manufacturer-seller, court held (1) that buyer and its ultimate Mexican customers were "merchants" within meaning of UCC § 2-104(1); (2) that seller was "merchant" within meaning of both UCC § 2-104(1) and § 2-314(1); (3) that telephoned order for 20 additional trailers was not enforceable under statute of frauds in UCC § 2-201(1) because it did not come within exceptions to such statute contained in UCC § 2-201(3); (4) that "specially manufactured goods" exception in UCC § 2-201(3)(a) applies only when seller, rather than buyer, seeks to escape statute-of-fraud defense; (5) that since three trailers purchased under valid written contract were put to improper use by buyer's Mexican customers, rather than being used for their "ordinary purposes,"

no breach of implied warranty of merchantability under UCC § 2-314(1) and (2)(c) occurred; (6) that use of trailers for improper purposes, rather than for their stated "particular purpose," prevented recovery under implied warranty of fitness in UCC § 2-315; (7) that buyer could not recover for breach of express warranty under UCC § 2-313(1)(a) because it failed to prove that it had relied on statements in manufacturer-seller's brochure either prior to or contemporaneously with making of parties' contract; and (8) that since buyer had no right under UCC § 2-601(a) to reject two unused and undamaged trailers, manufacturer-seller was not required to retake them or to refund their purchase price to buyer. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

Where shipping crates or containers were manufactured to detailed specifications required by purchaser, were to be used for shipping overseas all-terrain vehicle manufactured by purchaser, and were not suitable for sale to others in ordinary course of seller's business, contract for purchase and sale of crates was not rendered unenforceable by statute of frauds. *LTV Aerospace Corp. v. Bateman*, 492 S.W.2d 703 (Tex. Civ. App. 1973), ref. n.r.e. (July 11, 1973).

Blacktop that has already been packed down and laid in place is goods which is manufactured specially for the buyer and for which this seller would be hard pressed to find a suitable sale in the ordinary course of business, so as to fall within statute of frauds exception. *Rose Acre Farms, Inc. v. L.P. Cavett Co.*, 151 Ind. App. 268, 279 N.E.2d 280 (1972).

Where there was a possibility that an oral agreement relating to sale of lacquered plate may fall within UCC § 2-201(3)(a) exception for specially manufactured goods, court below abused its discretion in failing to allow amendment of complaint to set forth such agreement. *Pittsburgh Metal Lithographing Co. v. Sovereign Corp.*, 220 Pa. Super. 219, 283 A.2d 714 (Super. 1971).

A contract whereby plaintiff was to render sales promotional services to the defendant was not a contract for the sale of special order goods governed by the provi-

sions of § 85 of the Personal Property Law. *Tradeways Inc. v. Chrysler Corp.*, 342 F.2d 350 (2d Cir. N.Y. 1965), cert. denied, 382 U.S. 832, 86 S. Ct. 71, 15 L. Ed. 2d 75 (1965).

42. Admissions by parties.

In action for breach of oral contract to sell hay, where (1) seller admitted in pleadings and testimony that there was a sales contract, but denied that it involved sale of all hay raised on his farm during season in question, (2) seller admitted that contract was for sale of first two cuttings of hay during season in question, and (3) performance of such contract involved delivery and receipt of payment for only first two cuttings of hay, court held that under UCC § 2-201(3)(b) and (c), contract was enforceable only as to quantity of hay (first two cuttings) admitted, which either had been received and accepted or concerning which payment had been made and accepted. *Darrow v. Spencer*, 581 P.2d 1309 (Okla. 1978).

In suit on open account, buyer's contention that requirement of writing under statute of frauds had not been met was eliminated under UCC § 2-201(3)(b) by buyer's acknowledgement that alleged agent had ordered goods in dispute. *Custom Radio Wholesalers, Inc. v. Hamilton/Avnet Elecs.*, 147 Ga. App. 110, 248 S.E.2d 187 (1978).

In sellers' action to rescind written contract for sale of cotton on ground of mutual mistake, where buyer before execution of written contract informed sellers that oral negotiations between parties had contractually bound sellers to sell, but sellers consistently denied making any oral contract, case was governed by statute of frauds provision set forth in UCC § 2-201(3)(b), which provides that oral contract for sale of goods can be enforced provided that party against whom enforcement is sought has judicially admitted making such contract. In such case, moreover, buyer could not successfully contend that there was no evidence that parties were mistaken in their belief that sellers were contractually obligated to sell their cotton even before sellers executed the written contract. *Plains Cotton Coop. Ass'n v. Wolf*, 553 S.W.2d 800 (Tex. Civ. App. 1977), ref. n.r.e. (Jan. 11, 1978).

Where buyer, on July 23, 1973, telephoned grain seller about buying wheat and seller said he might let buyer have 40,000 bushels, subject to buyer's sending written confirmation of contract for seller's approval; where such written confirmation, because of error by buyer, was sent to incorrect address and not received by seller until August 17, 1973; where seller, on July 31, 1973, informed buyer by phone that change should be made in contract, and buyer sent written confirmation of such change to incorrect address; and where seller, on August 21, 1973, wrote buyer that seller was repudiating contract because of provision in confirmation of contract giving buyer option to cancel, (1) buyer and seller were "merchants" under UCC § 2-104(1); (2) buyer's written confirmation of contract, which seller did not receive until August 17, 1973, was not received within reasonable time under UCC § 2-201(2); (3) seller's objection on August 21, 1973 to buyer's confirmation of contract, because of clause giving buyer option to cancel agreement, was made within ten-day period prescribed by UCC § 2-201(2); and (4) seller never admitted existence of valid contract so as to permit its enforcement under UCC § 2-201(3)(b). *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. Colo. 1977).

Where buyer of transformers admitted to making of oral contract with seller and where buyer accepted goods without giving seasonable notice of rejection as required by UCC § 2-602, oral contract for sale of goods was enforceable pursuant to UCC § 2-201(3)(b)(c). *Carolina Transformer Co. v. Anderson*, 341 So. 2d 1327 (Miss. 1977).

If making of oral contract is admitted in court, either in written pleading, by stipulation, or by oral statement before the court, no additional writing is necessary for protection against fraud. Under UCC § 2-201(3)(b), it is no longer possible to admit an oral contract in court and still assert statute of frauds as defense. However, the contract is not thus conclusively established. The admission so made by a party is itself evidential against him of truth of facts admitted and nothing more, and as against the other party, it is not

evidential at all. *Packwood Elevator Co. v. Heisdorffer*, 260 N.W.2d 543 (Iowa 1977).

Although statute of frauds under UCC § 2-201 was applicable to contract for sale of soybeans which constituted goods within meaning of UCC § 2-105 and also constituted under UCC § 2-107 growing crops capable of severance, seller was prohibited from asserting statute of frauds as defense in action on contract where seller admitted that contract was made. *Cargill, Inc., Commodity Mktg. Div. v. Hale*, 537 S.W.2d 667 (Mo. Ct. App. 1976).

In action based on two alleged oral agreements for sale of corn, action on first agreement was permitted under UCC § 2-201(3)(b) where defendant seller admitted existence of agreement and his incomplete performance, but action based on second agreement was barred by UCC § 2-201(1) statute of frauds since defendant seller denied existence of second agreement. *Jurek v. Thompson*, 308 Minn. 191, 241 N.W.2d 788 (1976).

In action by buyer against seller arising out of nondelivery of wheat under oral sales contract, original oral contract was not rendered unenforceable by UCC § 2-201 statute of frauds, where seller admitted existence of contract. Nor was oral modification of contract as to delivery date due to unavailability of elevator space rendered unenforceable by statute of frauds requirement under UCC §§ 2-209 and 2-201 where pursuant to UCC § 1-103 and 2-209, seller waived statute of frauds defense through his course of performance under UCC § 2-208 and 1-205 in delivering 36 truckloads of wheat well after original delivery date without making timely objection. *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 552 P.2d 63 (1976).

An oral contract was valid and unenforceable under UCC § 2-201(3)(b) where both parties admitted to it. *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 285 N.C. 344, 204 S.E.2d 834, 72 A.L.R.3d 466 (1974).

It is the intent of paragraph (b) of subdivision (3) of this section that if, after the petition or cross action is filed based on an oral contract for the sale of goods of the value of more than \$500, the person charged admits the contract in the case

thus pending, the statute of frauds as a defense shall not be available to him, but on the contrary the case thus made shall be determined on the merits without reference to the statute of frauds; and it was further designed to prevent the statute of frauds itself from becoming an aid to fraud, by prohibiting one claiming the benefit of the statute who admits in the case the oral contract sued on. *Garrison v. Piatt*, 113 Ga. App. 94, 147 S.E.2d 374 (1966).

43. —In testimony.

In action for seller's breach of oral contract to sell soybeans, where seller admitted making contract during testimony as adverse witness, but testified that contract had expired by its own terms 14 days after date on which it was made, buyer testified that contract had provided for "usual 30-day delivery period," and other testimony showed that market price of soybeans had risen after contract was made and that seller had sold his soybeans to another buyer for a higher price, (1) under UCC § 2-201(3)(b), defense of statute of frauds was not available to seller because of his testimonial admission that he had made contract; (2) after seller's admission of agreement, buyer had burden of proving existence of agreement and its terms; (3) buyer's manager was properly allowed to testify as to his understanding about alleged 30-day delivery term; and (4) there was substantial evidence in record on appeal to support trial court's finding that delivery term provided for 30 days, rather than two weeks as contended by seller. *Packwood Elevator Co. v. Heisdorffer*, 260 N.W.2d 543 (Iowa 1977).

Verbal agreement for sale of heavy equipment and gravel pit was enforceable against buyer under UCC § 2-201(3)(b), notwithstanding contract involved sale of realty in addition to goods, where contract was "entire" contract and thus was not severable, where contract was predominantly one for sale of goods since gravel pit represented only about five per cent of total price agreed upon, and where buyer freely admitted in his testimony existence of oral agreement. *Dehahn v. Innes*, 356 A.2d 711 (Me. 1976).

In action by wholesale gas and oil distributor against supplier for breach of oral contract, trial court erred in granting summary judgment in favor of supplier on ground that action was barred by UCC § 2-201, where supplier conceded it made some agreement for sale of petroleum products to distributor, where sales had actually been made and where, based on testimony, jury could find either that agreement by supplier was to furnish 50 million gallons to distributor within one year period or that agreement was one for "spot sales" with no firm commitment. *Oskey Gasoline & Oil Co. v. Continental Oil Co.*, 534 F.2d 1281 (8th Cir. Minn. 1976).

In action for breach of oral contract for sale of mobile home, Uniform Commercial Code statute of frauds was satisfied under UCC § 2-201(3)(b) where, although defendant denied existence of contract, he testified in court that he had agreed to pay seller's price, a fact which established as matter of law that contract was formed. *Lewis v. Hughes*, 276 Md. 247, 346 A.2d 231, 88 A.L.R.3d 406 (1975).

Admission in testimony of contractor's officer that contract for sale of stone had been made was evidence that contract was enforceable under statute of frauds. *Providence Granite Co. v. Joseph Rugo, Inc.*, 362 Mass. 888, 291 N.E.2d 159 (1972).

The contention that no written contract was entered into and, therefore, no valid contract could be possible because of the requirements of the statute of frauds is without merit since the seller admitted in his testimony that the contract of sale, as alleged in the plaintiff's complaint, was made. *Hale v. Higginbotham*, 228 Ga. 823, 188 S.E.2d 515 (1972).

Defendant-farmer's testimony, both as adverse witness called by grain company and as witness in his own behalf, established evidence to bring claimed oral contract for sale of corn within statute of fraud's exception relating to admission of contract by party against whom enforcement is sought. *Quad County Grain, Inc. v. Poe*, 202 N.W.2d 118 (Iowa 1972).

44. —In pleadings.

In action by buyer of automobile on oral contract with seller for money had and received when seller resold vehicle to

third person, although contract in suit did not comply with UCC § 2-201(1), it was nevertheless enforceable under UCC § 2-201(3)(b), since seller's pleadings admitted making of such contract. *Acuri v. Figliolli*, 91 Misc. 2d 831 (1977).

Contract held enforceable under UCC § 2-201(3)(c) where complaint alleged, and affidavit admitted, possession of goods. *Davis v. Aandewiel*, 16 Ariz. App. 262, 492 P.2d 758 (1972).

A verbal agreement to repurchase a certain number of generators may be enforced under UCC § 2-201(3)(b), notwithstanding the statute of frauds, where the existence of the verbal agreement is admitted in pleadings. *Chrysler Corp. v. Majestic Marine, Inc.*, 35 Mich. App. 403, 192 N.W.2d 507 (1971).

UCC statute of frauds was not bar to action where affidavits of plaintiff and answer of defendant clearly show receipt, acceptance, and retention of goods by defendant. *Rochester Iron & Metal Co. v. Capellupo*, 62 Misc. 2d 264 (1969).

45. —In discovery.

Admission by corporate agent in discovery deposition that contract had been made constituted judicial admission sufficient to permit plaintiff to enforce alleged oral contract under exception in Miss Code § 75-2-201(3)(b). *Babst v. FMC Corp.*, 661 F. Supp. 82 (S.D. Miss. 1986).

Admission made in discovery deposition by party to be charged that such party had entered into oral contract sought to be enforced was in-court admission of such contract within meaning of UCC § 2-201(3)(b). *URSA Farmers Coop. Co. v. Trent*, 58 Ill. App. 3d 930, 374 N.E.2d 1123 (4th Dist. 1978).

In seller's action for buyer's breach of alleged oral contract under which seller was to supply all potatoes required by buyer's chain of restaurants, (1) contract was sufficiently definite in quantity to be enforceable under UCC § 2-306(1), but (2) since buyer in its pleading did not admit making of contract within meaning of UCC § 2-201(3)(b), and since deposition testimony of buyer's former employees, which admitted existence of oral contract sued on, did not constitute binding admission against buyer under UCC § 2-201(3)(b) because of witnesses' lack of au-

thority at time depositions were taken, contract was unenforceable under statute of frauds set forth in UCC § 2-201(1). *Miller v. Sirloin Stockade*, 224 Kan. 32, 578 P.2d 247 (1978).

46. —Non-judicial admissions.

In seller's action to recover for 9,072 bushels of corn delivered to buyer under oral contract to sell 20,000 bushels to buyer, in which buyer counterclaimed for damages for seller's failure to deliver remainder of corn contracted for, (1) seller was entitled under UCC § 2-201(3)(c) to payment for corn received and accepted by buyer, but (2) buyer was not entitled to recover for corn that seller did not deliver, since letter written by seller's attorney to buyer discussing alleged oral contract did not satisfy requirements of UCC § 2-201(3)(b), dealing with enforceability of contract unenforceable under statute of frauds if making of contract is admitted by party to be charged in his "pleading, testimony, or otherwise in court." *Wilke v. Holdrege Coop. Equity Exch.*, 200 Neb. 803, 265 N.W.2d 672 (1978).

Copy of buyer's check stub for check allegedly sent to seller for purchase of horse and the assertion of plaintiff and his executive assistant who allegedly monitored phone call in which seller stated that he did not wish to complete the transaction until after the first of the year for tax reasons along with buyer's assertions that seller retained check did not establish assent to the contract by the seller in view of the seller's denials, and thus alleged contract was not removed from the operation of the statute of frauds. *Presti v. Wilson*, 348 F. Supp. 543 (E.D.N.Y. 1972).

47. Partial performance.

The effect of part payment on a contract for the sale of an indivisible item is not specifically treated by the Uniform Commercial Code (see UCC § 2-201(3)(c)). Generally, however, such payment is construed to render an indivisible oral contract enforceable, notwithstanding the statute of frauds. *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

Oral agreement by president of corporation to sell truck to corporation did not fall

within any exception to statute of frauds for sale of goods contained in UCC § 2-201(3) where certificate of title to truck had not been transferred to corporation, corporation had not paid any part of purchase price to seller, entry of debt for payment of purchase price had not been made on corporation's books, and truck had never been altered or used for corporation's purposes. In such case, neither party could have enforced such contract unless other party admitted that contract had been made or that truck had been received and accepted. *Keller Lorenz Co. v. Insurance Assocs. Corp.*, 98 Idaho 678, 570 P.2d 1366 (1977).

The statute of frauds permits a party to welch on an oral bargain in order to avoid the risk that an oral contract may be proved by fraudulent testimony; the exceptions for part performance or payment and acceptance both involved mutual participation and not unilateral acts. *Presti v. Wilson*, 348 F. Supp. 543 (E.D.N.Y. 1972).

Contract to supply milk at special discount price was terminated after 6 months by the giving of reasonable notice; held, this partial performance did not take the contract out of statute of frauds under UCC § 2-201(3)(c). *Spiering v. Fairmont Foods Co.*, 424 F.2d 337 (7th Cir. Ill. 1970).

A writing is not required under the Code when equipment sold by the seller is delivered and installed by him. *Fyre-Safety, Inc. v. Yerger Bros.*, 56 Lanc. L. Rev. 311 (Pa. 1959).

48. —Extent of ratification; whole contract.

Seller was not "merchant," as defined by UCC § 2-104(1), with respect to sale of corn and therefore was not bound to oral contract under UCC § 2-201(2), even though buyer sent confirmation notice to seller following oral agreement, since seller was not in business of selling corn but, rather, conducted cattle feeding operation, growing grain for that purpose and selling grain only when it was surplus to cattle feeding needs. However, seller's delivery of corn in approximate quantity called for in oral agreement, and its acceptance by buyer, constituted part performance under UCC § 2-201(3)(c) sufficient to take contract out of statute of frauds even though such conduct was consistent

with making of spot sale at current market price. *Gerner v. Vasby*, 75 Wis. 2d 660, 250 N.W.2d 319, 97 A.L.R.3d 897 (1977).

Under UCC §§ 2-201(1) and 2-309, oral contract to supply plastic pipe which did not include times for delivery was enforceable beyond extent to which it had been performed. *Owens v. Clow Corp.*, 491 F.2d 101 (5th Cir. Ala. 1974).

49. —Extent of ratification; part performed.

Oral contract to purchase 100 cattle for \$50,000, under which buyer gave seller check for \$1,000 as earnest money, was unenforceable under UCC § 2-201(1), except to extent that buyer's check for \$1,000 earnest money could constitute partial payment for cattle within meaning of UCC § 2-201(3)(c). *Anthony v. Tidwell*, 560 S.W.2d 908 (Tenn. 1977).

Trial court properly dismissed complaint alleging breach by defendants of oral contract to sell 7,000 bushels of soybeans to plaintiffs at \$4.42 per bushel and further alleging partial performance of such contract; although UCC § 2-201(3)(c) provides exception for completely executed part of oral contract, existence of partial performance does not support cause of action for anything over that already performed. *Lippold v. Beanblossom*, 23 Ill. App. 3d 595, 319 N.E.2d 548 (4th Dist. 1974).

In action for purchase price of certain goods delivered to and accepted by plaintiff, UCC § 2-201(1) statute of frauds, vitiating plaintiff's capacity to sue, could have been raised by demurrer but for fact that degree of performance alleged was sufficient to erase effect of language of statute of frauds and validate contract for goods allegedly accepted. *Texas Truck Sleeper Co. v. Artman*, 62 Pa. D. & C.2d 663 (1973).

In action for purchase price of certain goods delivered to and accepted by plaintiff, UCC § 2-201(1) statute of frauds, vitiating plaintiff's capacity to sue, could have been raised by demurrer but for fact that degree of performance alleged was sufficient to erase effect of language of statute of frauds and validate contract for goods allegedly accepted. *Texas Truck Sleeper Co. v. Artman*, 62 Pa. D. & C.2d 663 (1973).

Under oral contract for sale of corn, buyer by making part payment, and seller by accepting that part payment, made enforceable contract only as to that quantity of corn that could have been purchased by that part payment. In re Augustin Bros. Co., 460 F.2d 376 (8th Cir. Neb. 1972).

UCC parted company with old Sales Act in holding that partial performance of an agreement does not avoid the requirement of a writing under UCC § 2-201, but renders the agreement enforceable only with respect to the goods which have been delivered and accepted. *Huyler Paper Stock Co. v. Information Supplies Corp.*, 117 N.J. Super. 353, 284 A.2d 568 (L. Div. 1971).

50.—Indivisible contracts.

The effect of part payment on a contract for the sale of an indivisible item is not specifically treated by the Uniform Commercial Code (see UCC § 2-201(3)(c)). Generally, however, such payment is construed to render an indivisible oral contract enforceable, notwithstanding the statute of frauds. *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

An order form for a specifically optioned automobile sent by the dealer to the manufacturer, either taken alone or when read in conjunction with the customer's purchase order is a sufficient note or memorandum to satisfy the provisions of section 2-201 of the Uniform Commercial Code, since the order form evidences the existence of a contract, is signed by the party to be charged and implicitly specifies the quantity involved. However, assuming the absence of a sufficient writing, nevertheless the customer's part payment of \$1,000 on the indivisible contract operated to take the agreement out of the Statute of Frauds (§ 2-201, subd [3], par [c]). *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

Even if subparagraph (c) validates a divisible contract only for as much of the goods as have been paid for, it does not necessarily follow that such a rule invalidates an indivisible oral contract where some payment has been made and accepted; it is difficult to see how the contract for the purchase of an automobile,

upon which the buyer paid \$25, could have contemplated less than one automobile, assuming as the court did, that automobiles are indivisible. Any other conclusion would work an unconscionable result and would encourage rather than discourage fraud if the facts as pleaded were proven at the trial. *Starr v. Freeport Dodge, Inc.*, 54 Misc. 2d 271 (1967).

51.—Payment; sufficient.

In seller's action against merchant buyer for damages for nonpayment of accounts due for furniture sold, trial court committed error in refusing to admit, on ground that it was barred by statute of frauds set forth in UCC § 2-201, seller's evidence of goods ordered and delivered that consisted in part of signed check that buyer had sent to seller, which referred to specifically numbered invoice and had been accepted by seller and deposited in its bank account before being returned for insufficient funds, since check was sufficient under UCC § 2-201(3)(c) to take at least part of contract out of statute of frauds. Furthermore, seller's proffered copies of acknowledgements that it had sent to buyer, to which buyer had raised no objections whatever, also removed contract from operation of statute of frauds under UCC § 2-201(2) and Official Comment 3. *LEA Indus., Inc. v. Raelyn Int'l, Inc.*, 363 So. 2d 49 (App. 3 Dist. 1978).

Where (1) buyer placed order for new Corvette on form furnished by dealer, (2) such form described car, listed its purchase price, provided for delivery to buyer as soon as possible, and also stated that order was not binding until accepted by dealer, (3) buyer, but not dealer, signed such order form and gave dealer check for \$1,000 deposit on vehicle, (4) dealer on same day placed written order with manufacturer for car ordered by buyer, (5) such order was signed by dealer, listed buyer as "customer," and described order as "sold," rather than "stock" for inventory, (6) dealer subsequently notified buyer by letter that "market conditions" had made buyer's "offer" unacceptable and that dealer would refund buyer's \$1,000 deposit, and (7) car was ultimately manufactured, delivered to dealer, and sold to third party, court held (1) that under UCC § 2-204(1) and (2), dealing with making of

contracts generally, contract was formed as matter of law no later than time when dealer, after taking and retaining buyer's down payment, placed signed order for car with manufacturer which designated car as "sold" and listed buyer's name as "customer," (2) that dealer's conduct was clearly sufficient to signify an acceptance, even though it did not sign its own order form, (3) that order form sent by dealer to manufacturer was sufficient memorandum of contract to satisfy statute of frauds set forth in UCC § 2-201(1), and (4) that even assuming absence of a sufficient memorandum under UCC § 2-201(1), buyer's part payment on the indivisible contract operated under UCC § 2-201(3)(c) to take contract out of statute of frauds. *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

In action by prospective buyer to enforce oral contract for sale of piece of construction equipment, question of fact was raised as to whether sellers had accepted payment, thus removing oral contract from statute of frauds under UCC § 2-201(3)(c) and precluding entry of summary judgment, where sellers received and retained buyer's check, in amount alleged to be full purchase price of equipment, for 30 days before check was returned unendorsed to buyer. *Kaufman v. Solomon*, 524 F.2d 501 (3d Cir. Pa. 1975).

A check for \$2,325 bearing legend "deposit on aux. sloop, D'Arc Wind, full amount \$4,650" would constitute partial performance sufficient to uphold entire contract calling for sale of this boat, as against statute of frauds objection. *Cohn v. Fisher*, 118 N.J. Super. 286, 287 A.2d 222 (L. Div. 1972).

52. —Payment; insufficient.

In action on option contract to purchase airplane, where (1) defendants gave plaintiff written option to purchase on April 1, 1977, which by its terms would expire on April 11, 1977, (2) defendants issued sight draft on April 5, 1977, payable to order of defendants and listing plaintiff as drawee, which plaintiff's bank received on April 8, 1977 together with partially executed bill of sale, (3) defendants on April 11, 1977 (expiration date of written option) gave plaintiff oral extension of option to purchase plane and (4) plaintiff on April 18,

1977 instructed his bank to pay sight draft, but defendants in the interim sold plane to another person, court held (1) that contract was required by UCC § 2-201(1) (statute of frauds) to be in writing; (2) that written option-offer was not accepted by plaintiff within time limit contained therein; (3) that expiration date of written option-offer was not superseded by oral extension of such date because parol evidence of extension was not admissible under UCC § 2-202 to vary material term of written option; (4) that if written option-offer, as claimed by plaintiff, was still only an offer at time of its oral modification, then acceptance tendered by plaintiff after original time limit of written option had expired was acceptance of different contract offer and contract thus formed was unenforceable under statute of frauds provision contained in UCC § 2-201(1); and (5) that such different contract was not removed from statute of frauds by part performance that allegedly occurred when defendants sent sight draft to plaintiff's bank. *McCollum Aviation, Inc. v. CIM Assocs.*, 446 F. Supp. 511 (S.D. Fla. 1978).

Evidence was conclusive that there was sale of automobile to buyer under UCC § 2-201(3) where seller delivered automobile to buyer at his home so buyer could drive it, where buyer drove automobile to seller's place of business and informed seller that he had decided to buy it, giving seller check for whole purchase price of car and leaving his old car in possession of seller, although buyer left automobile in possession of seller for purpose of making minor repairs, and seller subsequently asked for additional payment and refused to deliver possession of automobile to buyer. *Shipman v. Craig Ayers Chevrolet, Inc.*, 541 P.2d 876 (Okla. Ct. App. 1975).

Oral contract for sale of two conveyors for price in excess of \$500 did not fall within payment and acceptance exceptions to statute of frauds set forth in UCC § 2-201(3)(c) where check given by purchaser as payment was not accepted by seller, but was returned uncashed, and where seller never consented to removal of equipment by buyer. *Nelson v. Hy-Grade Constr. & Materials, Inc.*, 215 Kan. 631, 527 P.2d 1059 (1974).

Payment without acceptance of the payment is not sufficient to establish part performance removing oral contract from statute of frauds; tender alone does not establish payment, and there must be some objective manifestation referable to payment and acceptance. *Presti v. Wilson*, 348 F. Supp. 543 (E.D.N.Y. 1972).

Copy of check stub representing check allegedly mailed by buyer as payment for horse and affidavit of buyer's executive assistant that he monitored telephone call in which seller allegedly indicated willingness to sell horse and desire not to consummate transaction until later date for tax reason and that he prepared and mailed bill of sale and check, along with buyer's assertion that seller retained check was not evidence of an objective manifestation of assent to contract and did not constitute payment and acceptance taking oral contract out of statute of frauds. *Presti v. Wilson*, 348 F. Supp. 543 (E.D.N.Y. 1972).

If the whole agreement (written and oral) require transfer of the stone stockpiles, and if they were not transferred, the provisions of UCC § 2-201(3)(c) are satisfied by payment of the whole consideration. *Bridgewater Washed Sand & Stone Co. v. Bridgewater Materials, Inc.*, 361 Mass. 809, 282 N.E.2d 912 (1972).

53. —Receipt and acceptance.

Contract for sale of pyrenone was enforceable under statute of frauds where (1) pyrenone was "received and accepted" by buyer under UCC § 2-201(3)(c), and (2) buyer's attempt to reject pyrenone three months later was not effective under UCC § 2-606(1)(b) and § 2-602(1). *Pride Lab., Inc. v. Sentinel Butte Farmers Elevator Co.*, 268 N.W.2d 474, 24 U.C.C. Rep. Serv. 817 (N.D. 1978) (under circumstances of case, rejection three months after delivery was not attempted within reasonable time).

Contract between seller of footwear and wholesale grocery corporation with subsidiaries that serviced independently owned retail stores in two states, which allegedly provided that footwear ordered by such stores would be shipped directly to stores and that stores would be billed through corporation's warehouse, was enforceable under UCC § 2-201(3)(c), since

bar of statute of frauds contained in UCC § 2-201(1) does not apply to goods that have been received and accepted, and in present case stores ordering footwear from seller had received and accepted all goods contracted for. *Pedi Bares, Inc. v. P & C Food Mkts., Inc.*, 567 F.2d 933 (10th Cir. Kan. 1977).

Where there was ample proof that contract for sale of sawmill existed and it was clear that purchasers received and accepted sawmill, under UCC § 2-201(3)(b), (c) it was necessary for trial court to determine what were provisions of sale, notwithstanding purchaser's contention that their alleged assumption of notes was invalid because sale contract was over \$500 and not in writing. *Barnett v. Stewart Lumber Co.*, 547 S.W.2d 788 (Ky. Ct. App. 1977).

Seller was not "merchant," as defined by UCC § 2-104(1), with respect to sale of corn and therefore was not bound to oral contract under UCC § 2-201(2), even though buyer sent confirmation notice to seller following oral agreement, since seller was not in business of selling corn but, rather, conducted cattle feeding operation, growing grain for that purpose and selling grain only when it was surplus to cattle feeding needs. However, seller's delivery of corn in approximate quantity called for in oral agreement, and its acceptance by buyer, constituted part performance under UCC § 2-201(3)(c) sufficient to take contract out of statute of frauds even though such conduct was consistent with making of spot sale at current market price. *Gerner v. Vasby*, 75 Wis. 2d 660, 250 N.W.2d 319, 97 A.L.R.3d 897 (1977).

Oral accord and satisfaction was enforceable under UCC § 2-201(3)(c), where evidence was presented that debtor performed by delivering potatoes to third party, that creditor allowed debtor to mistakenly believe that third party was associated with creditor, that creditor agreed to credit value of potatoes to debt, and that agreement to extinguish debt was executed when creditor credited potatoes to debt and accepted notes without demanding additional money that he subsequently contended was still owing. *Smith v. Hornbuckle*, 140 Ga. App. 871, 232 S.E.2d 149 (1977).

Oral agreement by cottonseed buyer that it would in all respects meet prices and rebates of its competition was enforceable under UCC § 2-201(3)(c) where seller delivered seed from time to time to buyer and buyer acknowledged and receipted delivery. *Tennessee Valley Cotton Oil Mill v. Oakland Gin Co.*, 341 So. 2d 153 (Ala. Civ. App. 1976).

In action by materialman against property owner to recover for materials delivered to subcontractor where it was alleged that owner orally agreed to "guarantee" payment for materials previously delivered to subcontractor, in consideration for which materialman agreed to continue furnishing materials to job and to forebear from filing claim of lien against owner's real property, enforcement of alleged oral "guarantee" contract was not barred by statute of frauds, UCC § 2-201; materials supplied at instance of owner after promise sued on were delivered pursuant to new agreement and were "received and accepted" within contemplation of UCC § 2-201(3)(c) and thus statute of frauds was inapplicable as to them; with respect to materials supplied before "guarantee" contract sued on, they were not delivered pursuant to "contract for sale" within definition thereof in UCC § 2-106 and statute was thus inapplicable as to them. *Jim & Slim's Tool Supply, Inc. v. Metro Communities Corp.*, 328 So. 2d 213 (Fla. App. 1976).

Mortgage loan company was liable to pay purchase price of building materials delivered to third party where there was evidence that mortgage loan company entered into oral contract with lumber company to pay for building materials and where there was evidence that mortgage loan company designated employee of third party to sign invoices for receipt of materials; contract was enforceable under UCC § 2-201(3)(c), notwithstanding lack of a writing, since building materials had been received and accepted. *Engel Mtg. Co. v. Triple K Lumber Co.*, 56 Ala. App. 337, 321 So. 2d 679 (Civ. App. 1975).

Oral contracts for sale of lettuce were enforceable under UCC § 2-201(3)(c), notwithstanding they were not in writing, where seller was transferred lettuce from its cooler to motor carrier for delivery for

buyer; for purpose of satisfying UCC § 2-201(3)(c), lettuce was "received" by buyer when it was shipped in accordance with each invoice, and buyer would be deemed to have "accepted" lettuce, as defined in UCC § 2-606, since (1) transfer of lettuce to carrier was "an act inconsistent with the seller's ownership," and (2) buyer failed to make an effective rejection" of lettuce after it was received. *O'Day v. George Arakelian Farms, Inc.*, 24 Ariz. App. 578, 540 P.2d 197 (1975).

Fact issue was presented on question whether oral contract for sale of house was enforceable under "received and accepted" exception found in UCC § 2-201(3)(c), where seller alleged that he had installed house on concrete blocks on the buyers' land and buyers had accepted this labor and material. *Wade v. Jones*, 526 S.W.2d 160 (Tex. Civ. App. 1975).

Contract for sale of cattle received by buyer was not required to be in writing under UCC § 1-206, since provision does not apply to contracts for sale of goods, nor by § 2-201, since written contract was not required with respect to goods which have been received or accepted. *Clifton Cattle Co. v. Thompson*, 43 Cal. App. 3d 11 (2d Dist. 1974).

Where last purchase of goods as demonstrated by accounts occurred 20 days prior to commencement of action on accounts, difference between 2 dates represented reasonable time within which any inspection and rejection of goods should have been made, so that sales of goods represented by account were taken out of statute of frauds by receipt and acceptance of goods by defendant. *Gardner & Beedon Co. v. Cooke*, 267 Or. 7, 513 P.2d 758 (1973).

Properly treating the indebtedness owned by respondent as representing money owned on a sale of goods the parties may show the terms of the oral agreement between respondent and testator relating to such indebtedness including price, terms of payment and dates for such payment, since complete delivery of the goods took the sale out of the statute. *Cornelius v. Crea*, 33 A.D.2d 887 (4th Dep't 1969), rev'd on other grounds, 27 N.Y.2d 339, 318 N.Y.S.2d 133, 266 N.E.2d 815 (1971).

Contractor received and accepted cabinets; contractor raised statute of frauds as defense to cabinet maker's action for payment on contract to build cabinets; held, UCC § 2-201(3)(c) precluded this defense. *Buxton v. Horn*, 452 S.W.2d 250 (Mo. Ct. App. 1970).

Oral contract enforceable and statute of frauds inapplicable where truck in question had been received and accepted. *Roe v. Flamegas Indus. Corp.*, 16 Mich. App. 210, 167 N.W.2d 835 (1969).

Where buyer and automobile dealer had agreed on a "trade", buyer had turned over his old car to the dealer and had in turn received absolute and unconditional possession of the new vehicle, and nothing remained except for the title papers to be processed and the delivery to seller of a check for the cash payment, title to the new car passed to buyer at time of its delivery; and when the car was wrecked on the night the trade was made, buyer's rather than seller's insurer was liable. *Motors Ins. Corp. v. Safeco Ins. Co. of Am.*, 412 S.W.2d 584 (Ky. 1967).

The seller's contract sent to the buyer declared that it was binding when it was delivered to the buyer if no objection was made thereto or when the buyer accepted and paid for any goods thereunder, it was held that the buyer was bound by the contract when he made no objection thereto, and accepted part of the goods, and was therefore required to arbitrate any dispute as specified in the contract. *Aaron Kamhi, Inc. v. Vanity Fabrics, Inc.*, 4 U.C.C. Rep. Serv. 481 (1967, NY Sup.).

Where goods are received and accepted by the purchaser, the transaction is without the statute of frauds. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

54. Waiver and estoppel.

UCC § 2-201, by its own terms, permits a party to waive the statute of frauds. Moreover, UCC § 2-201 does not by its terms operate as a bar to, or destroy, a plaintiff's cause of action. *Duffee v. Judson*, 251 Pa. Super. 406, 380 A.2d 843, 24 U.C.C. Rep. Serv. 823 (1977) (holding that because UCC § 2-201 is waivable, it could only be raised, under Pennsylvania

procedure, in new matter and not in preliminary objections).

In seller's action for buyer's breach of oral contract to purchase 17 million advertising "flyers" for insertion in national mail-sale literature, oral contract in suit was not voidable under written-memorandum requirement of UCC § 2-201(1) because such contract came under exception contained in UCC § 2-201(3)(a) concerning goods specially manufactured for buyer that are not suitable sale to others in ordinary course of seller's business and seller, before receiving notice of buyer's repudiation of contract, had made substantial commencement of goods' manufacture by printing 62 per cent of 17 million flyers ordered. *Perlmutter Printing Co. v. Strome, Inc.*, 436 F. Supp. 409 (N.D. Ohio 1976).

55. —Equitable estoppel.

In action by buyer to enforce oral contract for sale of 20,000 bushels of corn at \$1.22 per bushel for future delivery, seller was barred from raising defense of statute of fraud, UCC § 2-201(1), by doctrine of equitable estoppel where buyer substantially changed its position in reliance on oral contract by selling 18,000 bushels of corn to two third parties in accordance with buyer's general business practice, and where seller knew or should have known that buyer would rely on contract and would resell corn. *Farmers Elevator Co. v. Lyle*, 90 S.D. 86, 238 N.W.2d 290 (1976).

Under UCC § 2-201, oral agreement regarding sale of goods may be enforced if admitted by other party to agreement. Furthermore, equitable estoppel may be applied to avoid statute of frauds provision regarding oral agreements for sale of goods if agreement is first established by competent evidence, where statute does not render such agreement void; thus, where one party, in reliance on representation or conduct of another, changes his position or otherwise suffers unjust or unconscionable injury or loss, or where one party has accepted performance for benefits to detriment of other, a party may be estopped to deny validity of oral agreement. *Dangerfield v. Markel*, 222 N.W.2d 373 (N.D. 1974).

56. —Promissory estoppel.

Oral contract allegedly made between wood dealer and mill did not come within brokerage exception to statute of frauds because dealer actually acquired interest in wood; promissory estoppel is not available as exception to statute of frauds applicable to such an agreement. *Futch v. James River-Norwalk, Inc.*, 722 F. Supp. 1395 (S.D. Miss. 1989), *aff'd*, 887 F.2d 1085 (5th Cir. 1989).

Alleged contract of farmers to sell cotton crop to buyer was not enforceable under UCC § 2-201(1) where there was no writing sufficient to indicate that such contract had been made and been signed by parties against whom enforcement was sought; although sellers failed to keep oral promise to sign and deliver written contract of sale that would comply with statute of frauds contained in UCC § 2-201(1), doctrine of promissory estoppel did not preclude sellers from asserting statute, since no complete agreement was ever reached by parties as to terms of written contract. *H. Molsen & Co. v. Hicks*, 550 S.W.2d 354 (Tex. Civ. App. 1977), *writ ref'd n.r.e.*, (Sept. 27, 1977).

Doctrine of promissory estoppel was applicable so as to bind subcontractor to written bid which it submitted to general contractor notwithstanding subcontractor's claim that, since bid included sale of materials valued in excess of \$500 and did not specify any quantities, it was unenforceable under UCC § 2-201(1). *Jenkins & Boller Co. v. Schmidt Iron Works, Inc.*, 36 Ill. App. 3d 1044, 344 N.E.2d 275 (2d Dist. 1976).

In action against farmer to obtain possession of wheat allegedly sold by him to cooperative grain elevator under oral contract, or alternatively, for damages for failure to deliver wheat: (1) defendant farmer was not "merchant" within meaning of UCC § 2-201(2) so as to render inoperative defense afforded by statute of frauds; but (2) sufficient facts were pleaded and presented to trial court to invoke doctrine of promissory estoppel so as to render oral promise enforceable despite statute of frauds, UCC § 2-201(1), and rendition of summary judgment in favor of defendant was improper. *Decatur Coop. Ass'n v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976).

Action for breach of oral contract to sell 90,000 bushels of corn was barred by statute of frauds in that sale was for more than \$500, contract was not in writing, there was no written confirmation of contract, and it was not within any exceptions enumerated in UCC § 2-201(3); UCC § 2-201 contains no exception for claim based on promissory estoppel. *Farmland Serv. Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976).

Statute of frauds, UCC § 2-201 was not applicable to action based on promissory estoppel. *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. Wis. 1976).

Where contractor obtained price quotation on certain pipe required for construction project from pipe supplier, relied on price quotation and incorporated it into his bid, was awarded contract, and supplier then refused to supply pipe at price quoted: (1) no binding contractual obligation existed under UCC, since mere use of supplier's bid was not acceptance giving rise to contract, and, since supplier had not offered to make its bid irrevocable, nor was there an option supported by consideration, its bid did not meet "firm offer" requirement of § 2-205; (2) however, supplier was liable to contractor on theory of promissory estoppel; (3) statute of frauds, UCC § 2-201 was not applicable to action based on promissory estoppel. *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. Wis. 1976).

Where plaintiff submitted bid on used machinery in conformance with defendant's invitation and instructions, defendant was not entitled to summary judgment on ground that plaintiff's claim was barred by statute of frauds, since evidence raised genuine issues of material fact as to whether statements of defendant through its agent constituted acceptance of bid and promised to confirm this bid in writing, whether plaintiff detrimentally relied upon representation of defendant, and whether defendant reasonably should have expected reliance of nature alleged by plaintiff. *Fairway Mach. Sales Co. v. Continental Motors Corp.*, 40 Mich. App. 270, 198 N.W.2d 757 (1972).

F. Procedural Matters.**57. In general; pleading.**

A plaintiff does not aver a cause of action when he pleads the existence of an oral contract which comes within the scope of the statute of fraud section of the Code, but does not plead any fact which removes the contract from the scope of the statute. *Kessler v. Green Co.*, 28 Pa. D. & C.2d 186 (1962).

58. Evidence and burden of proof.

A confirmatory writing to which no timely written notice of objection was given merely prevents the merchant who failed to give such notice from invoking the statute of frauds as a defense. The sending merchant still has the burden of proving both that a contract was made and also its terms. *Perdue Farms, Inc. v. Motts, Inc.*, 459 F. Supp. 7 (N.D. Miss. 1978).

Auto rental agency brought detinue action against bank; bank had obtained autos in question upon foreclosure of chattel mortgages executed by used car dealer; held, UCC statute of frauds did not apply to used car dealer's testimony, inasmuch as bank was not party to sales transaction, was not seeking to enforce contract, and had no rights controlled by contract. *Blowers v. First Nat'l Bank*, 45 Ala. App. 485, 232 So. 2d 666 (Civ. App. 1970).

59. Questions of law or fact.

UCC § 2-201(2) merely makes an oral contract for the sale of goods enforceable against a party who has signed nothing, provided that such party has received a written confirmation of the existing oral agreement and failed to give written notice of objection to its contents within ten days after its receipt. Failure to object in writing within ten days does not signify assent to the terms of the writing; it merely deprives the recipient of the opportunity to raise the statute of frauds as a defense. Therefore, in such a case the trier of facts must determine whether or not there was an oral contract. *Pecker Iron Works, Inc. v. Sturdy Concrete Co. Inc.*, 96 Misc. 2d 998 (1978).

Letters and order confirmations offered by buyer as evidence of valid contract orally made with seller of clothing raised

issue for jury as to whether such documents satisfied statute-of-frauds requirements of UCC § 2-201(1). *The Hip Pocket, Inc. v. Levi Strauss & Co.*, 144 Ga. App. 792, 242 S.E.2d 305 (1978).

Question of whether facts existed to bring a contract within the statute of frauds was for the jury. *Ken Wire & Metal Prods., Inc. v. Columbia Broadcasting Sys.*, 338 F. Supp. 624, 172 U.S.P.Q. (BNA) 632 (S.D.N.Y. 1971), *aff'd*, 464 F.2d 1393, 175 U.S.P.Q. (BNA) 391 (2d Cir. N.Y. 1972).

60. Appellate review.

A defense founded on the statute of frauds cannot be raised for the first time on appeal. *McMillan Feeder Fin. Corp. v. Stephens*, 240 Ark. 167, 398 S.W.2d 535 (1966).

G. Decisions Under Former Statutes.**61. Construction and application, generally.**

An oral agreement between two parties to acquire jointly shares of corporate stock owned by a third person is not a contract of sale and purchase and consequently does not violate this section. *Jones v. McGahey*, 187 So. 2d 579 (Miss. 1966), error overruled, 191 So. 2d 532 (Miss. 1966).

The statute does not apply where the contract calls for the making of articles not a marketable commodity, but especially for defendant's use. *Ludke Elec. Co. v. Vicksburg Towing Co.*, 240 Miss. 495, 127 So. 2d 851 (1961).

Oral testimony is admissible to show that a contract is not within the statute. *Ludke Elec. Co. v. Vicksburg Towing Co.*, 240 Miss. 495, 127 So. 2d 851 (1961).

Where a case is taken out of the statute for any reason, parol evidence is admissible to show the terms of the agreement. *Ludke Elec. Co. v. Vicksburg Towing Co.*, 240 Miss. 495, 127 So. 2d 851 (1961).

The statute of frauds was designed to serve the salutary purpose of requiring traders and others to make open summaries of their contracts of sale before they will be enforced. *Gordon v. Fechtel*, 220 Miss. 722, 71 So. 2d 769 (1954).

Where there was an oral contract to furnish baby chicks needed and the con-

tract had been enforceable despite the failure to provide method for determining price, subsequent letter making three substantial changes in the original agreement of the parties, amounted to a completely new oral contract which was within the statute of frauds and unenforceable. *Gordon v. Fechtel*, 220 Miss. 722, 71 So. 2d 769 (1954).

An action for breach of an oral contract to cut and deliver pulp wood to the railroad for shipment to defendant with a guarantee to the plaintiff of employment under the contract for a period of not less than two years could not be maintained, whether or not the contract should be regarded as one of employment or as one for the purchase of pulp wood, since it could not be performed within a period of fifteen months from the making thereof. *Poole v. Johns-Manville Prods. Corp.*, 210 Miss. 528, 49 So. 2d 891 (1951).

Parol promise that deceased's realty and personalty would someday belong to the promisees if they continued to look after deceased's property, was unenforceable under the statute of frauds, where the promisees were never placed in possession of such property, irrespective of whether the transfer of the property was to be by will, deed or otherwise, and regardless whether the promisees performed their part of the arrangement. *Wells v. Brooks*, 199 Miss. 327, 24 So. 2d 533 (1946).

The statute does not apply either where the writing signed by the party sufficiently shows the contract, or where the purchase price is fully paid by the purchaser. *John M. Parker Co. v. May*, 128 F.2d 1020 (5th Cir. 1942), cert. denied, 317 U.S. 675, 63 S. Ct. 80, 87 L. Ed. 542 (1942).

Oral contract for exchange of horses held within statute of frauds. *Garner v. Broom*, 161 Miss. 734, 138 So. 336 (1931).

In action for breach of contract a parol waiver of a stipulation may be pleaded and proved. *Albert Mackie & Co. v. S.S. Dale & Sons*, 122 Miss. 430, 84 So. 453 (1920).

The statute of frauds has reference only to the "contract for the sale" and has no influence whatever on a "sale." The two are totally distinct. *Berry v. Waterman*, 71 Miss. 497, 15 So. 234 (1894).

A contract of sale may fulfill the requirements of this statute and yet be insufficient to transfer the property. *Smith v. Sparkman*, 55 Miss. 649, 30 Am. R. 537 (1878).

A contract within the statute is void. *Daniel v. Frazer*, 40 Miss. 507 (1866).

62. Delivery or receipt of property.

The exception applies where in accordance with an oral lease-purchase agreement the buyer received the property and made a payment thereon. *Dreijer v. Girod Motor Co.*, 294 F.2d 549 (5th Cir. 1961).

Upon the sale of store property, this section did not preclude the passing of the store's contents owned by seller's wife, where the seller had told the buyer in the wife's presence that everything went with store, and buyer was given possession of the store. *Rice v. Quong*, 238 Miss. 794, 120 So. 2d 156 (1960).

As regards the validity of an oral contract whereby the buyer of goods resold part of the goods of a value in excess of \$50 back to the seller in settlement of the balance due on the original contract, without any consideration or money passing between the parties, buyer's agreement to hold the goods as bailee or agent of the seller until called for did not constitute a delivery under this section. *Carrilon v. Thornton*, 211 Miss. 507, 52 So. 2d 9 (1951).

Parol contract for sale of sugar cane without payment of purchase price was void, unless buyer received part or all of cane bought. *Entrekin v. Byrd*, 149 Miss. 340, 115 So. 562 (1928).

Receipt sufficient to take parol contract of sale out of statute requires taking of property into possession with intent to become owner. *Entrekin v. Byrd*, 149 Miss. 340, 115 So. 562 (1928).

Sellers, retaining possession of sugar cane sold under parol contract for purpose of counting stalks, invalidated contract because of failure of delivery. *Entrekin v. Byrd*, 149 Miss. 340, 115 So. 562 (1928).

Receipt of property by buyer to satisfy statute must be by taking possession and control with intent to become owner. *A.K. Burrow & Co. v. Planters' Oil Mill & Gin Co.*, 138 Miss. 284, 103 So. 9 (1925).

Oral subscription for stock void in absence of performance. *Mayhaw Canning &*

Preserving Co. v. Cohen, 135 Miss. 378, 99 So. 896 (1924).

Buyer must have "received" part of property with intent to become owner. Young v. Alexander, 123 Miss. 708, 86 So. 461 (1920).

Delivery not compliance with oral contract if buyer declines to accept. Young v. Alexander, 123 Miss. 708, 86 So. 461 (1920).

Contract for sale of personalty void under statute, unless partial receipt thereunder. Young v. Alexander, 123 Miss. 708, 86 So. 461 (1920).

Oral contract for sale of ice during season rendered valid by delivery of 30 tons of ice. Crystal Ice Co. v. Holliday, 106 Miss. 714, 64 So. 658 (1914).

Where sale of personalty is otherwise complete delivery is not necessary to vest purchaser with title unless contract requires it. Johnson v. Tabor, 101 Miss. 78, 57 So. 365 (1912).

Statute satisfied where purchaser actually received and paid for part of cotton under oral contract. Moreland v. Newberger Cotton Co., 94 Miss. 572, 48 So. 187 (1908).

However, verbal sale of soda water fountain is valid on delivery of a pitcher which is part of the outfit. L.A. Becker Co. v. E.D. Davis Drug Co., 93 Miss. 803, 47 So. 468 (1908).

Verbal sale of flock of sheep ranging in woods for \$400 not saved from statute by delivery of three pet lambs not of the flock. Ladnier v. Ladnier, 90 Miss. 475, 43 So. 946 (1907).

A receipt of a part of the goods in pursuance of a previous oral contract is sufficient. Stonewall Mfg. Co. v. Peek, 63 Miss. 342 (1885).

63. Payment of purchase price.

Where personalty is credited on indebtedness there is a payment of the purchase money. Johnson v. Tabor, 101 Miss. 78, 57 So. 365 (1912).

64. Note or memorandum.

A real estate agent's oral agreement that if plantation owners would execute a written contract to convey the land to agent's principal, agent would be responsible for a quantity of liquid fertilizer then in tanks on the subject property was un-

enforceable; the landowners' execution of the sales contract did not constitute part performance of the agent's agreement with respect to the fertilizer, and there was no evidence that the fertilizer was ever delivered to the agent. Howell v. Buford, 218 So. 2d 859 (Miss. 1969).

Where a customer executed a written contract authorizing a brokerage firm to act as his agent in the purchase and sale of future contracts and thereafter gave certain oral instructions to the broker concerning transactions which were fully consummated, this section does not apply. Kohlmeyer & Co. v. Rotwein, 186 So. 2d 768 (Miss. 1966), cert. denied, 385 U.S. 971, 87 S. Ct. 508, 17 L. Ed. 2d 435 (1966).

The memorandum must state the names of both parties, and show which is the buyer and which the seller, and be signed by the party to be charged or his lawful agent. Ludke Elec. Co. v. Vicksburg Towing Co., 240 Miss. 495, 127 So. 2d 851 (1961).

There must be a valid oral contract of which the memorandum is a written statement, and the memorandum must be complete in itself and cannot be eked out by oral testimony. Ludke Elec. Co. v. Vicksburg Towing Co., 240 Miss. 495, 127 So. 2d 851 (1961).

Parol evidence is admissible to show that the written memorandum of an oral contract is inadequate or inaccurate and hence does not comply with the statute. Ludke Elec. Co. v. Vicksburg Towing Co., 240 Miss. 495, 127 So. 2d 851 (1961).

The requirement of the statute is met when a written memorandum of an oral contract is signed by the party to be charged at any time before suit brought. Ludke Elec. Co. v. Vicksburg Towing Co., 240 Miss. 495, 127 So. 2d 851 (1961).

If the memorandum contains all the features of the agreement, parol evidence is admissible to show the situation of the parties and the application of the terms used. Ludke Elec. Co. v. Vicksburg Towing Co., 240 Miss. 495, 127 So. 2d 851 (1961).

The written memorandum may consist of several writings if so related by reference, express or implied, that the one signed by the party to be charged can be held to approve the others. Ludke Elec. Co. v. Vicksburg Towing Co., 240 Miss. 495, 127 So. 2d 851 (1961).

Entry by wife of the buyer in a looseleaf account book of transaction whereby the buyer of the goods resold to the seller part of the merchandise of value in excess of fifty dollars under an oral contract for settlement of the balance due on the original contract, without any consideration passing between the parties, was insufficient memoranda to take the contract of resale out of the statute of frauds. *Carrilon v. Thornton*, 211 Miss. 507, 52 So. 2d 9 (1951).

But memorandum must contain substantial terms of the contract so as to be understood without resort to parol evidence. *Willis v. Ellis*, 98 Miss. 197, 53 So. 498, Am. Ann. Cas. 1913A, 1039 (1910).

Where a contract for the sale of personal property is evidenced by letters between the parties fully recognizing the existence and setting forth the terms of the contract, it is immaterial that precedent cipher telegrams do not sufficiently show a sale to take the case out of the statute. *Bonds v. Thos. J. Lipton Co.*, 85 Miss. 209, 37 So. 805 (1905).

Where it is impossible to decide upon the face of the memorandum of sale who is purchaser and who is seller, the writing is insufficient. *Frank v. Eltringham*, 65 Miss. 281, 3 So. 655 (1888).

ATTORNEY GENERAL OPINIONS

There is no statutory requirement that a bid to supply commodities to a county

must be dated. Fortier, August 20, 1999, A.G. Op. #99-0413.

RESEARCH REFERENCES

ALR. Check as payment within contemplation of statute of frauds. 8 A.L.R.2d 251.

Undelivered lease or contract (other than for sale of land), or undelivered memorandum thereof, as satisfying statute of frauds. 12 A.L.R.2d 508.

Construction and effect of exception making the statute of frauds provision inapplicable where goods are manufactured by seller for buyer. 25 A.L.R.2d 672.

Statute of frauds as applicable to seller's oral warranty as to quality or condition of chattel. 40 A.L.R.2d 760.

Parol evidence to connect signed and unsigned documents relied upon as memorandum to satisfy statute of frauds. 81 A.L.R.2d 991.

Buyer's note as payment within statute of frauds. 81 A.L.R.2d 1355.

Statute of frauds and conflict of laws. 47 A.L.R.3d 137.

Promissory estoppel as basis for avoidance of statute of frauds. 56 A.L.R.3d 1037.

Construction and application of UCC § 2-201(3)(b) rendering contract of sale enforceable notwithstanding Statute of Frauds to extent it is admitted in plead-

ing, testimony, or otherwise in court. 88 A.L.R.3d 416.

Farmers as "merchants" within provisions of UCC Article 2, dealing with sales. 95 A.L.R.3d 484.

Construction and application of UCC § 2-201(3)(c) rendering contract of sale enforceable notwithstanding statute of frauds with respect to goods for which payment has been made and accepted or which have been received and accepted. 97 A.L.R.3d 908.

Promissory estoppel as basis for avoidance of UCC statute of frauds (UCC § 2-201). 29 A.L.R.4th 1006.

Sales: "specially manufactured goods" statute of frauds exception in UCC § 2-201(3)(a). 45 A.L.R.4th 1126.

Sales: construction of statute of frauds exception under UCC § 2-201(2) for confirmatory writing between merchants. 82 A.L.R.4th 709.

Who is "creditor" within meaning of § 103(f) of Truth in Lending Act (15 U.S.C.S. § 1602(f)). 157 A.L.R. Fed. 419.

Am Jur. 15A Am. Jur. 2d, Commercial Code § 37.

67 Am. Jur. 2d, Sales §§ 54 et seq.

72 Am. Jur. 2d, Statute of Frauds §§ 108 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:11-2:23. (Form, formation, and readjustment of contract; Statute of frauds).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:271 et seq. (Statute of frauds).

CJS. 77 C.J.S., Sales §§ 6, 9, 10, 68-71 et seq.

Law Reviews. Bruckel, The Weed and the Web: Section 2-201's Corruption of the Code's Substantive Provisions — The

Quantity Problem. 1983 U Ill L Rev 811, 1983.

1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December 1979.

§ 75-2-202. Final written expression; parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) [Section 75-1-205] or by course of performance (Section 2-208) [Section 75-2-208]; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

SOURCES: Codes, 1942, § 41A:2-202; Laws, 1966, ch. 316, § 2-202, eff March 31, 1968.

Cross References — Acceptance stating terms additional to or different from those offered or agreed on, see § 75-2-207.

Unconscionable contract or clause, see § 75-2-302.

“Or return” term of contract for sale as separate contract for sale within statute of frauds, see § 75-2-326.

JUDICIAL DECISIONS

1. In general.
2. Writing intended as final expression of agreement.
3. —Ambiguities.
4. —Integration clauses.
5. —Multiple instruments.
6. Effect of prior agreements.
7. Effect of contemporaneous oral agreements.
8. Effect of allegations of fraud.
9. Course of dealing, etc. (par. (a)).
10. —Evidence admissible.
11. —Evidence inadmissible.
12. Consistent additional terms.
13. —Price and payment.

14. —Quality; warranties.
15. —Quantity.
16. —Time or date.
17. —Other particular terms and conditions.
18. What constitutes inconsistency.
19. Complete and exclusive statement of terms.
20. —Writings found incomplete.
21. —Warranty disclaimers or the like.

1. In general.

Evidence of matter not addressed in formal written contract, competitive pricing, which was discussed incident to ex-

ecution contract, showed that retailer had breached contract with gasoline supplier where supplier never agreed to sell to retailer on such terms as would enable him to sell gasoline at pump at same price as local communities, although supplier did sell to retailer on terms that enabled him to be competitive within his own town; there was no evidence to show that supplier had failed to pay any claim which had been reduced to judgment concerning a second verbal side agreement, which required supplier to indemnify and hold harmless retailer from any judgment and litigation expenses related to claims of prior supplier. *Lovett v. E.L. Garner, Inc.*, 511 So. 2d 1346 (Miss. 1987).

Under Miss Code § 75-2-202, court may be able to consider course of dealing, usage of trade, and course of performance in determining whether contract is ambiguous. *Southern Natural Gas Co. v. Pursue Energy*, 781 F.2d 1079 (5th Cir. 1986).

In an action to recover damages resulting from fraudulent misrepresentations made by defendant's sales employee, the chancellor presumably considered parol evidence in rendering his final decision, where the record clearly indicated that parol evidence was permitted to be introduced into evidence even though the chancellor reserved his ruling on its admissibility. *Franklin v. Lovitt Equip. Co.*, 420 So. 2d 1370 (Miss. 1982).

The issue of the admissibility of written or parol evidence at the trial (see UCC § 202) to prove the terms of an agreement requires an initial, substantive determination by the trial court of what constitutes the final, integrated agreement of the parties. Such evidence is admissible at the trial only if it is found to be part of, or a subsequent amendment of, that agreement. This preliminary determination depends on the facts of each case, and no relevant evidence should be excluded in making it. Written documents, standing alone, are not sufficient to determine this threshold issue. *Burroughs Corp. v. Weston Int'l Corp.*, 577 F.2d 137 (4th Cir. Md. 1978).

The parol evidence rule precludes adding oral terms to the description of the goods in the contract so as to then charge the seller with breach of the warranty of

conformity to the goods. *Marble Card Elec. Corp. v. Maxwell Dynamometer Co.*, 10 Chest. Co. 145 (Pa. 1961).

2. Writing intended as final expression of agreement.

In action for balance due on purchase price of 15 miles of used railroad track, (1) defendant buyer's amendment of its original purchase order, which changed dimensions of materials described in original purchase order, supported conclusion that original purchase order was not intended to be final expression of parties, within meaning of UCC § 2-202, concerning quantities and sizes of materials purchased and thus did not bar admission of parol evidence to establish actual terms of agreement; (2) under UCC § 2-209(4), buyer by orally agreeing to pay for 110-pound materials at contract price waived contract requirement that such materials must be 90-pound materials; and (3) as result of buyer's inspection of purchased materials before delivery, there was under UCC § 2-316(3)(b) no implied warranty with regard to defects in materials that buyer's inspection should have disclosed. *Durbano Metals, Inc. v. A & K R.R. Materials, Inc.*, 574 P.2d 1159 (Utah 1978).

In action by buyer to recover damages from seller for breach of oral express warranties and representations allegedly made by seller during negotiations prior to sale of truck, testimony as to alleged misrepresentations made by seller was, under parol evidence rule of UCC § 2-202, inadmissible, notwithstanding UCC § 2-316 provision regarding the exclusion or modification of warranties, where purchase order contract was intended by parties as final expression of sales agreement, buyer failed to allege or prove fraud, contract contained unequivocal and conspicuous "as is" disclaimer, and buyer read the contract, saw the handwritten disclaimer, understood what it meant, and signed the contract. *Jordan v. Doonan Truck & Equip. Inc.*, 220 Kan. 431, 552 P.2d 881 (1976).

UCC § 2-313(1)(a), pertaining to samples or models giving rise to express warranties, did not apply in action by purchaser of computer equipment alleging that computer equipment manufactured and sold by defendant for use in

plaintiff's insurance premium service business did not perform as defendant had represented or warranted it would where all prior negotiations, demonstrations, "conditional" lease, and experiments, culminated in two outright sales whose terms were put into final written expression signed by plaintiff which set out entire agreement between parties and by separate conspicuous paragraph excluded all outside matters, thus conforming to UCC § 2-202 as final written expression of parties and to UCC § 2-316 as exclusion of matters not specified in final agreements. *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.C.S.C. 1974).

Where contract between gasoline dealer and supplier specified minimum amount of gasoline that supplier could be required to deliver in any one month, and where contract, by its express terms, constituted entire agreement of parties, under UCC § 2-202 dealer was precluded by parole evidence rule from introducing evidence to show that contract was intended to be "requirements contract," thus imposing upon supplier obligation and duty to supply dealer its entire marketing needs of gasoline. *Intermar, Inc. v. Atlantic Richfield Co.*, 364 F. Supp. 82 (E.D. Pa. 1973).

Where invoices were no more than statements of amounts due and were never intended by parties to be final expression of their agreement, parole evidence rule did not operate to exclude oral testimony as to time within which payment was due on contract for sale of construction materials. *Fizzano Bros. Concrete Prods. v. Ceritano Brickwork, Inc.*, 59 Del. Co. 518 (1972).

Where the court could not upon the record determine whether the parties intended the confirmation of a contract of sale to be a final expression of their agreement, Uniform Commercial Code § 2-202 had no application. *Crispin Co. v. Delaware Steel Co.*, 283 F. Supp. 574 (E.D. Pa. 1968).

Where invoices were no more than statements of amounts due and were never intended by parties to be final expression of their agreement, parole evidence rule did not operate to exclude oral

testimony as to time within which payment was due on contract for sale of construction materials. *Fizzano Bros. Concrete Prods. v. Ceritano Brickwork, Inc.*, 59 Del. Co. 518 (1972).

3. —Ambiguities.

In action for seller's alleged breach, by late delivery, of contract for sale of heating and air-conditioning equipment, parole evidence concerning delivery dates was inadmissible under UCC § 2-202 to contradict unambiguous language in written contract that any date agreed on by parties was only a "best estimate," and that seller would incur no liability as result of late delivery. *General Plumbing & Heating, Inc. v. American Air Filter Co.*, 696 F.2d 375 (5th Cir. 1983).

Where the parties have not defined with precision the terms of a written instrument, notwithstanding a written statement that the instrument is a complete and exclusive statement of the terms of their agreement, evidence may be received under UCC § 2-202 to determine the intention of the parties. *Sunbury Textile Mills, Inc. v. Commissioner*, 585 F.2d 1190, 25 U.C.C. Rep. Serv. 642 (3d Cir. 1978) (applying Massachusetts UCC; admitting evidence to clarify meaning of words "cancelled" and "cancellation" in in contract for purchase of textile looms).

Under contract between building subcontractor and supplier for sale of ductwork, where both subcontractor's purchase order form and supplier's acceptance thereof contained trade phrase "as released" and testimony admitted under UCC § 2-202(a) showed that such phrase referred to no specific date but to entire life of construction project, supplier was obligated to deliver ductwork under contract terms and at contract price until February, 1976, which was estimated life of construction project in suit. *U.S. Indus., Inc. v. Semco Mfg., Inc.*, 562 F.2d 1061 (8th Cir. Mo. 1977), cert. denied, 434 U.S. 986, 98 S. Ct. 613, 54 L. Ed. 2d 480 (1977).

It is not a prerequisite to the admissibility of testimony under UCC § 2-202 that the wording of the contract be ambiguous, since no such requirement is contained in the statute. Nor is it correct that the court, rather than the jury, must determine the effect of such testimony on the

meaning of the contract. *Campbell v. Hostetter Farms, Inc.*, 251 Pa. Super. 232, 380 A.2d 463, 23 U.C.C. Rep. Serv. 563 (1977) (where parol testimony was admitted under UCC § 2-202(a) to explain meaning of written agreements for sale of wheat and corn which, although clear about commodities purchased, quantities, price, and time of delivery, were silent as to whether seller's farms were to be the source of the commodities).

In action by wholesaler against retailer for recovery of purchase price of two motorcycles, under UCC §§ 1-205, 2-202 and 2-326(4) trial court properly denied admissibility to defendant's proposed parol evidence that agreement was actually consignment sale agreement under "sale or return" arrangement, where written sales agreement between parties was not ambiguous. *Recreatives, Inc. v. Travel-On Motorcycles Co.*, 29 N.C. App. 727, 225 S.E.2d 637 (1976).

Description of cotton covered by contracts for sale of future cotton crop, i.e., purchase of cotton grown on specified approximate acreage, was not so vague as to render contracts unenforceable under Code where it appeared, by contracts in question, that each seller intended to sell his entire cotton crop for the year to buyer. *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. Ga. 1974).

Parol testimony was properly admitted to remove ambiguities with respect to description of mobile home, where sales agreement contained blank spaces, incomplete descriptions of optional equipment, and contradictory language regarding parties' use of samples or models. *Mobile Hous., Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App. 1973).

A finding of ambiguity is not necessary for the admission of extrinsic evidence about the usage of the trade and the parties' course of dealing under UCC § 2-202. *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. Va. 1971).

Trial court erred in rejecting parol proof to interpret what parties meant by use, in written agreement, of language referring to "among other things." *Nord v. Ruderman*, 34 A.D.2d 555 (2d Dep't 1970).

Code rejects those New York cases which require ambiguity in contract be-

fore evidence of course of dealing or performance is admissible. *Division of Triple T Serv., Inc. v. Mobil Oil Corp.*, 60 Misc. 2d 720 (1969), *aff'd*, 34 A.D.2d 618, 311 N.Y.S.2d 961 (2 Dep't 1970), stay denied, 26 N.Y.2d 1020 (1970), appeal denied, 26 N.Y.2d 614 (1970).

Agreement to pay "within the next 60 days the sum of \$5,000 from the jobs now under construction" did not contain an unconditional promise to pay and therefore was not a negotiable instrument and the language was ambiguous as to whether payment was to be made from gross receipts or solely if profits existed and evidence as to such question would clearly be admissible particularly since the additional terms sought to be developed were not inconsistent with the existing agreement. *Webb & Sons v. Hamilton*, 30 A.D.2d 597 (3d Dep't 1968).

There is an ambiguity when the printed part of the contract would create an "as is" sale while a handwritten notation created a "thirty-day warranty." *Leveridge v. Notaras*, 433 P.2d 935 (Okla. 1967).

4. —Integration clauses.

Where the contractual intention of the parties was evidenced by their conduct and an agreement satisfying the statute of frauds was made, although that writing was expressly not intended to be an integration, parol evidence could be used to explain the interim agreement. *Graulich Caterer, Inc. v. Hans Holterbosch, Inc.*, 101 N.J. Super. 61, 243 A.2d 253 (App. Div. 1968).

5. —Multiple instruments.

In action for breach of written contract for sale of carpeting, where five documents, each purporting to be prior contract between the parties and bearing notation on its face that it had been rescinded, were offered by buyer as proof of prior course of dealing, or oral agreement, between parties to effect that either party could unilaterally cancel any contract made by them, documents were properly excluded by trial court under parole evidence rule contained in UCC § 2-202(b), since (1) effect of such documents was to add consistent additional terms to contract sued on, and (2) such additional terms were inadmissible because contract

sued on was intended by parties to be complete and exclusive statement of terms of their agreement. *Snyder v. Herbert Greenbaum & Assocs.*, 38 Md. App. 144, 380 A.2d 618, 22 U.C.C. Rep. Serv. 1104 (1977) (stating that any agreement between the parties as to right of unilateral cancellation would certainly have been included in contract sued on).

Under the Uniform Commercial Code as adopted in Pennsylvania there is no requirement that a contract be evidenced by a single instrument, and if the parties wish, they may express their agreement in more than one writing, and in such circumstances the several documents are to be interpreted together, each one contributing, to the extent of its worth, to the ascertainment of the true intent of the parties, and this rule was held applicable to an agreement for the sale of securities. *Stern & Co. v. State Loan & Fin. Corp.*, 238 F. Supp. 901 (D. Del. 1965).

6. Effect of prior agreements.

Where buyer of used diesel tractor and trailer alleged making of oral warranties prior to execution of written contract of sale and also conduct on part of seller which tended to show that such warranties had been made, material issue of fact for resolution was whether parties had intended written sale contract to be final expression of their agreement and, if not, what the terms of that agreement actually were. Under such circumstances, parol evidence concerning such oral warranties and course of conduct was admissible under UCC § 2-202 to resolve the issue. *O'Neil v. International Harvester Co.*, 40 Colo. App. 369, 575 P.2d 862 (1978).

Parol evidence as to terms of agreement made prior to execution of document is not effective to vary terms of written contract. *Romines v. Wagstaff Motor Co.*, 120 Ga. App. 608, 171 S.E.2d 752 (1969).

Uniform Commercial Code § 2-202 may not be applied to permit the introduction of parol evidence with respect to contracts that predated its enactment. *Eskimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987 (S.D.N.Y. 1968).

7. Effect of contemporaneous oral agreements.

In an action to recover the purchase price for the sale of borrow material from

plaintiff seller's land, the trial court improperly held that the action was an effort to amend a written contract by a previous or contemporaneous parol agreement, where plaintiff specifically alleged that the oral agreement was entered into subsequent to the written contract, and where plaintiff brought suit on a separate, independent oral contract. *Bell v. Hill Bros. Constr. Co.*, 419 So. 2d 575 (Miss. 1982).

In action by seller of carpeting against buyer, which had repudiated entire contract of purchase, for damages consisting of difference between resale price and contract price of such goods, court held (1) that conversation and representations as to delivery date of goods, which took place before signing of purchase order, were properly disregarded by trial court, since terms of written agreement cannot be contradicted under UCC § 2-202 by evidence of prior agreement or contemporaneous oral agreement; (2) that trial court properly received evidence under UCC § 2-202(a) that in carpet industry, term "at once" meant "as soon as possible"; (3) that trial court's failure to find that seller had not identified conforming goods to the contract prior to resale thereof, as required by UCC § 2-704(1)(a), was proper and was supported by the evidence; and (4) that damages assessed against buyer under UCC § 2-706(1), dealing with seller's resale of the goods, had been properly calculated, since trial court did not include therein amount of carpeting sold at such resale before seller gave notice to buyer. *Action Time Carpets, Inc. v. Midwest Carpet Brokers, Inc.*, 271 N.W.2d 36 (Minn. 1978).

While contracts dealt with same amount of steel and were made on same day, where seller's price to buyer was not at original bid price but at a higher price, giving seller a profit, and it could be inferred that seller's omission of "as is" and "deficiencies" clauses in contract with buyer was deliberate, there was no basis for finding that buyer and seller impliedly agreed that sale of steel to buyer would be on same terms as seller's contemporaneous purchase and its "sale back" of steel, and thus seller was obligated to reimburse buyer for conceded shortage of steel paid

for in full by buyer. *Apache-Beals Corp. v. International Adjusters, Ltd.*, 59 A.D.2d 1032 (4th Dep't 1977), aff'd, 46 N.Y.2d 888, 414 N.Y.S.2d 685, 387 N.E.2d 617 (1979).

Where note sued on was executed on printed form that was absolute in its terms and required payment six months from date of note's execution, terms of note could not be contradicted under UCC § 2-202 by evidence of allegedly contemporaneous oral agreement that note would be renegotiated on its due date, even though such oral agreement was judicially admitted in testimony of plaintiff holder. *Chaplin v. Milne*, 555 S.W.2d 161, 23 U.C.C. Rep. Serv. 374 (Tex. Civ. App. 1977).

Where invoices sent by seller of potatoes to broker contained term that broker was to "collect and remit," a standard clause in commodities brokerage business meaning that broker was to collect purchase price from buyer and remit to seller but that broker did not guarantee payment, under UCC § 2-202 alleged prior oral agreement could not be used to modify express written terms of contract and broker incurred no liability for buyer's failure to pay. *C.H. Robinson Co. v. L & M Brokerage Co.*, 344 So. 2d 894 (Fla. App. 1977).

In an action based upon the contract for the sale of laundry and drycleaning equipment, in which defendant having prepared the written contract with considerable precision sought to introduce upon trial parol testimony that plaintiff was to supervise installation of the equipment, provide for the training of personnel, and thereafter notify defendant that it had an operable plant taxed the court's credulity and was therefore inadmissible. *Whirlpool Corp. v. Regis Leasing Corp.*, 29 A.D.2d 395 (1st Dep't 1968).

The Arkansas parol evidence rule was not changed by this section, and the testimony of automobile buyer and his wife that seller's agent had told them that mechanical parts of the vehicle were guaranteed for one year was inadmissible. *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

8. Effect of allegations of fraud.

(criticized by *Broadus v. Town North Nat'l Bank* (1977, Tex Civ App Tyler) 558 SW2d 909, 23 UCCRS 371).

Since it was well established prior to enactment of Uniform Commercial Code that if fraud were alleged with respect to formation of written contract, parol evidence rule did not bar consideration of contemporaneous oral agreement, and since UCC § 1-103 expressly provides that common-law principles of fraud and misrepresentation supplement Uniform Commercial Code's provisions, courts have continued to recognize pre-UCC fraud exception to parol evidence rule after adoption of parol evidence rule set forth in UCC § 2-202. Thus, in action by buyer of front-end loader to recover damages caused by fraudulent misrepresentations of seller's employee, chancellor was required to consider testimony by buyer—even though parties' written contract specifically declared that it was complete and exclusive statement of terms of their agreement (see UCC § 2-202(b))—that loader, although represented as being 1973 model, was in fact manufactured in 1968. *Franklin v. Lovitt Equip. Co.*, 420 So. 2d 1370 (Miss. 1982).

In an action to recover damages resulting from fraudulent misrepresentations made by defendant's sales employee, the chancellor was required to consider parol evidence of two witnesses, where their testimony regarded the events surrounding the purchase of the equipment and the alleged fraudulent statement made by defendant's employee. *Franklin v. Lovitt Equip. Co.*, 420 So. 2d 1370 (Miss. 1982).

In action to rescind contract for fraud, where (1) buyer purchased baler from seller for \$2,995, based on offer in seller's letter which represented that baler was two years old and was worth \$4,250, and (2) buyer alone signed purchase agreement, court held (1) that purchase agreement did not constitute complete and exclusive statement of terms of contract, (2) that seller's letter offering baler for sale and making certain representations about it, including representations as to its age, was admissible supplementary evidence of consistent additional terms within meaning of UCC § 2-202(b), and (3) that in absence of any specification in purchase agreement about baler's age or model year, its age as set forth in seller's letter became both a consistent additional term

of the purchase agreement and, by operation of law, an express warranty under UCC § 2-313(1)(a). *Mill Printing & Lithographing Corp. v. Solid Waste Mgt. Sys.*, 65 A.D.2d 590, 25 U.C.C. Rep. Serv. 124 (2d Dep't 1978) (also holding that warranty disclaimer found inferentially by trial court was inconspicuous and therefore ineffective).

Provision in contract for sale of recreation equipment located in seller's theater building which provided that seller should in no way be deemed to be liable under any guarantees or warranties concerning such equipment, including any implied warranties of title, was ineffective to disclaim warranty of title under UCC § 2-312(2), since such provision did not make disclaimer in specific language required by UCC § 2-312(2), but was couched in negative terminology that stated what seller would not be liable for, rather than what buyer was not receiving. Moreover, in such case testimony that manager of seller's theater had told buyer prior to sale that seller owned such equipment was not precluded by parol evidence rule contained in UCC § 2-202, since party may not invoke parol evidence rule to shield his own fraud. *Sunseri v. RKO-Stanley Warner Theatres, Inc.*, 248 Pa. Super. 111, 374 A.2d 1342 (1977).

Although written agreements may not be varied or contradicted by contemporaneous oral agreement or prior accord under UCC § 2-202, there is exception to this rule where instrument is procured by fraud, and charge of fraud, if adequately alleged, may therefore be established by parol evidence; thus, in action to enforce contract for sale of cotton crop at "12 cents above loan," allegations of seller's counterclaim and cross-claim to effect that seller was enticed into signing "12 cent" contract with buyer by promise of subsequent written agreement for sale of cotton at price of 12 and one-half cents, although buyer had no intention of fulfilling that promise, was sufficient to support suit for cancellation of written contract. *Cone Mills Corp. v. A.G. Estes, Inc.*, 377 F. Supp. 222 (N.D. Ga. 1974).

In action in tort by buyer of used car against seller for alleged fraudulent misrepresentation, buyer claiming that he

purchased automobile with understanding that it had never been wrecked when in fact it had, language of clause in sales agreement that "no other agreement, promise, or understanding of any kind pertaining to this purchase will be recognized" did not prevent buyer from claiming that he relied on seller's misrepresentation; although UCC § 2-202 was intended to allow sellers to prevent buyers from making false claims of oral warranties in contract actions, parol evidence of alleged misrepresentation was admissible on question of fraud and deceit since UCC does not preclude action in tort based upon fraudulent misrepresentation action could not be controlled by terms of contract itself. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794, 71 A.L.R.3d 1054 (1974).

Where there are allegations of fraud and misrepresentation, parol evidence rule does not preclude inquiry into whether writing is intended as final expression of parties' agreement. *Fecik v. Capindale*, 54 Pa. D. & C.2d 701 (1971).

As provided in § 1-103, it was settled law in Pennsylvania prior to enactment of the Uniform Commercial Code that where fraud, accident, or mistake are alleged with respect to the execution of a written contract, prior oral agreements between the parties are admissible. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

Under Pennsylvania law where parties, without any fraud or mistake, have deliberately put their engagements in writing, the writing is not only the best, but the only, evidence of their agreement. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

9. Course of dealing, etc. (par. (a)).

The defendant could not establish a course of dealing based on language employed by the plaintiff in an unrelated transaction, especially where the contract between the parties was drafted by the defendant. *Carlo Corp. v. Casino Magic*, 26 F. Supp. 2d 904 (S.D. Miss. 1998).

Contract of seller of wheat was supplemented under UCC § 2-202(a) by evidence of trade usage that parties to such

contracts intend to be bound regardless of success of seller's crop, and seller's failure to deliver all wheat under his contract because of partial crop failure was not excused under either UCC § 2-613 (dealing with casualty to identified goods) or UCC § 2-615(a) (dealing with commercial impracticability), which were, inapplicable to case. *Colley v. Bi-State, Inc.*, 21 Wash. App. 769, 586 P.2d 908 (1978).

Course of performance (see UCC § 2-202(a)) is always relevant in interpreting a writing. *Atlantic Richfield Co. v. Razumic*, 480 Pa. 366, 390 A.2d 736 (1978).

Since Uniform Commercial Code does not apply to contract to excavate boot-pit area for rice dryer, provisions of code did not govern admissibility of evidence of custom and usage of trade to explain basis for paying for such excavation work. *Venturi, Inc. v. Adkisson*, 261 Ark. 855, 552 S.W.2d 643 (1977).

When UCC § 2-202 is read in light of UCC § 1-205(4), it is clear that the test of admissibility is not whether the contract appears on its face to be complete in every detail, but whether the proffered evidence of course of dealing and trade usage reasonably can be construed as consistent with the express terms of the agreement. *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. Va. 1971).

This section limits parties in explaining the meaning of language in a written integrated contract to proof of a course of dealing, usage of trade, and a course of performance; and none of these terms encompass testimony or other proof as to the subjective intent of the parties. *Es-kimo Pie Corp. v. Whitelawn Dairies, Inc.*, 284 F. Supp. 987 (S.D.N.Y. 1968).

10. —Evidence admissible.

Under Mississippi law, if agreement falls within purview of Uniform Commercial Code (UCC), agreement need not be found to be incomplete or ambiguous before evidence of course of dealing and usage of trade may be considered. *Yazoo Mfg. Co. v. Lowe's Cos.*, 976 F. Supp. 430 (S.D. Miss. 1997).

In action for balance due on sale of computer equipment, where evidence showed (1) that buyer had purchased equipment from seller by submitting a

purchase order to seller dated December 30, 1970, (2) that seller, by letter also dated December 30, 1970, had assured buyer that equipment purchased, which buyer intended to lease to third party, would be repurchased by seller if buyer's lessee should decide to replace it, (3) that lessee had terminated its lease at an early date, but seller had refused to repurchase equipment, (4) that buyer then refused to pay balance due seller, (5) that buyer alleged that its refusal to pay was justified by seller's December 30, 1970 letter, which buyer initially contended was admissible under UCC § 2-202(b) as part of parties' agreement because it was a consistent additional term to buyer's purchase order, and (6) that buyer, after district court ruled that letter was inadmissible under UCC § 2-202(b), had sought by motion for reconsideration to have it admitted under UCC § 2-202(a), concerning prior course of dealing between the parties, court held that district court erred in refusing to reconsider its ruling on letter's admissibility since buyer's evidence on motion for reconsideration showed (1) that purchase order for equipment and seller's letter promising to repurchase it were physically exchanged in seller's branch office, (2) that the parties might have intended, by such exchange, that both documents should evidence their final agreement, (3) that there was also the possibility that if seller's letter was delivered and accepted after buyer had submitted its purchase order, such letter was admissible as modification of the parties' agreement, and (4) that if evidence of similar transactions between the parties could be produced to show that they had engaged in a prior course of dealing, within meaning of UCC § 2-202(a), which indicated their intent to include trade-in terms similar to those contained in seller's letter, letter might be admissible to explain terms of buyer's purchase order. *Burroughs Corp. v. Weston Int'l Corp.*, 577 F.2d 137 (4th Cir. Md. 1978).

In action by lessor of new office machine against lessee thereof for balance due under lease agreement, which agreement was rescinded by lessee when machine did not function properly, lessee's claim that

parties had agreed as part of contract that payments under lease would not start until salesman of machine's manufacturer had demonstrated proper operation of machine to lessee was not sustained under UCC § 2-202 by evidence showing that although salesman never did demonstrate machine's operation to lessee, leasee made 15 monthly payments under such lease to lessor. *Lectro Mgt., Inc. v. Freeman, Everett & Co.*, 135 Vt. 213, 373 A.2d 544 (1977).

Evidence of custom and usage was admissible by virtue of UCC § 2-202 to explain memorandum of agreement for sale and purchase of cotton crop providing for sale of "all cotton produced on 400 acres" where buyer contended contract required seller to deliver 400 acres of cotton, whereas seller contended contract called for his delivery all cotton produced on 400 acres of land, although part of land was "skip row planted", and where seller was apparently knowledgeable as to custom and usage relating to sales of cotton crops. *Loeb & Co. v. Martin*, 295 Ala. 262, 327 So. 2d 711 (1976).

Under UCC § 2-202(a), providing that with regard to the parol evidence rule for personal property sales contracts, trade customs may be put in evidence to aid interpretation of such contracts, established trade customs are part of the contract unless the parties otherwise agree. Thus, in action by grower against food processor alleging breach of two contracts to buy specified quantities of potatoes, it was proper to admit evidence of the custom of treating such specified quantities as being only reasonable estimates, where the contract did not say that the quantities were "fixed" or "firm," and where the parties' conduct of negotiations raised a factual question for the jury as to their intent to exclude the custom from the contracts. *Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc.*, 59 Cal. App. 3d 948 (5th Dist. 1976).

In action for defendant's breach of contract to repurchase cars used in plaintiff's car-rental business, where (1) plaintiff purchased business from independent owner thereof, (2) owner of business, prior to its sale to plaintiff, had agreed with defendant that cars purchased from de-

fendant for use in such business would be repurchased by defendant if they had not been used more than 6,000 miles, and (3) plaintiff's written contract with defendant, covering purchase and repurchase of vehicles used in plaintiff's business and executed after plaintiff had purchased business from prior owner, did not specify number of miles vehicles could be used before repurchase by defendant, but merely provided that after 9,000 miles, "time left in service" of a vehicle would "be negotiated," court held (1) that evidence did not show that written contract between plaintiff and defendant had been modified, with respect to defendant's repurchase of vehicles, by prior course of dealing between same parties within meaning of UCC § 1-205(1), but showed that person involved in such prior course of dealing with defendant was seller of business to plaintiff; (2) purchaser of business does not adopt, in absence of evidence to the contrary, seller's prior course of dealing with third parties; and (3) provision in contract between plaintiff and defendant concerning "time left in service" of a vehicle did not impose absolute mileage limitation, but was agreement to negotiate "continued use" of vehicle after it had been used for 9,000 miles. *Budget Sys. v. Seifert Pontiac, Inc.*, 40 Colo. App. 406, 579 P.2d 87, 25 U.C.C. Rep. Serv. 630 (1978) (stating that on retrial of case, if evidence should establish a prior course of dealing between plaintiff and defendant that included a mileage limitation, such evidence would be admissible under UCC § 2-202(a) since it would not directly contradict terms of parties' written agreement, but would supplement it).

In action by purchaser to recover damages from manufacturer for repudiation of contract to supply airconditioners, where manufacturer had submitted bid to supply air conditioners in accord with buyer's specifications, where, although specifications provided that "[c]apacities shall not be less than indicated," air conditioners had approximate six per cent deficiency in capacity to remove heat, and where manufacturer refused to supply air conditioners in literal compliance with bid, trial court erred (1) in excluding evidence as to customs and usage in air conditioning indus-

try to effect that reasonable variations in cooling capacity are considered to comply with specifications, and (b) in refusing to permit jury to consider such customs and usage if they would vary terms of written agreement. *Modine Mfg. Co. v. North E. Indep. Sch. Dist.*, 503 S.W.2d 833 (Tex. Civ. App. 1973), *ref. n.r.e.* (Apr. 17, 1974).

Even in the absence of a written agreement with respect to every term of a contract great weight attaches to the course of dealing of the parties, and where it appears from the conduct of the parties that their mode of calculating price, although not accepted formally by signature of a written instrument, was adhered to by both parties during an extensive course of dealing, during which the purchaser received, accepted, and paid for over \$800,000 worth of merchandise, this course of dealing must be held applicable and governing with respect to remaining merchandise which was received, accepted, but not paid for. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 236 F. Supp. 879 (W.D. Pa. 1965), *vacated on other grounds*, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

11. —Evidence inadmissible.

Testimony by one corporate officer as to his company's practices in pricing resin used for PVC pipes is insufficient to establish pattern or "regularity of observance" and therefore such testimony should not be admitted as evidence of course of dealing or usage of trade. *H & W Indus., Inc. v. Occidental Chem. Corp.*, 911 F.2d 1118 (5th Cir. 1990).

A contract's express terms and conditions that the written contract contained the entire agreement of the parties precluded the introduction of oral testimony regarding delivery dates, since, even if the subject oral arrangements constituted "trade usage" or somehow would represent a "course of dealing" between the parties, they could be introduced only to clarify ambiguities in the written contract, not to contradict and alter the express contract provisions. *General Plumbing & Heating, Inc. v. American Air Filter Co.*, 696 F.2d 375 (5th Cir. 1983).

Where a contract was assigned to plaintiff finance corporation with recourse, inasmuch as it contained a limited repur-

chase clause which provided that payment was guaranteed by defendant car dealership for six months, parol evidence of a loss reserve account, from which the finance company sometimes covered losses incurred upon repossession of merchandise, was erroneously admitted, under § 75-2-202, 75-1-205, and 75-2-208, in that the parol evidence was not an explanation of or supplementary to the recourse agreement in the contract, but rather was contradictory to it. *Security Mut. Fin. Corp. v. Willis*, 439 So. 2d 1278 (Miss. 1983).

Under contract of sale for approximately 70,000 cubic yards of concrete where buyer purchased only 12,542 cubic yards, buyer could not introduce under UCC 2-202 evidence of custom in trade or of additional conditions allegedly agreed to in that (1) contract terms were fairly specific as to quantity, price, and time without provision for repricing rights to either party; (2) no prior dealings were alleged by either party; (3) contract specified that conditions not incorporated in contract would not be recognized; and (4) contract did not intimate that buyer would be liable only for concrete actually delivered. *Southern Concrete Servs., Inc. v. Mableton Contractors*, 407 F. Supp. 581 (N.D. Ga. 1975), *aff'd*, 569 F.2d 1154 (5th Cir. Ga. 1978).

Written contracts for leasing of construction cranes which designated in each contract a specific monthly rental, and which also did not mention any discounting of such rentals, could not be contradicted under UCC § 2-202 by parol evidence to show alleged prior practice of cranes' lessor to grant rental discounts on completion of similar equipment-leasing agreements with lessee. *Eisert v. Ermco Erectors, Inc.*, 60 A.D.2d 903 (2d Dep't 1978). But see *Eisert v. Ermco Erectors, Inc.*, 62 A.D.2d 1027 (2d Dep't 1978).

In action arising out of contract for sale of 700 head of cattle, where buyer contended that because quality of cattle was stated as "choice" and contract warranted that quality, he was justified in not accepting 56 head of cattle, but where seller contended that requirement of contract that buyer would take all cattle governed, extrinsic evidence to explain contract

should not have been received under UCC § 2-202 since parties pointed only to language contract to sustain their respective positions and neither of them suggested that additional evidence constituted "evidence of consistent additional terms" or evidence of "course of dealing or usage of trade" or "course of performance" within meaning of subsections (a) or (b) of § 2-202. *Shepard v. Top Hat Land & Cattle Co.*, 560 P.2d 730 (Wyo. 1977).

Buyer purchased used truck "as is" and could not raise implied warranty claim against his seller where buyer insisted on closing sale without inspecting truck, although seller repeatedly advised buyer of risk he was taking by purchasing truck without inspection, and where buyer admitted that he purchased truck "as it was"; under UCC § 2-316(3)(c) implied warranty could be excluded or modified by course of performance and fact that exclusion in present case, raised by parties' course of performance, was oral did not vitiate its utility or relevance; under UCC § 2-202(a) parol evidence was admissible to explain and supplement lease-purchase agreement and to establish oral waiver of implied warranties. *Robinson v. Branch Moving & Storage Co.*, 28 N.C. App. 244, 221 S.E.2d 81 (1976).

In action on contract to deliver 4,000 bushels of soybeans by buyer against farmer who as result of drought was able to deliver less than 2,000 bushels, his entire crop, rejection of buyer's evidence relating to custom and usage of soybean trade was proper under UCC § 1-205(6) where offer of evidence came late in trial and probably would have denied seller opportunity to rebut it absent continuance or other disruption of trial. *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652 (Miss. 1975).

An antecedent misunderstanding in that the seller allegedly expected the buyer to test a gas purifier for the exclusion of hydrogen as well as the removal of oxygen while buyer, not conscious of such expectation and testing only for oxygen removal, unintentionally misled the seller by its reports that the model was operating satisfactorily, was not such a set of circumstances as might be categorized as a "course of dealing", "usage of trade", or

"course of performance" which explain or supplement the integrated contract under Code § 2-202. *GE Co. v. United States Dynamics, Inc.*, 403 F.2d 933 (1st Cir. Mass. 1968).

12. Consistent additional terms.

UCC § 2-202(b) precludes the contradiction of confirmatory memoranda by prior or contemporaneous oral agreements when the writing was "intended by the parties as a final expression of their agreement," and permits the introduction of consistent additional terms, unless the court finds that the writing was also intended to be "a complete and exclusive statement of the terms of the agreement". The focus of the statute is plainly on the intention of the parties and not on the integration practices of reasonable persons acting normally and naturally. *Interform Co. v. Mitchell*, 575 F.2d 1270 (9th Cir. Idaho 1978).

Contract of seller of wheat was supplemented under UCC § 2-202(a) by evidence of trade usage that parties to such contracts intend to be bound regardless of success of seller's crop, and seller's failure to deliver all wheat under his contract because of partial crop failure was not excused under either UCC § 2-613 (dealing with casualty to identified goods) or UCC § 2-615(a) (dealing with commercial impracticability), which were, inapplicable to case. *Colley v. Bi-State, Inc.*, 21 Wash. App. 769, 586 P.2d 908 (1978).

In action to rescind contract for fraud, where (1) buyer purchased baler from seller for \$2,995, based on offer in seller's letter which represented that baler was two years old and was worth \$4,250, and (2) buyer alone signed purchase agreement, court held (1) that purchase agreement did not constitute complete and exclusive statement of terms of contract, (2) that seller's letter offering baler for sale and making certain representations about it, including representations as to its age, was admissible supplementary evidence of consistent additional terms within meaning of UCC § 2-202(b), and (3) that in absence of any specification in purchase agreement about baler's age or model year, its age as set forth in seller's letter became both a consistent additional term of the purchase agreement and, by opera-

tion of law, an express warranty under UCC § 2-313(1)(a). *Mill Printing & Lithographing Corp. v. Solid Waste Mgt. Sys.*, 65 A.D.2d 590, 25 U.C.C. Rep. Serv. 124 (2d Dep't 1978) (also holding that warranty disclaimer found inferentially by trial court was inconspicuous and therefore ineffective).

Under UCC § 2-202(b), evidence of consistent additional terms to agreement may be introduced, since Uniform Commercial Code rejects assumption that because final writing has been worked out on some terms, such writing includes all matters agreed on. However, writing itself may indicate that it was intended by both parties as complete and exclusive statement of all terms of agreement, and if examination of four corners of writing demonstrates that such was intent of parties, extrinsic or parol evidence may not then be introduced to show additional consistent terms. *Dave Markley Ford, Inc. v. Lair*, 565 P.2d 671 (Okla. 1977).

UCC § 2-202(b) allows evidence of additional terms, subject to two prerequisites to admission. First, the writing or contract sued on must not be found by the court to have been intended as a complete and exclusive statement of the terms of such contract. Second, the additional terms must not be inconsistent with those contained in the contract. *Snyder v. Herbert Greenbaum & Assocs.*, 38 Md. App. 144, 380 A.2d 618 (1977).

UCC parol evidence rule permits oral evidence of consistent additional terms to contract to explain or supplement contract, but only where court finds that written terms were not intended as complete and exclusive statement of contract. *North Penn Oil & Tire Co. v. Phillips Petro. Co.*, 358 F. Supp. 908 (E.D. Pa. 1973), reargument denied, 371 F. Supp. 676 (E.D. Pa. 1974).

Where writing in question was not intended as a complete and exclusive statement of the terms of the agreement, evidence of oral terms of agreement which were not inconsistent with written terms but merely supplemented what was written was properly admitted. *Pacific Indem. Co. v. McDermott Bros. Co.*, 336 F. Supp. 963 (M.D. Pa. 1971), *aff'd*, 475 F.2d 1395 (3d Cir. Pa. 1973).

Having decided that contract for sale of concrete for slab was ambiguous, lacking in clarity and not including all terms necessary for construction, court was not in error in allowing parol evidence of consistent additional terms and of facts and circumstances surrounding creation of agreement. *Port City Constr. Co. v. Henderson*, 48 Ala. App. 639, 266 So. 2d 896 (Civ. App. 1972).

13. —Price and payment.

Where contract was ambiguous as to whether payment made to subcontractor for carpet padding delivered, but not installed, should include proportion of total overhead and profit for the job, extrinsic evidence was properly admitted under UCC § 2-202(b) to help ascertain intent of parties on the matter. *United States ex rel. Union Bldg. Materials Corp. v. Haas & Haynie Corp.*, 577 F.2d 568 (9th Cir. Haw. 1978).

Where contract for sale of new automobile expressly provided that it constituted entire agreement of parties, trial court committed reversible error under UCC § 2-202(b) in admitting both parol and extrinsic evidence offered by seller to establish, as consistent supplemental term of such contract, that buyer was obligated to pay seller for cost of repairing vehicle that buyer had traded in for new car. *Dave Markley Ford, Inc. v. Lair*, 565 P.2d 671 (Okla. 1977).

Oral agreement to extend credit entered into at time buyer purchased used car from seller, paid seller partial down payment, and executed partially completed bill of sale, but prior to time parties executed conditional sales contract, constituted valid and binding contract under statute of frauds: (1) bill of sale was sufficient written memorandum to take sale of car out of operation of statute under UCC § 2-201(1); (2) oral agreement to extend credit was collateral to sale and inducement for entire bargain; (3) terms of oral agreement to extend credit were consistent with and additional to written bill of sale under UCC § 2-202(b); and (4) conduct of parties indicated firm commitment to extend credit under UCC § 2-201(3)(c). *Hardin v. Cliff Pettit Motors, Inc.*, 407 F. Supp. 297 (E.D. Tenn. 1976).

Evidence regarding alleged oral agreement covering rebates allegedly promised as inducement to purchase automobiles was admissible as not inconsistent with any terms of written chattel mortgages which were found not to have been intended as complete and exclusive statement of parties' agreement. *Thrifty Rent-A-Car Sys. v. Chuck Ruwart Chevrolet*, 500 P.2d 172 (Colo. Ct. App. 1972).

With no indication in the record that the trial court found a bill of sale "to have been intended also as a complete and exclusive statement of the terms of the agreement" for the sale of cattle and machinery, the trial court could not be convicted of reversible error for receiving parol evidence that defendants would execute a note and security instruments covering the personalty, since that evidence was not offered in contradiction of the bill of sale but rather as tending to show consistent additional terms. *McDown v. Wilson*, 426 S.W.2d 112 (Mo. Ct. App. 1968).

14.—Quality; warranties.

In buyer's action for seller's breach of written and oral warranties in sale of marine diesel engine, (1) where terms of sale contract were contained in seller's letter to buyer, buyer's written purchase order, and manufacturer's written warranty which accompanied sale of engine; (2) where seller also orally warranted to buyer that engine would deliver specified standard of performance, that if it did not do so it could be removed from buyer's boat at seller's expense, and that it would be delivered in time to meet requirements of builder of buyer's boat; (3) where such oral warranties were breached and buyer, within six-months period provided in written engine warranty for manufacturer's repair or replacement of defective parts, refused to allow manufacturer's mechanic to inspect defective engine; (4) where buyer, more than six months after date engine was put into operation, notified seller that he had removed engine from his boat, tendered engine back to seller, and demanded return of purchase price; and (5) where such tender and demand were refused by seller, (1) trial court properly found that all terms of sale contract had not been reduced to writing; (2) ad-

mission in evidence of oral warranties as part of sale contract did not violate parol evidence rule contained in UCC § 2-202; (3) such oral warranties did not constitute "sale or return" provision in contract under UCC § 2-326(1)(b), but were analogous to "sale on approval" provision under UCC § 2-326(1)(a) and thus were not required by UCC § 2-326(4) to be in writing; (4) buyer's failure to allow seller to exercise right under UCC § 2-508(1) to inspect and repair engine negated warranty provisions of sale contract; (5) buyer accepted engine under UCC § 2-327(1)(b) by not seasonably notifying seller of buyer's election to return engine; and (6) buyer's delay of nearly six months in informing seller of buyer's intention to revoke acceptance of engine was insufficient compliance with buyer's good faith obligation under UCC § 1-203 and did not revoke such acceptance under UCC § 2-608. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

In action arising out of contract for sale of 700 head of cattle, where buyer contended that because quality of cattle was stated as "choice" and contract warranted that quality, he was justified in not accepting 56 head of cattle, but where seller contended that requirement of contract that buyer would take all cattle governed, extrinsic evidence to explain contract should not have been received under UCC § 2-202 since parties pointed only to language contract to sustain their respective positions and neither of them suggested that additional evidence constituted "evidence of consistent additional terms" or evidence of "course of dealing or usage of trade" or "course of performance" within meaning of subsections (a) or (b) of § 2-202. *Shepard v. Top Hat Land & Cattle Co.*, 560 P.2d 730 (Wyo. 1977).

In action for breach of warranty in sale of defective printing press, where sale transaction was complicated by existence of security agreement signed by buyer which contained disclaimer of all express and implied warranties other than those set forth in security agreement, and where there was testimony that seller had told buyer that if buyer would sign secu-

rity agreement, seller would “make the press print,” seller’s statement was promise that formed part of bargain of sale and created express warranty within meaning of UCC § 2-313(1)(a). *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 23 U.C.C. Rep. Serv. 323 (S.D. 1977) (also holding that testimony that seller had made such warranty was not barred by UCC § 2-202, and that words in security agreement which limited such warranty were inoperative under UCC § 2-316(1)).

In sales contract, express warranties based on UCC § 2-313 need not be part of written agreement or bill of sale, but written expressed warranties given in a written agreement or bill of sale in accordance with UCC § 2-313 may be explained or supplemented by oral express warranties in accordance with UCC §§ 2-202 and 2-316, where written agreement was not intended by parties as final expression of their agreement. *Centennial Ins. Co. v. Vic Tanny Int’l of Toledo, Inc.*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975).

Where contract for sale of cucumbers to be grown from seed furnished by plaintiff was silent as to type of seed to be furnished, parol evidence as to type of seed agreed on by parties was supplementary or explanatory, and did not contradict, modify, or rescind written agreement between parties. *Flamm v. Scherer*, 40 Mich. App. 1, 198 N.W.2d 702 (1972).

15. —Quantity.

In buyer’s action for seller’s breach of contract to sell mohair, parol evidence was admissible under UCC § 2-202(a) to show that term “fleece” had well understood meaning in mohair industry, that average weight of spring fleece of kid mohair was three pounds, and that average weight of spring fleece of adult mohair was four pounds. *Raney v. Uvalde Producers Wool & Mohair Co.*, 571 S.W.2d 199 (Tex. Civ. App. 1978), ref. n.r.e (Nov. 22, 1978).

In action for seller’s breach of contract to sell buyer all of seller’s stock of certain type of equipment located in specified warehouse, where both buyer and seller relied on invoice showing purchase price of \$9,000 for (1) one lot of selected equipment, (2) one trailer-load of equipment, and (3) “remainder” of such equipment “currently in inventory,” oral testimony by

buyer that he was told that the two lots specified in the invoice constituted half of goods purchased was admissible under UCC § 2-202(b) to explain understanding of parties as to quantity of equipment indicated in invoice by use of term “remainder.” *Atlanta Army & Navy Store, Inc. v. Stuckman*, 143 Ga. App. 850, 240 S.E.2d 220 (1977).

The fact that one party makes subsequent additions to an order blank does not show that there was not a complete written contract if such additions are merely the unit prices for the goods ordered in the original writing. *Wolcov v. Russell*, 46 Del. Co. 202 (1959).

16. —Time or date.

Where the parties have not defined with precision the terms of a written instrument, notwithstanding a written statement that the instrument is a complete and exclusive statement of the terms of their agreement, evidence may be received under UCC § 2-202 to determine the intention of the parties. *Sunbury Textile Mills, Inc. v. Commissioner*, 585 F.2d 1190, 25 U.C.C. Rep. Serv. 642 (3d Cir. 1978) (applying Massachusetts UCC; admitting evidence to clarify meaning of words “cancelled” and “cancellation” in contract for purchase of textile looms).

Contract of seller of wheat was supplemented under UCC § 2-202(a) by evidence of trade usage that parties to such contracts intend to be bound regardless of success of seller’s crop, and seller’s failure to deliver all wheat under his contract because of partial crop failure was not excused under either UCC § 2-613 (dealing with casualty to identified goods) or UCC § 2-615(a) (dealing with commercial impracticability), which were, inapplicable to case. *Colley v. Bi-State, Inc.*, 21 Wash. App. 769, 586 P.2d 908 (1978).

In action by seller of carpeting against buyer, which had repudiated entire contract of purchase, for damages consisting of difference between resale price and contract price of such goods, court held (1) that conversation and representations as to delivery date of goods, which took place before signing of purchase order, were properly disregarded by trial court, since terms of written agreement cannot be contradicted under UCC § 2-202 by evi-

dence of prior agreement or contemporaneous oral agreement; (2) that trial court properly received evidence under UCC § 2-202(a) that in carpet industry, term "at once" meant "as soon as possible"; (3) that trial court's failure to find that seller had not identified conforming goods to the contract prior to resale thereof, as required by UCC § 2-704(1)(a), was proper and was supported by the evidence; and (4) that damages assessed against buyer under UCC § 2-706(1), dealing with seller's resale of the goods, had been properly calculated, since trial court did not include therein amount of carpeting sold at such resale before seller gave notice to buyer. *Action Time Carpets, Inc. v. Midwest Carpet Brokers, Inc.*, 271 N.W.2d 36 (Minn. 1978).

Where written contract for sale of jewelry on approval did not specify date on which jewelry was to be returned if buyer did not accept it, parol evidence was admissible under UCC § 2-202(b) to show such date. *George v. Davoli*, 91 Misc. 2d 296 (1977).

Terms of specific statute providing that time was never considered as of the essence of a contract, unless by its terms expressly so provided, prevailed over those of general statute, UCC § 2-202, which states that written contract may be explained or supplemented by evidence of consistent additional terms; thus, parol evidence was not admissible to show that time of delivery was the essence in contract for sale of truck crane. *Martel Constr. v. Gleason Equip., Inc.*, 166 Mont. 479, 534 P.2d 883 (1975).

In action for breach of express warranty in sale of bull, sellers' liability for breach of warranty that bull was breeder would be determined as of May 27, date when written agreement for sale of bull was executed, notwithstanding buyers made down payment on March 8 and bull was delivered on April 17. *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974).

Allegation that seller orally promised a delivery date of no later than the end of the second week of December and that they would try to make delivery by the first week of December is not contradictory to, nor does it negate, the written expression that buyer understood that

seller would try to ship by approximately the first of December, and the parol evidence of a firm delivery date, not being inconsistent with the terms of the letter, should have been admitted. *MacGregor v. McReki, Inc.*, 30 Colo. App. 196, 494 P.2d 1297 (1971).

17. —Other particular terms and conditions.

Where purchase orders of general contractor and owner of concrete-molding forms used by contractor on construction projects were not intended as final expression of parties' agreement with respect to whether such forms were to be rented to or purchased by contractor, trial court properly admitted under UCC § 2-202(b) evidence extrinsic to purchase orders to determine whether transaction was sale or lease. *Interform Co. v. Mitchell*, 575 F.2d 1270 (9th Cir. Idaho 1978).

Parol evidence rule, UCC § 2-202, did not preclude consideration of understanding between parties to contract for sale and delivery of soybeans as to damages in event of breach where such understanding did not contradict any terms of contract; seller could not rely on defense of impossibility under UCC § 2-615, notwithstanding seller was farmer and was unable to deliver because his soybean crop failed, where buyer did not contemplate that contract would be filled by beans from any particular crop and where seller did not give seasonable notice of his inability to deliver. *Bunge Corp. v. Miller*, 381 F. Supp. 176 (W.D. Tenn. 1974).

A term or understanding that a stock option was not to be exercised unless the owner of the stock sought outside bids, which was admittedly discussed but whose operative effect was disputed, which was not set out in the writing evidencing the stock option, was clearly "additional" to what was in the writing, and could be proven in a dispute arising when the stockholder declined plaintiff's tender and refused to deliver the stock. *Hunt Foods & Indus., Inc. v. Doliner*, 26 A.D.2d 41 (1st Dep't 1966), *aff'd*, 26 A.D.2d 623, 272 N.Y.S.2d 686 (1st Dep't 1966).

18. What constitutes inconsistency.

"Inconsistency," as used in UCC § 2-202(b), does not mean that the additional

terms offered must negate or contradict the express terms contained in the contract sued on. Instead, "inconsistency" means the absence of reasonable harmony in terms of the language and respective obligations of the parties. *Snyder v. Herbert Greenbaum & Assocs.*, 38 Md. App. 144, 380 A.2d 618 (1977).

Summary judgment was granted to seller for entire amount due in payment for certain air conditioning/heating units which allegedly did not comply with express warranties contained in advertising brochure, where front page of sales contract contained boldface disclaimer "Of Warranties, Express or Implied, of Merchantability or Fitness" not discussed by said contract, and where same page contained large bold print warning buyer to read contract. *Pennsylvania Gas Co. v. Secord Bros.*, 73 Misc. 2d 1031 (1973), *aff'd*, 44 A.D.2d 906, 357 N.Y.S.2d 702 (4th Dep't 1974).

To be inconsistent with the terms of a written agreement, the parol conditions sought to be introduced must contradict or negate a term of the writing, and a parol term or condition which has a lesser effect is provable. *Whirlpool Corp. v. Regis Leasing Corp.*, 29 A.D.2d 395 (1st Dep't 1968).

To be "inconsistent", the term sought to be proven must contradict or negate a term of the writing, and a term or condition which has a lesser effect is provable. *Hunt Foods & Indus., Inc. v. Doliner*, 26 A.D.2d 41 (1st Dep't 1966), *aff'd*, 26 A.D.2d 623, 272 N.Y.S.2d 686 (1st Dep't 1966).

19. Complete and exclusive statement of terms.

Where defendant sellers agreed in telephone conversation to sell 4,500 bushels of soybeans to plaintiff buyer; where buyer thereafter prepared and mailed to sellers written "confirmation of purchase" which contained requisite contract language as to amount, quality, price, and place and method of delivery of such soybeans; and where such written agreement was signed by both plaintiff and defendants, written agreement constituted exclusive statement of contract between parties under UCC § 2-202, so as to bar, in action for breach of contract for defendants' failure to deliver quantity of soybeans contracted

for, parol evidence that would vary quantity of soybeans that defendants had agreed to sell. Moreover, without admission of such parol evidence, defense of impossibility of performance of contract because of flooding of defendants' farm at harvest time, which defense was based on additional provision in Mississippi Uniform Commercial Code that was not part of official code, could not be sustained. *Ralston Purina Co. v. Rooker*, 346 So. 2d 901 (Miss. 1977).

Where written contract for lease of three truck trailers expressly stated that it was an equipment lease, that transaction was not a sale of the trailers, conditional or otherwise, that lessee by payment of rentals acquired only right to use trailers, that written instrument contained entire agreement of the parties, and that no representations or understandings not contained in the written instrument would be binding unless reduced to writing and signed by parties to be bound, trial court correctly concluded that transaction was lease and that parol evidence was not admissible under UCC § 2-202(b) to contradict instrument's terms, since instrument was complete and final statement of parties' agreement. *Hobbs Trailers v. J.T. Arnett Grain Co.*, 560 S.W.2d 85 (Tex. 1977) (stating that lease of trailers under express agreement that lessee would not acquire, by paying rentals, any title or interest in the equipment was inconsistent with contemporaneous collateral agreement that lessee would acquire title).

In seller's action to recover unpaid balance of purchase price of machine for producing packing-list pouches, where provision in express warranty paragraph contained in the written contract of sale stated that such warranty was in place of any other warranties, express or implied, including any warranty of merchantability or fitness for particular purpose, written contract constituted complete and exclusive statement of agreement of parties and could not be explained or supplemented under UCC § 2-202 by evidence offered by defendant to show express warranty by seller that machine would produce pouches equal to sample shown defendant before machine was purchased.

FMC Corp. v. Seal Tape Ltd., Inc., 90 Misc. 2d 1043 (1977).

In action by car dealer against buyer to recover alleged unpaid balance due on sale of car, dealer was not entitled to offer parole testimony under UCC § 2-202(a) that buyer had agreed to deliver insurance check covering wrecked trade-in vehicle as part of consideration where insurance check was not mentioned in contract and contract was, by its own terms, complete and exclusive statement of terms of agreement; nor did evidence disclose course of dealing and usage of trade as defined by UCC § 2-205 or course of performance as defined by UCC § 2-208 which would permit introduction of such evidence. *Noble v. Logan-Dees Chevrolet-Buick, Inc.*, 293 So. 2d 14 (Miss. 1974).

20. —Writings found incomplete.

In action on option contract to purchase airplane, where (1) defendants gave plaintiff written option to purchase on April 1, 1977, which by its terms would expire on April 11, 1977, (2) defendants issued sight draft on April 5, 1977, payable to order of defendants and listing plaintiff as drawee, which plaintiff's bank received on April 8, 1977 together with partially executed bill of sale, (3) defendants on April 11, 1977 (expiration date of written option) gave plaintiff oral extension of option to purchase plane, and (4) plaintiff on April 18, 1977 instructed his bank to pay sight draft, but defendants in the interim sold plane to another person, court held (1) that contract was required by UCC § 2-201(1) (statute of frauds) to be in writing; (2) that written option-offer was not accepted by plaintiff within time limit contained therein; (3) that expiration date of written option-offer was not superseded by oral extension of such date because parole evidence of extension was not admissible under UCC § 2-202 to vary material term of written option; (4) that if written option-offer, as claimed by plaintiff, was still only an offer at time of its oral modification, then acceptance tendered by plaintiff after original time limit of written option had expired was acceptance of different contract offer and contract thus formed was unenforceable under statute of frauds provision contained in UCC § 2-201(1); and (5) that such dif-

ferent contract was not removed from statute of frauds by part performance that allegedly occurred when defendants sent sight draft to plaintiff's bank. *McCollum Aviation, Inc. v. CIM Assocs.*, 446 F. Supp. 511 (S.D. Fla. 1978).

In buyer's action to rescind sale of sloop, oral assurances made by seller during course of parties' negotiations that sloop would become watertight after it had been placed into the water and allowed sufficient time to swell created express warranty under UCC § 2-313(1)(a) and (b), and evidence of such warranty was not barred by UCC § 2-202(b) since writings involved in case, which consisted of written notice of intent to purchase, bill of sale, and seller's advertisement incorporated by reference into bill of sale, did not constitute complete and exclusive statement of terms of parties' agreement. *Werner v. Montana*, 117 N.H. 721, 378 A.2d 1130, 22 U.C.C. Rep. Serv. 894 (1977) (also holding that such express warranty did not merely relate to condition of sloop at time of sale, but of necessity related to time when sloop would be put into water and prepared for sailing).

Action for breach of contract to supply stainless steel solids; there was no clause in written contract stating that it was complete agreement; held, corporate defendant was not precluded from introducing evidence that written contract specifying delivery of 500 tons did not represent complete understanding of parties and that there was oral agreement that defendant was to supply as many tons as could be obtained up to 500 tons. *Michael Schiavone & Sons v. Securalloy Co.*, 312 F. Supp. 801 (D. Conn. 1970).

Where instalment sales contract containing provision that no representations, promises, or statements had been made by seller unless incorporated therein was found not to be "complete and exclusive statement of terms of agreement," parole evidence was admissible under Code § 2-202(b) to establish seller's oral agreement to repair defects in mobile home. *Zwierzyski v. Owens*, 499 P.2d 996 (1972).

Parole evidence may be introduced to show an agreement to execute a note and "security interests" where the bill of sale which was executed was not found by the

court to have been intended as the complete and exclusive statement of the terms of the agreement. *McDown v. Wilson*, 426 S.W.2d 112 (Mo. Ct. App. 1968).

Where the security agreement states that it constitutes the entire "agreement" between the parties, but as to "warranties, representations and promises" the language is that they are not "to be binding on any assignee" of the seller, the "agreement" and "representations, warranties, and promises" are treated as being separate and distinct, and representations as to the condition of the property sold are not generally considered a part of the agreement but an inducement to the execution of the sale agreement, and it cannot be said that the parties intended the security agreement as a final statement of the terms of sale; and parol evidence is admissible, in an action for breach of contract brought by the buyer against the seller, as to the defective condition of the automobile sold. *Hull-Dobbs, Inc. v. Mallicoat*, 57 Tenn. App. 100, 415 S.W.2d 344 (1966).

"Cash Repair and Service Agreement" with the words "one cozy-aire oil furnace installed as is with oil burner-tank-gauge, etc. \$350" written after the phrase "Additional Material and Labor As Follows" was not a complete and exclusive statement of the terms relied on, and parol evidence was admissible to supplement the memorandum. *Holland Furnace Co. v. Heidrich*, 7 Pa. D. & C.2d 204 (1955).

21. —Warranty disclaimers or the like.

In buyer's action for breach of warranty in sale of computer and computer programs, (1) trial court properly admitted parol evidence under UCC § 2-202(b) to show that parties had entered into contract of sale, rather than security agreement; (2) seller's claim that admission of extrinsic evidence as to oral warranties contradicted warranty-disclaimer clause on reverse side of contract violated parol

evidence rule codified in UCC § 2-202(b) was immaterial because warranty-disclaimer clause was not part of sale contract; (3) since limitation-of-damages provision also was not part of sale contract, whether trial court was correct in holding such provision unconscionable under UCC § 2-302(1) was also immaterial; and (4) trial court's finding that seller did not supply goods as promised and warranted was supported by ample evidence in record. *Burroughs Corp. v. Chesapeake Petro. & Supply Co.*, 282 Md. 406, 384 A.2d 734 (1978).

Exculpatory clause, which was listed among 31 other paragraphs and not distinguished from them by lettering, type size or otherwise, was ineffective to disclaim warranties of merchantability and fitness, since it did not comply with requirement of UCC § 2-316 that disclaimer be conspicuous. *Redfern Meats, Inc. v. Hertz Corp.*, 134 Ga. App. 381, 215 S.E.2d 10 (1975).

Sale contract which contained provisions that machine was "accepted in its present condition" and that no warranties, express or implied, had been made by seller "unless specifically set forth in writing" were permissible exclusions and modifications of warranties, so that evidence of alleged oral statements of seller that machine was in "good condition" was prohibited by Code § 2-202. *Avery v. Aladdin Prods. Div., Nat'l Serv. Indus., Inc.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973).

Where the plaintiff had signed a statement releasing the defendant from liability for injuries caused in the course of receiving hair treatment from the defendant, and the issue to be determined was whether the covenant not to sue was broad enough to prevent recovery for injury to plaintiff's ear, testimony disclosing the intent of the parties was admissible. *Ciunci v. Wella Corp.*, 26 A.D.2d 109 (1st Dep't 1966).

RESEARCH REFERENCES

ALR. Validity and enforceability of contract which expressly leaves open for fu-

ture agreement or negotiation the terms of payment. 68 A.L.R.2d 1221.

Application of parol evidence rule of UCC § 2-202 where fraud or misrepresentation is claimed in sale of goods. 71 A.L.R.3d 1059.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death or patron. 54 A.L.R.5th 513.

Am Jur. 30 Am. Jur. 2d, Evidence §§ 977, 982, 983, 989 et seq.

67 Am. Jur. 2d, Sales §§ 317, 322 et seq.

72 Am. Jur. 2d, Statute of Frauds §§ 108 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:31. (Answer; defense; usage of trade specifically excluded in interpreting written contract).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:32. (Answer; defense; written contract not intended as final expression of agreement; modification by subsequent oral agreement).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:291 et seq. (Final written expression; parol evidence).

1 Am. Jur. Proof of Facts, Abbreviations, Proof No. 1 (meaning of abbreviation in commercial writing).

3 Am. Jur. Proof of Facts, Conversations, Proof No. 1 (foundation for admission of conversations); Proof No. 2 (proof of telephone conversations).

2 Am. Jur. Proof of Facts 2d, Reliability of scientific devices; telephone calling line identification, §§ 3 et seq. (proof of reliability of calling line identification equipment).

26 Am. Jur. Proof of Facts 2d, Meaning of abbreviation, word, or phrase according to usage of trade, §§ 16 et seq. (proof of meanings of particular written terms according to usages of trade).

26 Am. Jur. Proof of Facts 2d 229, Meaning of Abbreviation, Word, or Phrase According to Usage of Trade.

CJS. 32A C.J.S., Evidence §§ 1132, 1133.

77 C.J.S., Sales § 112.

Law Reviews. 1979 Mississippi Supreme Court Review: Miscellaneous. 50 Miss. L. J. 833, December 1979.

§ 75-2-203. Seals inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or to sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

SOURCES: Codes, 1942, § 41A:2-203; Laws, 1966, ch. 316, § 2-203, eff March 31, 1968.

Cross References — Supplementary general principles of law applicable, see § 75-1-103.

Formal requirements of contract, see § 75-2-201.

Unconscionable contract or clause, see § 75-2-302.

Seals, generally, see §§ 75-19-1 et seq.

JUDICIAL DECISIONS

1. In general.

Since UCC § 2-204(1) recognizes that a contract can come into being as a result of either a writing or words or conduct, and since UCC § 2-203 recognizes that in order to condition assent on formalities the parties must expressly agree thereto, it could be contended that there was a writ-

ten contract if it was signed, even though there was no delivery, or alternatively, that there was an oral agreement evidenced by a draft and bill of sale. *Osguthorpe v. Anschutz Land & Livestock Co.*, 456 F.2d 996 (10th Cir. Utah 1972).

The common-law rule that an undisclosed principal is not a party to a contract

executed by his agent under seal has been abrogated in Pennsylvania by the instant section as to contracts for the sale of goods. *Commonwealth Bank & Trust Co. v. Keech*, 201 Pa. Super. 285, 192 A.2d 133 (1963).

The question as to whether a motor vehicle dealer was the undisclosed principal of the salesman involved in an installment sales contract was a jury question. *Commonwealth Bank & Trust Co. v. Keech*, 201 Pa. Super. 285, 192 A.2d 133 (1963).

If a motor vehicle dealer was principal of seller of automobile who assigned in-

stalment sales contract, dealer was liable as assignor and guarantor of contract of sale, and was also the seller against whom the buyers had a defense which was good as against an assignee of the instalment contract under the Pennsylvania Motor Vehicle Sales Financing Act. *Commonwealth Bank & Trust Co. v. Keech*, 201 Pa. Super. 285, 192 A.2d 133 (1963).

The fact that an agreement for the conditional sale of an automobile purported to be sealed is of no significance, and failure of consideration can be shown despite the seal. *Quality Fin. Co. v. Hurley*, 337 Mass. 150, 148 N.E.2d 385 (1958).

RESEARCH REFERENCES

Am Jur. 6 *Am. Jur. Pl & Pr Forms* (Rev), Sales, Forms 2:11 et seq. (Complaint, petition, or declaration; breach of contract between merchants; failure to

repudiate written confirmation of oral contract).

CJS. 79 *C.J.S.*, Seals §§ 2 et seq.

§ 75-2-204. Formation in general.

(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

SOURCES: Codes, 1942, § 41A:2-204; Laws, 1966, ch. 316, § 2-204, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general; scope.
2. Liberal construction.
3. Relationship with other law.
4. Intent of parties.
5. Conduct of parties.
6. —Course of dealing.
7. —Customs and usages of trade.
8. Definiteness of contract.
9. —Open terms.
10. —Basis for appropriate remedy.

1. In general; scope.

Contracts under which farmers delivered soybeans to warehouseman for stor-

age and subsequent sale at price to be agreed on at later date, and pursuant to which weight tickets or statement sheets were issued as receipts with words "hold," "stored," or "on storage" appearing on such receipts together with name of individual farmer, were bailments and not present sales with price to be fixed in the future within meaning of UCC § 2-106(1), UCC § 2-204(3), and UCC 2-305(1), since such code sections did not contemplate farmers' right at their discretion to require a return of the same or equivalent fungible goods. *NYTCO Servs., Inc. v. Wilson*, 351 So. 2d 875, 23 U.C.C. Rep. Serv. 25 (Ala.

1977) (stating that fact that weight tickets and statement sheets issued as receipts had words indicating that soybeans were being stored also refuted contention that transactions were sales).

Where (1) buyer placed order for new Corvette on form furnished by dealer, (2) such form described car, listed its purchase price, provided for delivery to buyer as soon as possible, and also stated that order was not binding until accepted by dealer, (3) buyer, but not dealer, signed such order form and gave dealer check for \$1,000 deposit on vehicle, (4) dealer on same day placed written order with manufacturer for car ordered by buyer, (5) such order was signed by dealer, listed buyer as "customer," and described order as "sold," rather than "stock" for inventory, (6) dealer subsequently notified buyer by letter that "market conditions" had made buyer's "offer" unacceptable and that dealer would refund buyer's \$1,000 deposit, and (7) car was ultimately manufactured, delivered to dealer, and sold to third party, court held (1) that under UCC § 2-204(1) and (2), dealing with making of contracts generally, contract was formed as matter of law no later than time when dealer, after taking and retaining buyer's down payment, placed signed order for car with manufacturer which designated car as "sold" and listed buyer's name as "customer," (2) that dealer's conduct was clearly sufficient to signify an acceptance, even though it did not sign its own order form, (3) that order form sent by dealer to manufacturer was sufficient memorandum of contract to satisfy statute of frauds set forth in UCC § 2-201(1), and (4) that even assuming absence of a sufficient memorandum under UCC § 2-201(1), buyer's part payment on the indivisible contract operated under UCC § 2-201(3)(c) to take contract out of statute of frauds. *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

Under the Uniform Commercial Code, practical business people are not expected to govern their actions with reference to nice legal formalisms. Thus, when there is a basic agreement, however manifested and whether or not precise moment of such agreement can be determined, failure of parties to articulate agreement in

precise legal language, with every difficulty and contingency considered and resolved, will not prevent formation of contract. However, if there is no basic agreement, the code will not imply one. And without an agreement, there can be no contract and without a contract, there can be no breach. This principle is explicitly recognized by UCC § 1-201(3) and (11), and UCC § 2-204(1) and (2). *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 41 N.Y.2d 972, 363 N.E.2d 701 (1977).

2. Liberal construction.

Under this section a liberal construction with respect to the formation of contracts of sale is mandated, and where the buyer of prepared meals signed a letter of intent containing price, time delivery, quantity, and quality terms; the conduct of the parties evidenced their contractual intention, notwithstanding the buyer's addition of a paragraph indicating that a detailed contract containing complete specifications as to quality and quantity and protective provision in event the quality of the produce or service fell below established standards was to be completed in the future. *Graulich Caterer, Inc. v. Hans Holterbosch, Inc.*, 101 N.J. Super. 61, 243 A.2d 253 (App. Div. 1968).

3. Relationship with other law.

Since UCC § 2-204(1) recognizes that a contract can come into being as a result of either a writing or words or conduct, and since UCC § 2-203 recognizes that in order to condition assent on formalities the parties must expressly agree thereto, it could be contended that there was a written contract if it was signed, even though there was no delivery, or alternatively, that there was an oral agreement evidenced by a draft and bill of sale. *Osguthorpe v. Anschutz Land & Livestock Co.*, 456 F.2d 996 (10th Cir. Utah 1972).

Although the sales provisions of the Uniform Commercial Code have altered some of the formerly established doctrines of contract law in law to react more positively to the realistic needs of modern commerce, a sales contract must be made in a manner sufficient to show agreement. *Bruce Lincoln-Mercury, Inc. v. Universal*

C.I.T. Credit Corp., 325 F.2d 2 (3d Cir. Pa. 1963).

4. Intent of parties.

In suit for breach of alleged contract to furnish two pump stations for contractor, contractor's inclusion in purchase order of requirement that pump stations be in full compliance with plans and specifications for unique pump station previously erected by contractor, rather than contractor's standard type of station, constituted material alteration of supplier's offer, which was based on construction of standard type of station, so as to make purchase order a mere offer to buy which was not accepted by supplier. In such case, since no meeting of minds between parties took place within meaning of UCC § 2-204(1) as to products and services to be provided by supplier, no contract was ever entered into. *Lakeside Pump & Equip., Inc. v. Austin Constr. Co.*, 89 Wash. 2d 839, 576 P.2d 392, 23 U.C.C. Rep. Serv. 886 (1978) (holding that while Uniform Commercial Code liberalized some rules of contract formation, it did not eliminate basic requirement, codified by UCC § 2-204(1) that there must be agreement, or meeting of minds of parties, concerning subject matter of contract).

Insurance policies, issued to buyer of farm products and covering loss by fire of stock, materials, and supplies that were property of insured or where held by insured, did not provide coverage for beans destroyed in fire where beans were not delivered to insured; since seller remained free to make another disposition of crop, parties never intended to enter binding contract for sale of beans, no dominion passed to insured, and beans were not insured's property within terms of policy. *Dossey v. United States Fid. & Guar. Co.*, 528 P.2d 417 (Colo. Ct. App. 1974).

Use in purchase order of phrase "as per agreement, assignment to Coronet Carpet Co. subject to approval of buyer and seller and/or assignee" could arguably support reasonable inference of expressed intent that there was to be no legal obligation until subsequent formal documents met with parties' approval. *Peninsular Carpets, Inc. v. Bradley Homes, Inc.*, 58 Wis. 2d 405, 206 N.W.2d 408 (1973).

Where seller of diesel generator units was not satisfied that buyer had given it sufficient assurance as to whom the equipment would ultimately be sold and where it would be placed for use, as required in seller's invitation for an offer of purchase, and seller had not treated buyer's offer to purchase as acceptable, no contract had come into existence. *Euclid Eng'g Corp. v. Illinois Power Co.*, 79 Ill. App. 2d 145, 223 N.E.2d 409 (4th Dist. 1967).

To have a contract for financing, there must be, among other things, the requisite mutual assent to the same bargain, and accordingly, where the finance company at the time it paid for automobiles had no intention of creating a financing relationship, and the car dealer was under the impression that another finance company had financed the cars there was no formation of a financing contract between the parties. *Bruce Lincoln-Mercury, Inc. v. Universal C.I.T. Credit Corp.*, 325 F.2d 2 (3d Cir. Pa. 1963).

Subsection (3) of the Pennsylvania equivalent of this section was applicable to determine whether letters concerning the sale of corporate stock constituted a binding agreement. *Pennsylvania Co. v. Wilmington Trust Co.*, 39 Del. Ch. 453, 166 A.2d 726 (1960).

5. Conduct of parties.

The parties' actions established that they consummated a contract for the sale of a car (§ 75-2-204) where (1) the dealer and buyer had discussed financing the car at an 8.5 annual percentage rate, along with insurance and warranty coverage, and had arrived at an oral contract, (2) the car and the initial payments on it were delivered and accepted, and (3) the buyer faithfully made monthly payments on the car; the dealer's quick assignment of a retail installment contract to a third party before the buyer even picked up the car was inconsistent with the dealer's argument that it did not enter into a contract for sale of the car. *Fairley v. Turan-Foley Imports, Inc.*, 65 F.3d 475 (5th Cir. 1995).

A farmer's oral agreement to sell soybeans was enforceable, even though the farmer did not subsequently sign the contract form, where (1) the farmer had booked produce with the buyer on 4 previous occasions, 2 of which involved con-

tracts which the farmer never signed, and (2) the farmer had canceled an earlier contract with the buyer and had inquired into the possibility of canceling the soybean contract, which indicated his knowledge of the course of performance for such bookings. *Gooch v. Farmers Mktg. Ass'n*, 519 So. 2d 1214 (Miss. 1988).

Conduct "sufficient to show agreement" was shown by the acts of agents of a railroad who accepted diesel fuel from a supplier and signed an invoice which omitted price but included quantity; the law would supply a reasonable price in the absence of an agreement (§ 75-2-305(1)). However, judgment in favor of the supplier pursuant to a motion for a peremptory instruction would be reversed where a triable issue of fact existed as to the supplier's status as an agent of an oil company. *Alabama G.S.R.R. v. McVay*, 381 So. 2d 607 (Miss. 1980).

Where (1) plaintiff, but not defendant manufacturer, signed manufacturer's standard order form for purchase of computer system which contained disclaimer of all express and implied warranties concerning such system, (2) plaintiff thereafter arranged lease of system by having leasing company buy it from manufacturer exclusively for lease to plaintiff, (3) lease under which system was installed in plaintiff's plant provided that lessor made no warranties, express or implied, as to such system and that lessee (plaintiff) should have benefit of manufacturer's warranties, if any, (4) sales contract between manufacturer and lessor-purchaser expressly stated that lessor-purchaser agreed to terms and conditions on manufacturer's standard order form, and (5) plaintiff lessee, on system's failure to function properly, sued manufacturer for breach of express and implied warranties allegedly attaching to system, court held that manufacturer had effectively disclaimed all warranties, other than limited three-month warranty contained in manufacturer's standard order form, because (1) sales contract signed by plaintiff with manufacturer (prior to plaintiff's subsequent lease of system), although not constituting parties' entire agreement, was nevertheless enforceable under UCC § 2-204(1), dealing with sufficiency of con-

tracts established by conduct of parties, (2) original sales contract with plaintiff, although never signed by defendant manufacturer, became foundation for broader agreement whereby system was ultimately leased to plaintiff, (3) plaintiff's execution of original sales contract, after reading its terms, was conduct that showed agreement to such terms, including manufacturer's limited three-month warranty and disclaimer of all other express and implied warranties, (4) although defendant manufacturer never signed original sales contract, manufacturer subsequently agreed to its terms by incorporating them into later sales contract with leasing company, and (5) warranty disclaimer in original contract was not unconscionable. *Badger Bearing Co. v. Burroughs Corp.*, 444 F. Supp. 919 (E.D. Wis. 1977), *aff'd*, 588 F.2d 838 (7th Cir. Wis. 1978).

Where (1) buyer placed order for new Corvette on form furnished by dealer, (2) such form described car, listed its purchase price, provided for delivery to buyer as soon as possible, and also stated that order was not binding until accepted by dealer, (3) buyer, but not dealer, signed such order form and gave dealer check for \$1,000 deposit on vehicle, (4) dealer on same day placed written order with manufacturer for car ordered by buyer, (5) such order was signed by dealer, listed buyer as "customer," and described order as "sold," rather than "stock" for inventory, (6) dealer subsequently notified buyer by letter that "market conditions" had made buyer's "offer" unacceptable and that dealer would refund buyer's \$1,000 deposit, and (7) car was ultimately manufactured, delivered to dealer, and sold to third party, court held (1) that under UCC § 2-204(1) and (2), dealing with making of contracts generally, contract was formed as matter of law no later than time when dealer, after taking and retaining buyer's down payment, placed signed order for car with manufacturer which designated car as "sold" and listed buyer's name as "customer," (2) that dealer's conduct was clearly sufficient to signify an acceptance, even though it did not sign its own order form, (3) that order form sent by dealer to manufacturer was sufficient memoran-

dum of contract to satisfy statute of frauds set forth in UCC § 2-201(1), and (4) that even assuming absence of a sufficient memorandum under UCC § 2-201(1), buyer's part payment on the indivisible contract operated under UCC § 2-201(3)(c) to take contract out of statute of frauds. *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

Although "Declaration Terms" executed by brewer and beer distributor did not in and of itself create valid contract in that contract appeared to be illusory, under UCC § 2-204 trial court could have found that valid agreement existed between parties in regard to their conduct and continuing recognition that agreement for wholesale distribution of beer existed between them. *Jos. Schlitz Brewing Co. v. Central Beverage Co.*, 172 Ind. App. 81, 359 N.E.2d 566 (1977).

Although seller took position that its sales confirmation form was offer which buyer accepted by mailing back its purchase order form, whereas buyer took position that seller's sales confirmation form was offer which buyer orally rejected shortly after its receipt and that its purchase order was counter-offer which seller accepted by making two partial shipments, evidence established that oral contract for purchase of steel was formed before either party began sending or receiving written contract forms; conduct of parties indicated common understanding that sale had been arranged at time seller sent its sales confirmation form to buyer where, *inter alia*, on same date, seller mailed order to its supplier for 1,000 tons of steel which included size and grade specifications buyer had given to seller, and where buyer's testimony indicated that buyer only objected to boiler plate terms regarding delivery in seller's sales confirmation form and did not show any disagreement with seller's assertion in cover letter to form that contract for purchase of steel had already been agreed upon; even though it was difficult to identify exact point at which binding contract was formed, under UCC § 2-204(2) it could be found that agreement was in fact made during series of telephone conversations conducted by parties during week preceding mailing of sales confirmation

form and fact that shipping and delivery terms were not completely ironed out during oral negotiations was likewise unimportant under UCC § 2-204(3). *Harlow & Jones, Inc. v. Advance Steel Co.*, 424 F. Supp. 770 (E.D. Mich. 1976).

Under UCC §§ 2-204(1) and 1-201(3), buyer was not justified in terminating orders of submarine valves for alleged failure to meet delivery dates specified in contracts, notwithstanding alleged promise by seller to meet or improve upon delivery dates originally requested by buyer, where buyer requested certain delivery dates when it placed orders, seller clearly and unequivocally rejected buyer's requested dates and promised delivery at later dates, buyer merely appealed to seller to conform to requested dates and later appealed to seller to expedite one shipment, and buyer gave no notice to seller that seller breached contract by failing to meet required delivery dates. *Crane Co. v. Roberts Supply Co.*, 196 Neb. 67, 241 N.W.2d 516 (1976).

In action by milk case manufacturer against manufacturer of polyethylene used for milk case bottoms, fact that polyethylene manufacturer invoiced plastics to, and received payment from, company that performed actual molding of polyethylene for milk case manufacturer was not conclusive on issue whether there was necessary privity between milk case manufacturer and polyethylene manufacturer to support action for breach of implied warranty of fitness for particular purpose under UCC § 2-315. *Cumberland Corp. v. E.I. DuPont de Nemours & Co.*, 383 F. Supp. 595 (E.D. Tenn. 1973).

Since UCC § 2-204(1) recognizes that a contract can come into being as a result of either a writing or words or conduct, and since UCC § 2-203 recognizes that in order to condition assent on formalities the parties must expressly agree thereto, it could be contended that there was a written contract if it was signed, even though there was no delivery, or alternatively, that there was an oral agreement evidenced by a draft and bill of sale. *Osguthorpe v. Anschutz Land & Livestock Co.*, 456 F.2d 996 (10th Cir. Utah 1972).

An offer by a trust company to sell corporate stock held by it in its fiduciary

capacity, which offer was subject to approval by the purchasers' boards of directors, could, after such approval, form a contract for the sale of the stock. *Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (1964).

6. —Course of dealing.

Where seller's trailers were ordered over telephone by buyer and 5 trailers were delivered, each exceeding \$500 amount, which under § 2-201 necessitates writing signed by agent of buyer before alleged order for additional 20 trailers could be enforceable, and such was not in writing, no admission of existence of contract for additional 20 trailers was made, buyer never tendered and seller never received payment for these trailers, no deposit was tendered, exception for specially manufactured goods was inapplicable, court concluded that as matter of law, enforcement of any order in excess of 5 units was precluded by statute of frauds. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

Where (1) seller of heat-and-chemical-recovery boiler, in response to buyer's request for revised sale proposal, informed buyer by letter on July 27, 1970 of seller's firm price for boiler and stated that such price was "firm for acceptance by August 15, 1970," (2) seller on August 7, 1970 submitted revised sale proposal to buyer which excluded all express and implied warranties, except one-year warranty for repairs and replacement of parts, and also all liability for consequential damages, (3) buyer on August 12, 1970 sent seller letter of intent to purchase which stated boiler's price, terms of payment, shipping schedule, liquidated damages for breach of contract, and authorization to seller to begin work immediately subject only to cancellation charges, and (4) buyer on February 15, 1971 sent seller formal purchase order which contained certain conditions that were never agreed to by seller, court held (1) that under UCC § 2-204(1), contract to purchase boiler was entered into in August, 1970; (2) that such contract consisted of seller's offer-as contained in seller's letters of July 27, 1970 and August 7, 1970, and seller's revised proposal of August 7, 1970-and buyer's acceptance of

seller's offer in buyer's letter of intent on August 12, 1970; (3) that such contract also contained seller's proposed commercial terms and conditions of sale, including seller's disclaimer of warranties, limitation of liability to repairs and replacement of defective parts for one year, and exclusion of liability for consequential damages; and (4) such commercial terms of sale were not modified, under UCC § 2-207(2)(c) by buyer's subsequent inclusion of conflicting commercial terms in buyer's confirming purchase order of February 15, 1971, since seller had objected in writing within reasonable time to buyer's proposed changes. *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 445 F. Supp. 507 (D. Me. 1977).

Where general contractor of building project promptly notified subcontractor of its successful bid and verbally accepted subcontractor's offer to supply concrete, and where subcontractor began delivering concrete and general contractor accepted and paid for it in same manner parties had done business before, until price was raised by subcontractor, conduct of parties recognized existence of contract pursuant to UCC §§ 2-204 and 2-206. *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017 (1977).

Even in the absence of a written agreement with respect to every term of a contract, great weight attaches to the course of dealing of the parties, and where it appears from the conduct of the parties that their mode of calculating price, although not accepted formally by signature of a written instrument, was adhered to by both parties during an extensive course of dealing, during which the purchaser received, accepted, and paid for over \$800,000 worth of merchandise, this course of dealing must be held applicable and governing with respect to remaining merchandise which was received, accepted, but not paid for. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 236 F. Supp. 879 (W.D. Pa. 1965), vacated on other grounds, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

7. —Customs and usages of trade.

Oral contract for sale of soybeans which showed amount of beans to be sold and price per bushel, in conjunction with evi-

dence that showed that custom was to deal in particular grade of beans and to deliver at particular time, was established with sufficient certainty within meaning of UCC § 2-204(3). *URSA Farmers Coop. Co. v. Trent*, 58 Ill. App. 3d 930, 374 N.E.2d 1123 (4th Dist. 1978).

In action by diamond wholesaler against retailer to recover price of goods shipped under "all-risk" memorandum, custom and usage of industry established liability of consignee for full memorandum price of merchandise stolen while in his possession. *Lipschutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375 (S.D. Tex. 1974).

Evidence of long-established customs and usages of trade established implied agreement which obligated cooperative to pay milk producers reasonable value for milk purchased by cooperative based on competitive prices in area. *Columbus Milk Producers' Coop. v. Department of Agric.*, 48 Wis. 2d 451, 180 N.W.2d 617 (1970).

8. Definiteness of contract.

Under UCC § 2-204(3), legally enforceable contract existed for manufacture of cooling systems to be incorporated into electronic countermeasure (ECM) pods produced for United States Air Force where (1) both buyer and seller knew and understood terms and conditions of such contract, (2) both buyer and seller were fully aware of documents that comprised contract, and (3) such documents were clear on their face and provided all of the essential elements of a contract of sale. *Westinghouse Elec. Corp. v. Garrett Corp.*, 437 F. Supp. 1301 (D. Md. 1977), *aff'd*, 601 F.2d 155 (4th Cir. Md. 1979).

Valid oral contract for purchase of 17 million mail-order advertising "flyers" was sufficiently established under UCC § 2-204(3) by evidence which showed essential contract terms of quantity, price, and date and place of delivery, and which also revealed that buyer had urged seller to start printing flyers as soon as possible. *Perlmutter Printing Co. v. Strome, Inc.*, 436 F. Supp. 409 (N.D. Ohio 1976).

Contract for sale of one carload of plywood composed of unspecified amount of A-C and D-C grades of plywood, with limitation on shop grade of plywood to extent of 5 percent of carload shipped, was not so uncertain that it was unenforce-

able, and carload of plywood received by buyer fully complied with terms of contract, even though it contained approximately 85 percent D-C grade plywood, where, *inter alia*, there was nothing in applicable commercial standards (referred to in buyer's purchase order) which specified particular percentages of any grade in shipment mixed with another grade unless specified in contract between buyer and seller. *Pacific Prods., Inc. v. Great W. Plywood, Ltd.*, 528 S.W.2d 286 (Tex. Civ. App. 1975).

Where contracts for sale of cotton between buyer and cotton growers specified that buyer would purchase, and grower would sell, cotton grown during 1973 crop year on specified acreage, with projected yield of certain number of pounds of cotton per acre, quantity terms of contracts were not only sufficiently definite to satisfy UCC statute of frauds provision, § 2-201, but also were sufficient to meet standards of definiteness required by UCC § 2-204(3) for enforceability. *Riegel Fiber Corp. v. Anderson Gin Co.*, 512 F.2d 784 (5th Cir. Ala. 1975).

9. —Open terms.

In action brought by buyer against seller of paint for breach of implied warranties of fitness under UCC § 2-315 when paint, purchased as primer for structural steel, failed to adhere and prevent rusting, defendant-seller's contention that disclaimer appearing on each invoice for paint excluded implied warranties under UCC § 2-316 and established course of dealing under UCC § 1-205 was rejected because contract was made at time defendant's bid was accepted and attempted disclaimer made at time of delivery cannot affect implied warranties if disclaimer was not known to buyer at time of contract; defendant's challenge to existence of contract at time bid was orally accepted was controlled by UCC § 2-201(3)(c), which recognized partial performance as substitute for required writing and, under UCC § 2-204(3), fact that some matters were not covered did not render contract unenforceable where plaintiff informed defendant that he was low bidder and had the contract. *Geo. C. Christopher & Son v. Kansas Paint & Color Co.*, 215 Kan. 185, 523 P.2d 709

(1974), modified on denial of reh'g, 215 Kan. 510, 525 P.2d 626 (1974).

Even though party sent cable accepting price terms of contract existence of open term as to letter of credit evidenced no meeting of minds, where accepting party was uninformed as to unusual nature of letter of credit which involved possible violation of Argentinian currency regulations. *Luis Hirsch y Cia. Sociedad Anonima v. Rosenblatt Casing Co.*, 418 F.2d 1300 (2d Cir. N.Y. 1969).

Where some of contract terms were open, whether parties intended to make contract should be determined by commercial standards; where one of contracting parties was uninformed as to nature of credit involving possible violation of foreign country's currency regulations and where it was virtually certain that this party would have been advised of such circumstances by bank upon inquiry for letter of credit, there was no meeting of minds when this party sent cable accepting price terms. *Luis Hirsch y Cia. Sociedad Anonima v. Rosenblatt Casing Co.*, 418 F.2d 1300 (2d Cir. N.Y. 1969).

10. —Basis for appropriate remedy.

Under UCC § 2-204, parties may establish contract in any manner sufficient to show agreement and may leave open one or more terms as long as reasonably certain basis for giving appropriate remedy exists. Every detail of contract need not be specified by parties or proved in court, and

moment of contract's formation need not be ascertained. *Transammonia Export Corp. v. Conserv, Inc.*, 554 F.2d 719 (5th Cir. Fla. 1977).

In action for breach of oral contracts for sale of anhydrous ammonia, where buyer testified that it originally entered into oral contract in June, 1972, with seller for sale of 60,000 tons of ammonia of designated purity at \$28 per ton, FOB buyer's vessel, and that parties orally modified such contract in October, 1972, by reducing quantity of ammonia to 45,000 tons, of which 15,000 tons were actually delivered; and where evidence also showed more than enough terms of such contracts-with respect to product, quantity, price, due dates, and FOB delivery terms-to provide remedy under UCC § 2-204 for seller's alleged breach thereof, trial court correctly denied seller's motion for directed verdict and properly submitted issue of breach of contracts to jury, which returned verdict for plaintiff. *Transammonia Export Corp. v. Conserv, Inc.*, 554 F.2d 719 (5th Cir. Fla. 1977).

Under UCC § 2-204(3), if parties intended to contract and if appropriate remedy can be fashioned, contract of sale will not fail for indefiniteness, even though material terms are left open. But if dispute over material terms manifests lack of intent to contract, no contract will result. *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 41 N.Y.2d 972, 363 N.E.2d 701 (1977).

RESEARCH REFERENCES

ALR. Contract for sale of commodity to extent of buyer's requirements. 26 A.L.R.2d 1099.

Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements, etc., of certain commodities. 26 A.L.R.2d 1139.

Contract for the sale of commodity or goods wherein quantity is described as "about" or "more or less" than the amount specified. 58 A.L.R.2d 377.

Am Jur. 38 Am. Jur. 2d, Guaranty § 35.

67 Am. Jur. 2d, Sales §§ 102 et seq.

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2-Sales, §§ 253:301 et seq. (Formation of agreement).

CJS. 77 C.J.S., Sales §§ 29 et seq.

Law Reviews. Gedid, A Background to Variance Problems Under the Uniform Commercial Code: Toward a Contextual Approach. 22 Duq. L. Rev. 595, Spring, 1984.

§ 75-2-205. Firm offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three (3) months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

SOURCES: Codes, 1942, § 41A:2-205; Laws, 1966, ch. 316, § 2-205, eff March 31, 1968.

Cross References — Purposes of Code and rules of construction, see § 75-1-102.

Formal requirements of contract, see § 75-2-201.

Unconscionable contract or clause, see § 75-2-302.

JUDICIAL DECISIONS

1. In general.

Letter proposal and surrounding negotiations between buyer and seller of various meat products, which provided that buyer would be informed 45 days prior to any adjustment in price, was at most “firm offer” which was irrevocable, without consideration, only for period of 3 months commencing on date of proposal; thus, seller had right, after 3 month period, to raise its offered price without provision of 45 days’ notice. *Mid-South Packers, Inc. v. Shoney’s, Inc.*, 761 F.2d 1117 (5th Cir. 1985).

In action by seller to recover amount offset by buyer against purchase price of meat, court held (1) that seller’s “letter proposal” to sell meat constituted firm offer under UCC § 2-205 that was irrevocable, even without consideration, for three-month period after proposal’s date; (2) that letter proposal was not requirements contract under UCC § 2-306(1) because buyer did not promise to purchase its entire requirements exclusively from seller; (3) that after expiration of three months from date of letter proposal, each of buyer’s purchase orders stood on its own as separate contract between buyer and seller; (4) that offer in letter proposal was properly revoked after three months from proposal’s date and was replaced by offer to sell at increased price that buyer accepted by making subsequent purchase orders; that invoices sent by seller after buyer’s subsequent purchase orders con-

stituted “written confirmations” under UCC § 2-207(1) that were enforceable against seller under statute of frauds in UCC § 2-201(1); and (6) that because buyer did not contend that exceptions in UCC § 2-207(2) prevented additional terms in invoices concerning interest on delinquent accounts and reasonable costs of collection from becoming “part of the contract” under UCC § 2-207(2), such additional terms became part of parties’ contract. *Mid-South Packers, Inc. v. Shoney’s, Inc.*, 761 F.2d 1117 (5th Cir. 1985).

Under UCC § 2-205, a merchant’s price quotation, estimate, or other offer, in order to be irrevocable for a reasonable length of time, must by its terms give assurance that it will be held open. A mere offer lacking such assurance is subject to revocation by the seller at anytime prior to the buyer’s acceptance. *Ivey’s Plumbing & Elec. Co. v. Petrochem Maintenance, Inc.*, 463 F. Supp. 543 (N.D. Miss. 1978).

In breach of contract action by subcontractor against both supplier and manufacturer of air compressors for failure to make delivery, where (1) on September 13, 1977, supplier gave subcontractor oral quotation of \$89,000 for five compressors in issue, (2) on previous day (September 12), supplier had obtained both an oral quotation and an estimate sheet, signed by manufacturer’s agent, that listed price for two compressors, and agent orally stated that three more could be furnished at same unit price, so that total price for

five compressors would be \$80,000, (3) on September 13, 1977, subcontractor used supplier's quotation of \$89,000 to make successful bid for contract sought by it, (4) on September 26, 1977, manufacturer, after finding out that its competitors charged higher prices for compressors, issued revised price quotation to supplier and offered to sell five compressors in suit for \$113,000, (5) on October 24, 1977, supplier, ignoring manufacturer's revised quotation, issued purchase order to manufacturer for five compressors at manufacturer's original quotation of \$80,000, (6) on November 7, 1977, manufacturer advised supplier that it would not furnish compressors at its original quotation, (7) on October 6, 1977, at meeting between subcontractor and supplier, supplier told subcontractor that it could not sell compressors for \$89,000, but subcontractor nevertheless gave supplier purchase order for compressors at such price, and (8) on supplier's failure to deliver compressors, subcontractor purchased them elsewhere for \$121,000 and sought to recover \$32,000 as difference between supplier's original quotation of \$89,000 and subcontractor's cover price, court held (1) that manufacturer was not liable to subcontractor on either theory of vicarious responsibility for supplier's acts or theory that subcontractor was third-party beneficiary of contract between supplier and manufacturer, (2) that manufacturer's answer to supplier's cross claim did not contain unqualified admission of facts that, under exception to statute of frauds contained in UCC § 2-201(3)(b), would remove alleged oral contract between supplier and manufacturer from statute of frauds, (3) that manufacturer's estimate sheet of September 12, 1977 was not, as claimed by supplier, writing sufficient to indicate that contract of sale had been made within meaning of statute of frauds in UCC § 2-201(1), but was at best mere offer that had been effectually revoked by manufacturer under UCC § 2-205 at time when manufacturer had right to revoke it, (4) that such revocation had occurred before supplier attempted to place purchase order for compressors with manufacturer, and (5) that as between subcontractor and supplier, there was no writing of any kind

within meaning of statute of frauds in UCC § 2-201(1) on which subcontractor could rely to avoid the statute, and also no admission of facts by supplier that would constitute contract enforceable under admissions exception to the statute contained in UCC § 2-201(3)(b). *Ivey's Plumbing & Elec. Co. v. Petrochem Maintenance, Inc.*, 463 F. Supp. 543 (N.D. Miss. 1978).

Where contractor obtained price quotation on certain pipe required for construction project from pipe supplier, relied on price quotation and incorporated it into his bid, was awarded contract, and supplier then refused to supply pipe at price quoted: (1) no binding contractual obligation existed under UCC, since mere use of supplier's bid was not acceptance giving rise to contract, and, since supplier had not offered to make its bid irrevocable, nor was there an option supported by consideration, its bid did not meet "firm offer" requirement of § 2-205; (2) however, supplier was liable to contractor on theory of promissory estoppel; (3) statute of frauds, UCC § 2-201 was not applicable to action based on promissory estoppel. *Janke Constr. Co. v. Vulcan Materials Co.*, 386 F. Supp. 687 (W.D. Wis. 1974), *aff'd*, 527 F.2d 772 (7th Cir. Wis. 1976).

Evidence that vendors left written "quotations" with purchaser and that purchaser subsequently called vendors and placed orders for goods fell short of establishing firm offer to sell by vendors. *Realty Dev., Inc. v. Kosydar*, 67 Ohio Op. 2d 67, 322 N.E.2d 328 (Ct. App. 1974).

Transaction whereby seller, who was indebted to buyer, agreed to sell tractor to buyer in return for cancellation of seller's indebtedness constituted present, binding and completed sale, and title to tractor passed to buyer at time of execution of contract of sale, notwithstanding sales agreement provided that tractor would remain on seller's premises until needed by buyer and during that period of time seller would have right to sell tractor, and written agreement between seller and buyer was adequate as contract of sale under UCC since it contained date, identified buyer and seller and specified exactly model, make and serial number of tractor, listed amount and nature of con-

sideration and was signed by agent of both parties. *Ace Supply, Inc. v. Rocky-Mountain Mach. Co.*, 96 Idaho 183, 525 P.2d 965 (1974).

A subcontractor's letter to a general contractor, making an offer to furnish certain materials and perform certain work, which contained no terms giving assurance that would be held open does not fall within this section, and the offer could be withdrawn at any time prior to its acceptance. *E.A. Coronis Assocs. v. M. Gordon Constr. Co.*, 90 N.J. Super. 69, 216 A.2d 246 (App. Div. 1966).

The offer of a trust company to sell stock held by it in its fiduciary capacity is not a firm offer within the meaning of this section which applies only to merchants, and the trust company, in the absence of the written consent of its cotrustee, could not make a firm offer to sell and there was no assurance in its agreement of sale that the offer would be held open, and the trust company should have considered a subsequent offer to purchase the stock at a higher price (applying Pennsylvania UCC). *Wilmington Trust Co. v. Coulter*, 200 A.2d 441 (1964).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:41. (Complaint, petition, or declaration; against merchant; subsequent revocation of offer).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:42. (Answer; defense; offer lapsed

because not accepted within reasonable time).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:321 et seq. (Firm offers).

CJS. 77 C.J.S., Sales §§ 29 et seq.

§ 75-2-206. Offer and acceptance in formation of contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods, but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

SOURCES: Codes, 1942, § 41A:2-206; Laws, 1966, ch. 316, § 2-206, eff March 31, 1968.

Cross References — Firm offer, see § 75-2-205.

JUDICIAL DECISIONS

1. In general.

In action by assignee of account of buyer of carpeting for balance due on such account, where (1) buyer ordered carpeting from seller-assignor on discount terms

specified by buyer, (2) invoice mailed after goods were shipped contained different discount terms, (3) buyer continued to hold goods, although claiming that it had rejected them, and (4) entire shipment of

goods was later destroyed by fire at buyer's warehouse, court held (1) that under UCC § 2-206(1)(b), when seller-assignor shipped goods to buyer, it accepted buyer's offer to purchase goods, (2) that even if UCC § 2-207 superficially applied to alter terms of parties' contract, buyer properly objected under UCC § 2-207(2)(c) to different credit terms on seller-assignor's invoice and such terms did not apply, (3) that contract therefore was on buyer's own credit terms, (4) that there was nothing that buyer could reject as nonconforming, since goods were admittedly satisfactory, (5) that contract had not been breached by either party, (6) that since there had been no breach, risk of loss under UCC § 2-509(3) passed to buyer on his receipt of goods, and buyer thus had to bear loss of goods by fire, and (7) that under UCC § 2-210(2), assignment of buyer's account to plaintiff was valid. *Trust Co. Bank v. Barrett Distribs., Inc.*, 459 F. Supp. 959 (S.D. Ind. 1978).

Ordinarily, under UCC § 2-206(1)(a), an offer to make a contract invites acceptance in any manner that is reasonable under the circumstances. However, where (1) buyer's purchase order for pumps expressly provided for seller's acceptance in writing, (2) acceptance copy accompanying purchase order pointed out that order was not valid until buyer received acceptance copy from seller, and (3) purchase order did not invite acceptance by partial performance, trial court erred in holding that seller's conduct in shipping some of the pumps ordered, more than a year after the date of the purchase order, amounted to acceptance. Furthermore, buyer's purchase order was not a confirmatory memorandum within the meaning of UCC § 2-201(2), since evidence did not show that parties had entered into an oral contract. *Nations Enters., Inc. v. Process Equip. Co.*, 40 Colo. App. 390, 579 P.2d 655, 24 U.C.C. Rep. Serv. 828 (1978) (also holding that seller was entitled to purchase price for pumps that were shipped to and accepted by buyer, and that contract for their sale was enforceable under UCC § 2-201(3) c)).

A contract for the sale of a specifically optioned automobile was formed as a matter of law no later than the time when the

dealer, after having taken and retained the plaintiff's down payment of \$1,000, placed an order signed by it for the identical vehicle with the manufacturer, designating the vehicle as "sold" and listing plaintiff's name under the heading "customer"; the conduct of the dealer was sufficient to signify an acceptance notwithstanding its conceded failure to sign the purchase agreement in the space provided therefor after the words "Accepted by". *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492 (2d Dep't 1978).

Under UCC § 2-206(1)(a), a written bid can be effectively accepted not only by a written acceptance but also in any other manner and by any medium that is reasonable under the circumstances. However, it still must be accepted. *Woodridge v. Bohnen Int'l, Inc.*, 60 Ill. App. 3d 692, 377 N.E.2d 121 (1978) (holding that there was no acceptance of bid submitted to city for purchase of three trucks where city board of trustees merely voted to "recommend" acceptance of the bid).

Seller's action in shipping part of goods ordered by buyer would be sufficient to constitute acceptance of buyer's offer under UCC § 2-206(1)(b). *Avila Group, Inc. v. Norma J.*, 426 F. Supp. 537 (S.D.N.Y. 1977).

Where general contractor of building project promptly notified subcontractor of its successful bid and verbally accepted subcontractor's offer to supply concrete, and where subcontractor began delivering concrete and general contractor accepted and paid for it in same manner parties had done business before, until price was raised by subcontractor, conduct of parties recognized existence of contract pursuant to UCC §§ 2-204 and 2-206. *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017 (1977).

UCC § 2-206(1)(a) was not intended to change common-law rule that if offer to make contract by its terms indicates that acceptance can only be made in particular manner, offeree must comply with such manner. However, in case where manufacturer of office telephone system by letter solicited offer from prospective buyer to purchase system, letter was accompanied by equipment sales agreement providing that agreement would become binding

only on manufacturer's acceptance thereof at its home office, buyer signed and returned agreement to manufacturer with check for down payment, but manufacturer did not formally execute agreement at its home office and relied on UCC § 2-206(1)(a) in alleging that no contract was ever entered into, (1) buyer was offeror and manufacturer was offeree; (2) manufacturer had right to rely on manner of acceptance specified in equipment sales agreement, but could also assent to buyer's waiver of such manner of acceptance; (3) manufacturer's assent to such waiver could be sufficiently expressed by conduct, provided that such conduct was by persons having authority to bind manufacturer; and (4) letter from representative of one of manufacturer's divisions to telephone company advising telephone company of contract between manufacturer and buyer raised issue of fact as whether letter constituted manufacturer's assent to be bound by equipment sales agreement. *Empire Mach. Co. v. Litton Bus. Tel. Sys.*, 115 Ariz. 568, 566 P.2d 1044 (Ct. App. 1977).

In action by supermarket customer for injuries sustained when one or more bottles of Coca Cola exploded prior to being placed in shopping cart, retailer's act of placing bottles on shelf with price affixed manifested intent to offer them for sale, customer's act of taking physical possession of the goods with intent to pay for them constituted reasonable mode of acceptance and at that moment contract for sale came into existence. *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874 (1974), aff'd, 273 Md. 592, 332 A.2d 1, 78 A.L.R.3d 682 (1975).

Where plaintiff-seller sent list of furnishings to defendants to be purchased by them at specified prices, calling for payment of \$3,000 upon acceptance and asking that defendants sign letter and return copy, and where defendant sent letter enclosing \$3,000 check and asking that additional piece of furniture be included, stating that contract had been misplaced, while defendants did not sign and return one copy of contract in manner requested by plaintiff, under UCC § 2-206, acceptance could be made by any medium reasonable and circumstances, i.e. defen-

dant's letter. *McAfee v. Brewer*, 214 Va. 579, 203 S.E.2d 129 (1974).

Use of yard goods constituted an acceptance of such goods under UCC § 2-606, and thus purchaser's claims that such goods were nonconforming was rejected. *Kesco Textile Co. v. Coit Int'l, Inc.*, 41 A.D.2d 828 (1st Dep't 1973), aff'd, 34 N.Y.2d 700, 356 N.Y.S.2d 616, 313 N.E.2d 74 (1974).

Even if steel and wire products fabricator's oral offer to sell steel broker specified quantities of steel rods had lapsed, jury could find that required elements of offer and acceptance were present in broker's two subsequent telephone conversations with fabricator, in which broker agreed to purchase specific size and quantity of rods previously discussed at price previously agreed upon, and fabricator responded "Fine, Thank you." *Textron, Inc. v. Froelich*, 223 Pa. Super. 506, 302 A.2d 426 (1973).

In action on contract for purchase of tractor, whether notice given 4 weeks after acceptance was given within reasonable time under Code § 206(2) was question for trier of fact. *Petersen v. Thompson*, 264 Or. 516, 506 P.2d 697 (1973).

Negotiations for purchase of incinerator; purchase order referred to seller's prior proposal and requested that incinerator be shipped subject to submitting any controversy to arbitration; held, purchase order was counter-offer which was accepted so as to create contract when incinerator was shipped as ordered; arbitration provision was binding. *Universal Oil Prods. Co. v. S.C.M. Corp.*, 313 F. Supp. 905 (D. Conn. 1970).

Even in the absence of a written agreement with respect to every term of a contract, great weight attaches to the course of dealing of the parties, and where it appears from the conduct of the parties that their mode of calculating price, although not accepted formally by signature of a written instrument, was adhered to by both parties during an extensive course of dealing, during which the purchaser received, accepted, and paid for over \$800,000 worth of merchandise, this course of dealing must be held applicable and governing with respect to remaining

merchandise which was received, accepted, but not paid for. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 236 F. Supp. 879 (W.D. Pa. 1965), vacated on other grounds, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

An Illinois florist who receives interstate telegraphic orders for retail sales of flowers in Illinois is a seller, his sales are present sales made in the state whether

the contract is unilateral or bilateral, and title to the flowers passes in Illinois, and the sale is not one for resale which would be true if the seller were the out-of-state florist who telegraphs the order, and the Illinois florist is subject to that state's retailers' occupational tax on such sales. *O'Brien v. Isaacs*, 32 Ill. 2d 105, 203 N.E.2d 890 (1965).

RESEARCH REFERENCES

Am Jur. 38 Am. Jur. 2d, Guaranty § 5.
67 Am. Jur. 2d, Sales §§ 129 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:43-2:47. (Formation; offer and acceptance).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:331 et seq. (Acceptance of offer).

27 Am. Jur. Proof of Facts 2d 559, Offeree's Acceptance of Contract Offer.

27 Am. Jur. Proof of Facts 2d 605, Acts Constituting Rejection of Contract Offer.

CJS. 77 C.J.S., Sales §§ 29 et seq.

§ 75-2-207. Additional terms in acceptance or confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) the offer expressly limits acceptance to the terms of the offer;
- (b) they materially alter it; or
- (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.

SOURCES: Codes, 1942, § 41A:2-207; Laws, 1966, ch. 316, § 2-207, eff March 31, 1968.

Cross References — Purposes of Code and rules of construction, see § 75-1-102.

Unconscionable contract or clause, see § 75-2-302.

Buyer's right to inspection of goods, see § 75-2-513.

Rejection of goods, see § 75-2-602.

Effect of acceptance of goods by buyer, see § 75-2-607.

Right to adequate assurance of performance, see § 75-2-609.

Breach of "installment contract", see § 75-2-612.

Substituted performance, see § 75-2-614.

Delay in delivery or non-delivery, excuse, see §§ 75-2-615, 75-2-616.

Liquidation or limitation of damages for breach, see § 75-2-718.

Contractual modification or limitation of remedy, see § 75-2-719.

JUDICIAL DECISIONS

1. In general.
2. Scope.
3. Conditional acceptance or counteroffer.
4. —Acceptance on additional terms distinguished.
5. Additional terms as non-binding proposals.
6. Additional terms as binding merchants.
7. —Material alteration.
8. —Material alteration; arbitration clauses.
9. —Material alteration; disclaimers.
10. —Objection within a reasonable time.
11. Conduct of parties.
12. —Conflicting terms.

1. In general.

Interest and attorney fee provisions contained in invoices of seller of meat products, which terms provide for payment of both interest on delinquent accounts as well as reasonable costs of collection, including attorney fees, became part of contracts between buyer and seller when buyer expressly accepted purchase orders. *Mid-South Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117 (5th Cir. 1985).

Since UCC § 2-207(1) speaks of both acceptances and written confirmations, it is intended to include at least two distinct situations: (1) that in which the parties have reached a prior oral contract and any writings serve only as confirmation of that contract, and (2) the situation in which the prior dealings of the parties did not constitute actual formation of a contract, and the writings serve as either an offer or an acceptance, or as both an offer and acceptance. In either case, the writing or writings may contain additional terms, and in either case, the effect of such additional terms is the same under the Uniform Commercial Code. *Marlene Indus.*

Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 380 N.E.2d 239 (1978).

Acceptance is prerequisite to application of UCC § 2-207(1), and section should be applied only if traditional criteria of intent showing that contract has been made are met. Only then do prescriptions in UCC § 2-207(1) concerning "additional terms" become relevant. *U.S. Indus., Inc. v. Semco Mfg., Inc.*, 562 F.2d 1061 (8th Cir. Mo. 1977), cert. denied, 434 U.S. 986, 98 S. Ct. 613, 54 L. Ed. 2d 480 (1977).

2. Scope.

Where a bargain becomes effective upon execution of a contract several days before a purchase order is issued, terms of a purchase order cannot be read together with the contract as an additional term of the agreement, because § 75-2-207 applies only to the formation of contracts. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

In action by general contractor, which had been employed by defendant utility to construct power plant, for retained funds that utility refused to disburse, which action was ultimately settled with regard to all parties except for utility's counterclaim against subcontractor that supplied turbine generator and turbines for project, district court held, with respect to utility's claims against subcontractor for (a) breach of implied warranties by furnishing defective equipment, (b) cost of replacement power, and (c) lost profits, (1) that general contractor had express and implied authority from utility to execute limitation-of-liability agreement as to subcontractor's warranties and general contractor's remedies thereon, (2) that such limitation-of-liability agreement was valid and insulated subcontractor from utility's claims for cost of replacement power, lost profits, and breach of implied

warranties, (3) that utility did not obtain contract rights under UCC § 2-207 by virtue of subcontractor's price quotation, utility's purchase order, and events subsequent to execution of such documents, (4) that under UCC § 2-719(1)(a), general contractor's standard contract terms, when construed in light of both its course of dealing with subcontractor and usage of the trade, also limited utility's recovery to cost of replacement and repair of defective parts, and did not permit recovery under any legal theory for cost of replacement power, and (5) that cost of replacement power was consequential damage for breach of warranty attaching to power-generating equipment involved in suit. *Ebasco Servs., Inc. v. Pennsylvania Power & Light Co.*, 460 F. Supp. 163 (E.D. Pa. 1978).

Fact that trial court utilized standards embodied in UCC § 2-207, relating to additional terms in acceptance in connection with sale of goods, to determine whether option for purchase of real property had been properly exercised was not error. *Adams v. Waddell*, 543 P.2d 215 (Alaska 1975).

Where bargain became effective upon the execution of a contract several days before purchase order was issued, terms of purchase offer could not be read together with contract as additional term of agreement, since UCC § 2-207 applies only to the formation of contracts. *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. Va. 1971).

3. Conditional acceptance or counter-offer.

Where (1) seller on August 2nd orally offered to sell buyer 15,000 tons of fertilizer, which offer was valid until 2:00 p.m. on August 3d, (2) on morning of August 3d, as requested by buyer, seller sent buyer same offer by telex, (3) at 10:00 a.m. on August 3d, after seller had sent and relinquished control over its firm offer by telex, buyer allegedly accepted such offer orally, and (4) buyer thereafter sent seller responsive telex while seller's firm offer was still valid and such telex included certain terms, including terms as to payment and loading, that were not in seller's offer, court held (1) that inclusion in buyer's telex of payment and loading provisions

not mentioned in seller's offer was not, under UCC § 2-207(1), necessarily fatal to buyer's alleged acceptance, (2) that under UCC § 2-207(2), term "plus or minus 10 percent at buyer's option," although it might have materially altered the contract, did not by itself invalidate the alleged acceptance, (3) that on the other hand, since UCC § 2-207 does require definite expression of acceptance before its provisions can apply, it might be that buyer's responsive telex, taken as a whole, did not represent agreement between the parties on even price and quantity of seller's fertilizer, and (4) that if a contract had been formed, it was enforceable under statute of frauds set forth in UCC § 2-201(1) because document signed by seller as party to be charged was its firm offer in its August 3d telex and buyer's oral acceptance of that written offer was responsive thereto, insofar as satisfying statute of frauds was concerned, and clearly showed that oral evidence offered by buyer rested on a real transaction (applying New York and Pennsylvania UCC; holding, on cross-motions for summary judgment, that validity of buyer's acceptance depended on issues of fact to be resolved at the trial). *Ore & Chem. Corp. v. Howard Butcher Trading Corp.*, 455 F. Supp. 1150 (E.D. Pa. 1978).

In order to give effect to the expectations of the parties, UCC § 2-207 recognizes that a proposed deal, which in commercial understanding has in fact been closed, is to be treated as a contract. Thus, under UCC § 2-207(1), a definite and reasonable expression of acceptance operates as an acceptance, even though it states terms additional to, or different from, those offered or agreed on. If a contract is recognized under UCC § 2-207(1), the additional terms in the acceptance are treated under UCC § 2-207(2) as proposals for additions to the contract and, as between merchants, become part of the contract unless certain specified conditions render the proposals inoperative. UCC § 2-207(1) provides, however, that if an acceptance is expressly conditioned on the offeror's assent to the new terms and no assent is forthcoming, the entire transaction aborts. In other words, the consequence of a clause that conditions accep-

tance on assent to the additional or different terms is that, as of the writings, no contract exists. Nevertheless, under UCC § 2-207(3), if the parties' conduct recognizes the existence of a contract for sale by performance, it is sufficient to establish such a contract. In such case, the terms of the contract are those on which the writings of the parties agree, together with supplemental provisions of the code. *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 380 N.E.2d 571 (1978).

Where paper mill's order acknowledgment forms stated that any acceptance of buyer's order was expressly made conditional on buyer's assent to additional terms contained in acknowledgment form and that acceptance by buyer of delivery would be deemed to constitute such assent, under UCC § 2-207(1), no contract was formed for sale of paper absent buyer's assent to such additional or different terms. *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 429 F. Supp. 1039 (E.D. Mich. 1976).

Letters from steel supplier which purported to accept buyers' purchase orders did not operate as acceptance of shipping schedule contained in purchase orders under UCC § 2-207(1) where letters stated that supplier could not establish firm shipping schedule until firm quantities and required delivery schedule was established. *West Penn Power Co. v. Bethlehem Steel Corp.*, 236 Pa. Super. 413, 348 A.2d 144 (1975).

Seller of fabric was liable to buyer for breach of express warranties of merchantability and fitness for particular purpose, notwithstanding seller's invoice contained statement "No refunds after 5 days. Check goods before cutting," where buyer's purchase order stated that fabric was to be used for swimwear and that all "colors, prints and bonding processes must meet swimwear specifications," where buyer's order was based on sample supplied by seller and, although another fabric was substituted for sample fabric, such modification was initiated by seller, where seller's salesman assured buyer that substituted fabric would meet swimwear specifications and where fabric supplied and subsequently manufactured into

swimsuits was defective and failed to meet minimum performance standards for colorfastness: seller's invoice and shipment of goods did not constitute both acceptance and counteroffer under UCC § 2-207, binding buyer to terms of invoice, since language used did not clearly condition acceptance on additional terms nor were such terms conspicuous as defined by UCC § 1-201(10). *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973).

Where an acceptance was "expressly made conditional on assent to the additional or different terms" contained in an earlier letter, the District Court was justified in permitting the jury to treat that earlier letter as a counter-offer. *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. Ill. 1968), cert. denied, 395 U.S. 921, 89 S. Ct. 1774, 23 L. Ed. 2d 238 (1969).

4. —Acceptance on additional terms distinguished.

Under UCC § 2-207(1), contract between building subcontractor and supplier of ductwork existed where (1) antecedent negotiations of parties and circumstances prior to subcontractor's submission of purchase order showed that subcontractor had clearly intended to limit scope of purchase order in accordance with exclusions contained in supplier's written price quotation, (2) parties had bargained with reference to supplier's second price quotation and had arrived at contract price of \$207,500, which was same price stated in subcontractor's purchase order and supplier's written acknowledgment of such order, and (3) subcontractor's purchase order and supplier's acceptance thereof in no way indicated that subcontractor in purchase order had intended to include items that had been excluded throughout course of parties' negotiations. *U.S. Indus., Inc. v. Semco Mfg., Inc.*, 562 F.2d 1061 (8th Cir. Mo. 1977), cert. denied, 434 U.S. 986, 98 S. Ct. 613, 54 L. Ed. 2d 480 (1977).

Where in telephone conversation on July 31, 1973, seller agreed to sell and buyer agreed to buy 26,000 bushels of wheat, and buyer's written confirmation of contract was received by seller on August 7, 1973; and where seller, on August

21, 1973, repudiated such contract (and also an earlier contract for sale of 40,000 bushels of wheat) because of clause in buyer's confirmation giving buyer option to cancel agreement, (1) buyer's confirmation of contract was received by seller within reasonable time under UCC § 2-201(2); (2) seller's objection to confirmation of contract on August 21, 1973, was not made within ten-day period prescribed by UCC § 2-201(2); (3) provision in buyer's confirmation giving buyer option to cancel was addition of material term to contract; and (4) since buyer's confirmation of contract was not predicated on seller's assent to such additional term, seller's receipt of buyer's confirmation within reasonable time constituted acceptance of contract under UCC § 2-207(1) and such additional term did not void contract, although seller was not bound by additional term. *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. Colo. 1977).

Execution of forward contract by cotton grower was an offer to sell on terms contained therein and the subsequent attachment by buyer of a price schedule, with price related to quality, and a change in the exclusion date (i.e., the date after which buyer had the option to reject the cotton) was an acceptance by buyer of the offer on additional terms; under UCC § 2-207(2), additional terms did not invalidate the contract. *Bradford v. Plains Cotton Coop. Ass'n*, 539 F.2d 1249 (10th Cir. Okla. 1976), cert. denied, 429 U.S. 1042, 97 S. Ct. 743, 50 L. Ed. 2d 754 (1977).

Where seller sent buyer price quotation which contained sufficiently complete and specific terms as to quantity, description and price, and where buyer responded with purchase order containing specifications that were substantially identical with price quotation except for warranty clauses in dispute but also required seller's express consent to buyer's document, under language of UCC 2-207(1) stating "unless acceptance is expressly made conditional on assent to the additional or different terms," buyer's purchase order constituted a counter-offer, seller's signature was a binding acceptance, and contract was totally encompassed within purchase order form. *Falcon Tankers, Inc. v.*

Litton Sys., 355 A.2d 898 (Del. Super. 1976).

Where manufacturer of jail doors submitted written purchase order for gear motors to open and close doors automatically, specifying input speed of approximately 1,590 r.p.m., but where seller returned order acknowledgement referring to accepted prototype by description and number, and prototype had input speed of 3,200 r.p.m., notwithstanding its facial irreconcilability with purchase order, seller's acknowledgement operated as an acceptance resulting in a valid contract under UCC § 2-207(1). *Stewart-Decatur Sec. Sys. v. Von Weise Gear Co.*, 517 F.2d 1136 (8th Cir. Mo. 1975).

Where cotton farmer signed and delivered to his agent one-page purchase-and-sale agreement covering his 1973 cotton crop, which was complete except for name of purchaser, and where buyer responded by sending to agent three-page agreement which contained same terms as one-page agreement, but which also contained additional terms, under UCC § 2-207 delivery of three-page document constituted acceptance of one-page document and was not substantially different counteroffer which constituted automatic rejection of one-page document. *Hohenberg Bros. Co. v. Killebrew*, 505 F.2d 643 (5th Cir. 1974), reh'g denied, 507 F.2d 1280 (1975).

Where plaintiff-seller sent list of furnishings to defendants to be purchased by them at specified prices, calling for payment of \$3,000 upon acceptance and asking that defendants sign letter and return copy, and where defendant sent letter enclosing \$3,000 check and asking that additional piece of furniture be included, stating that contract had been misplaced, defendant's letter constituted definite and reasonable acceptance or written confirmation sent within reasonable time after receipt of plaintiff's offer to sell under UCC § 2-207. *McAfee v. Brewer*, 214 Va. 579, 203 S.E.2d 129 (1974).

5. Additional terms as non-binding proposals.

In action by assignee of account of buyer of carpeting for balance due on such account, where (1) buyer ordered carpeting from seller-assignor on discount terms specified by buyer, (2) invoice mailed after

goods were shipped contained different discount terms, (3) buyer continued to hold goods, although claiming that it had rejected them, and (4) entire shipment of goods was later destroyed by fire at buyer's warehouse, court held (1) that under UCC § 2-206(1)(b), when seller-assignor shipped goods to buyer, it accepted buyer's offer to purchase goods, (2) that even if UCC § 2-207 superficially applied to alter terms of parties' contract, buyer properly objected under UCC § 2-207(2)(c) to different credit terms on seller-assignor's invoice and such terms did not apply, (3) that contract therefore was on buyer's own credit terms, (4) that there was nothing that buyer could reject as nonconforming, since goods were admittedly satisfactory, (5) that contract had not been breached by either party, (6) that since there had been no breach, risk of loss under UCC § 2-509(3) passed to buyer on his receipt of goods, and buyer thus had to bear loss of goods by fire, and (7) that under UCC § 2-210(2), assignment of buyer's account to plaintiff was valid. *Trust Co. Bank v. Barrett Distribs., Inc.*, 459 F. Supp. 959 (S.D. Ind. 1978).

Where (1) seller on August 2nd orally offered to sell buyer 15,000 tons of fertilizer, which offer was valid until 2:00 p.m. on August 3d, (2) on morning of August 3d, as requested by buyer, seller sent buyer same offer by telex, (3) at 10:00 a.m. on August 3d, after seller had sent and relinquished control over its firm offer by telex, buyer allegedly accepted such offer orally, and (4) buyer thereafter sent seller responsive telex while seller's firm offer was still valid and such telex included certain terms, including terms as to payment and loading, that were not in seller's offer, court held (1) that inclusion in buyer's telex of payment and loading provisions not mentioned in seller's offer was not, under UCC § 2-207(1), necessarily fatal to buyer's alleged acceptance, (2) that under UCC § 2-207(2), term "plus or minus 10 percent at buyer's option," although it might have materially altered the contract, did not by itself invalidate the alleged acceptance, (3) that on the other hand, since UCC § 2-207 does require definite expression of acceptance before its provisions can apply, it might be that

buyer's responsive telex, taken as a whole, did not represent agreement between the parties on even price and quantity of seller's fertilizer, and (4) that if a contract had been formed, it was enforceable under statute of frauds set forth in UCC § 2-201(1) because document signed by seller as party to be charged was its firm offer in its August 3d telex and buyer's oral acceptance of that written offer was responsive thereto, insofar as satisfying statute of frauds was concerned, and clearly showed that oral evidence offered by buyer rested on a real transaction (applying New York and Pennsylvania UCC; holding, on cross-motions for summary judgment, that validity of buyer's acceptance depended on issues of fact to be resolved at the trial). *Ore & Chem. Corp. v. Howard Butcher Trading Corp.*, 455 F. Supp. 1150 (E.D. Pa. 1978).

In order to give effect to the expectations of the parties, UCC § 2-207 recognizes that a proposed deal, which in commercial understanding has in fact been closed, is to be treated as a contract. Thus, under UCC § 2-207(1), a definite and seasonable expression of acceptance operates as an acceptance, even though it states terms additional to, or different from, those offered or agreed on. If a contract is recognized under UCC § 2-207(1), the additional terms in the acceptance are treated under UCC § 2-207(2) as proposals for additions to the contract and, as between merchants, become part of the contract unless certain specified conditions render the proposals inoperative. UCC § 2-207(1) provides, however, that if an acceptance is expressly conditioned on the offeror's assent to the new terms and no assent is forthcoming, the entire transaction aborts. In other words, the consequence of a clause that conditions acceptance on assent to the additional or different terms is that, as of the writings, no contract exists. Nevertheless, under UCC § 2-207(3), if the parties' conduct recognizes the existence of a contract for sale by performance, it is sufficient to establish such a contract. In such case, the terms of the contract are those on which the writings of the parties agree, together with supplemental provisions of the code. *Uniroyal, Inc. v. Chambers Gasket & Mfg.*

Co., 177 Ind. App. 508, 380 N.E.2d 571 (1978).

UCC § 2-207(1) was intended to abrogate the harsh “mirror-image” rule of common law under which any deviation in the language of a purported acceptance from the exact terms of the offer transformed the acceptance into counteroffer, so as to preclude contract formation on the basis of those two documents alone. Under UCC § 2-207(1), an acceptance containing additional terms will operate as an acceptance unless it is “expressly made conditional on assent to the additional or different terms.” *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 380 N.E.2d 239 (1978).

In action for buyer’s breach of contract to purchase brick wrap, where provision for one percent per month service charge on overdue accounts appeared only on form sent by seller to acknowledge buyer’s oral and written acceptance of seller’s offer to sell goods, such provision did not become part of contract under UCC § 2-207 and interest on recovery obtained by seller could not be based thereon, but would be allowed under state statute governing interest. *Graham Paper Co. v. Schottco Corp.*, 555 F.2d 193 (8th Cir. Mo. 1977).

Because acceptances were not expressly conditional on the buyer’s assent to the additional terms within UCC § 2-207(1), a contract is recognized, and the additional terms are treated as “proposals” for addition to the contract under UCC § 2-207(2). *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161 (6th Cir. Tenn. 1972).

Where parties orally negotiated the terms for the installation of an air conditioning system, one party reduced the terms to writing and sent two signed copies to the other party for execution, but the other party, in addition to signing, inserted a provision as to the time when the work under the contract was to be completed, after which the first party started performance of the work, it was said, without so deciding, that there may have been, by virtue of the instant section, a completed agreement upon the execution of the first party’s document, with a proposal for additional terms. *Gateway Co. v. Charlotte Theatres, Inc.*, 297 F.2d 483 (1st Cir. Mass. 1961).

6. Additional terms as binding merchants.

The added terms became binding when they did not expressly limit acceptance to the terms of the offer, did not materially alter the original offer, and notification of objection to them was not given within a reasonable time after notice was received. *American Cable Corp. v. Trilogy Communications, Inc.*, 754 So. 2d 545 (Miss. Ct. App. 2000).

Where the original understanding between the parties did not address venue or choice of law, the provision in the invoices submitted by the plaintiff, which stated that the transaction would be governed by Mississippi law and that jurisdiction and venue would be in Mississippi, constituted an additional term which was binding in the absence of objection by the defendant. *American Cable Corp. v. Trilogy Communications, Inc.*, 1999 Miss. App. LEXIS 566 (Miss. Ct. App. Sept. 14, 1999), subst. op., 754 So. 2d 545 (Miss. Ct. App. 2000).

Where buyer’s contract contained certain delivery dates and seller’s order acknowledgment was silent concerning delivery dates but contained provision that seller’s terms would control in case of conflicting provisions or where buyer’s purchase order was silent, delivery terms contained in buyer’s purchase order became part of sales contract because delivery terms were not in conflict with any terms in acknowledgment. *United States ex rel. Control Sys. v. Arundel Corp.*, 814 F.2d 193 (5th Cir. 1987), decision clarified on denial of reh’g, 826 F.2d 298 (5th Cir. 1987).

In order to give effect to the expectations of the parties, UCC § 2-207 recognizes that a proposed deal, which in commercial understanding has in fact been closed, is to be treated as a contract. Thus, under UCC § 2-207(1), a definite and seasonable expression of acceptance operates as an acceptance, even though it states terms additional to, or different from, those offered or agreed on. If a contract is recognized under UCC § 2-207(1), the additional terms in the acceptance are treated under UCC § 2-207(2) as proposals for additions to the contract and, as between merchants, become part of the contract unless certain specified condi-

tions render the proposals inoperative. UCC § 2-207(1) provides, however, that if an acceptance is expressly conditioned on the offeror's assent to the new terms and no assent is forthcoming, the entire transaction aborts. In other words, the consequence of a clause that conditions acceptance on assent to the additional or different terms is that, as of the writings, no contract exists. Nevertheless, under UCC § 2-207(3), if the parties' conduct recognizes the existence of a contract for sale by performance, it is sufficient to establish such a contract. In such case, the terms of the contract are those on which the writings of the parties agree, together with supplemental provisions of the code. *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 380 N.E.2d 571 (1978).

Where a merchant orally placed an order for fabrics with another merchant and then sent the seller a purchase order, which did not provide for arbitration and specified that its terms could not be superseded by an unsigned contract, an arbitration clause in the seller's acknowledgment of the order, which the buyer retained without objection but did not sign, does not bind the buyer. *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 380 N.E.2d 239 (1978).

UCC § 2-207(1) was intended to abrogate the harsh "mirror-image" rule of common law under which any deviation in the language of a purported acceptance from the exact terms of the offer transformed the acceptance into counteroffer, so as to preclude contract formation on the basis of those two documents alone. Under UCC § 2-207(1), an acceptance containing additional terms will operate as an acceptance unless it is "expressly made conditional on assent to the additional or different terms." *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 380 N.E.2d 239 (1978).

7. —Material alteration.

Where (1) seller on August 2nd orally offered to sell buyer 15,000 tons of fertilizer, which offer was valid until 2:00 p.m. on August 3d, (2) on morning of August 3d, as requested by buyer, seller sent buyer same offer by telex, (3) at 10:00 a.m. on August 3d, after seller had sent and relin-

quished control over its firm offer by telex, buyer allegedly accepted such offer orally, and (4) buyer thereafter sent seller responsive telex while seller's firm offer was still valid and such telex included certain terms, including terms as to payment and loading, that were not in seller's offer, court held (1) that inclusion in buyer's telex of payment and loading provisions not mentioned in seller's offer was not, under UCC § 2-207(1), necessarily fatal to buyer's alleged acceptance, (2) that under UCC § 2-207(2), term "plus or minus 10 percent at buyer's option," although it might have materially altered the contract, did not by itself invalidate the alleged acceptance, (3) that on the other hand, since UCC § 2-207 does require definite expression of acceptance before its provisions can apply, it might be that buyer's responsive telex, taken as a whole, did not represent agreement between the parties on even price and quantity of seller's fertilizer, and (4) that if a contract had been formed, it was enforceable under statute of frauds set forth in UCC § 2-201(1) because document signed by seller as party to be charged was its firm offer in its August 3d telex and buyer's oral acceptance of that written offer was responsive thereto, insofar as satisfying statute of frauds was concerned, and clearly showed that oral evidence offered by buyer rested on a real transaction (applying New York and Pennsylvania UCC; holding, on cross-motions for summary judgment, that validity of buyer's acceptance depended on issues of fact to be resolved at the trial). *Ore & Chem. Corp. v. Howard Butcher Trading Corp.*, 455 F. Supp. 1150 (E.D. Pa. 1978).

In action by lessee of crane for defendant-lessor's refusal to sell crane to plaintiff under option in oral lease allegedly granting plaintiff right to purchase crane at "any time," where jury could have found (1) that parties had entered into oral lease during telephone conversation; (2) that such lease had actually given plaintiff option to purchase crane during "first six months of lease"; (3) that although written confirmation of oral lease, which plaintiff drafted and sent to defendant, did provide that plaintiff had option to purchase at "any time," defendant never signed confir-

mation document; and (4) that although defendant's first rental invoice to plaintiff did refer to order number on confirmation document, such reference did not constitute consent by defendant to proposed modification in confirmation document of purchase option in oral lease, plaintiff was not entitled, under UCC § 2-201(2) and Comment 3 thereto, to ruling that defendant was liable as matter of law under provisions of confirmation document, even though defendant did not object to such provisions within ten days, since only effect of defendant's failure to object was to be deprived of defense of statute of frauds, which he had not raised, and plaintiff's burden of proving prior oral lease remained unaffected. Defendant was also not liable as matter of law under UCC § 2-207(2) because of plaintiff's insertion in document confirming oral lease of provision giving plaintiff option to purchase crane at "any time," since jury could have found that such provision constituted material alteration of option-to-purchase provision in oral lease (holding that terms of option were question for jury). *Willamette-Western Corp. v. Lowry*, 279 Or. 525, 568 P.2d 1339 (1977).

In action by seller against buyer for alleged breach of contract for sale of steel products, petition did not show under UCC § 2-207 "definite and seasonable expression of acceptance" by buyer of terms contained in seller's counter proposal, which was "conditional on assent to the additional or different terms" and which materially altered the terms contained in buyer's proposal, and, thus, petition was insufficient to support default judgment or award of attorney's fees where it was not alleged that counter proposal was ever accepted by buyer and face of exhibit contract showed that place for buyer's acceptance was left blank and unexecuted. *Hillson Steel Prods., Inc. v. Wirth Ltd.*, 538 S.W.2d 162 (Tex. Civ. App. 1976).

8. —Material alteration; arbitration clauses.

Rule that addition of arbitration clause constitutes per se material alteration of contract merely applies to arbitration clauses traditional common-law principle that term does not become part of contract unless accepted by both parties; accord-

ingly, rule is not superseded by 9 USCA § 2, which provides for validity and enforceability of written arbitration clause "in any...contract," and which, by its terms, does not apply until arbitration clause in question is determined to be part of contract. *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135 (4th Cir. N.C. 1979).

The inclusion of an arbitration agreement materially alters a contract between merchants for the sale of goods, and thus an arbitration clause will not become a part of such a contract unless both parties explicitly agree to it, pursuant to the second exception listed in subdivision (2) of section 2-207 of the Uniform Commercial Code, which provides that additional terms in an acceptance or a written confirmation are to be considered merely proposals for addition to a contract for a sale, but that, as between merchants, such terms become part of the contract unless the offer expressly limits acceptance to the terms of the offer, or the terms "materially alter" the offer, or notification of objection to them has already been given or is given within a reasonable time after notice of them is received. *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 380 N.E.2d 239 (1978).

Where (1) buyer, after entering into oral contract for sale of fabrics, sent seller purchase order which did not provide for arbitration of contract disputes, (2) seller promptly sent buyer printed acknowledgement of order which contained provision for such arbitration, and (3) buyer, in suit concerning payments owed by it, contended that it had not agreed to arbitration provision, court held (1) that case was governed by UCC § 2-207(2)(b), dealing with additional terms in acceptance or confirmation of a contract, instead of UCC § 2-201(2), since UCC § 2-201(2) deals only with question whether contract exists that is enforceable under statute of frauds and has no application to situation, such as that in instant case, where parties concede that contract does exist and dispute concerns only terms of such contract, and (2) since parties to instant dispute were merchants and arbitration clause was clearly a proposed additional term that materially al-

tered contract within meaning of UCC § 2-207(2)(b), such clause did not become part of contract because of buyer's failure to agree to it expressly. *Marlene Indus. Corp. v. Carnac Textiles, Inc.*, 45 N.Y.2d 327, 380 N.E.2d 239 (1978).

Where oral contract to purchase yarn contained no reference to arbitration of contract disputes, seller's written confirmation of buyer's oral purchase order, which contained an arbitration clause, materially altered contract under UCC § 2-207(2)(b), so as to cause arbitration clause not to become part of contract. *Duplan Corp. v. W.B. Davis Hosiery Mill, Inc.*, 442 F. Supp. 86 (S.D.N.Y. 1977).

While it is generally recognized that commercial arbitration has had its principal use and development as means of resolving disputes in garment and fabric industries, and from this it might be inferred that buyers of fabric should not have been surprised or subjected to unnatural hardship upon finding arbitration clause in contract for purchase of fabric, it could not be said that trial court was clearly erroneous in holding that arbitration provision in seller's acknowledgment form was "material alteration" of buyers' purchase order where arbitration was never mentioned during course of negotiations between buyer and seller, there was no arbitration provision in buyers' purchase order, there was no evidence regarding industry practices or past experience, if any, of buyer with respect to such clauses, and buyer's agent testified that he did not read clause; it was not incumbent upon district court to take judicial notice of industry practice. *N&D Fashions, Inc. v. DHJ Indus., Inc.*, 548 F.2d 722 (8th Cir. Minn. 1976).

Where buyer orally contracted through broker to purchase 15 tons of beef, broker sent written confirmation of contract to both buyer and seller, and seller sent buyer document entitled "contract of sale," setting forth essential terms of broker's confirmation, but also containing arbitration clause, arbitration clause was "material alteration" within meaning of UCC § 2-207(2)(b), and did not become part of contract between parties. *John Thallon & Co. v. M & N Meat Co.*, 396 F. Supp. 1239 (E.D.N.Y. 1975).

Buyer of yarn was not obligated to submit contract dispute to arbitration where oral contract (valid and enforceable under UCC § 2-201(3)(b) because both parties admitted to it) did not provide for arbitration, and written contract later sent to buyer, which did provide for arbitration, constituted material alteration so that, under UCC § 2-207, arbitration provision did not become part of contract even though buyer failed to object. *Frances Hosiery Mills, Inc. v. Burlington Indus., Inc.*, 285 N.C. 344, 204 S.E.2d 834, 72 A.L.R.3d 466 (1974).

In dispute between candy manufacturer and its supplier of gelatin, supplier's "Sales Acknowledgement Agreement" constituted acceptances of plaintiff's purchase orders, but under UCC § 2-207 arbitration clause contained in acknowledgement agreements was additional term which materially altered offer and as such did not become part of contract. *Just Born, Inc. v. Stein, Hall & Co.*, 59 Pa. D. & C.2d 407 (1971).

9. —Material alteration; disclaimers.

In action for breach of express and implied warranties allegedly attaching to sale of electrostatic precipitator, where (1) buyer needed device to control emission of plastisol fumes at buyer's plant, (2) advertising brochures sent by seller to buyer prior to sale clearly stated that primary function of precipitator was to eliminate oil mist in industrial plants, (3) buyer nevertheless sent seller purchase order for precipitator, intending to use it to handle plastisol fumes, (4) seller's acknowledgment of purchase order contained both disclaimer of all express and implied warranties, except one-year warranty concerning repairs and replacement of defective parts, and also limitation-of-liability clause stating that neither party would be liable for incidental or consequential damages, (5) after installation in buyer's plant, precipitator allowed 90 per cent of particulate matter in plastisol fumes to escape into atmosphere, and (6) buyer paid large fine for causing such pollution and was also forced to purchase another device to abate it, effluent, court held (1) that buyer's purchase order constituted the original offer, (2) that such offer was materially altered under UCC

§ 2-207(2)(b) by seller's acknowledgment of order, which included seller's disclaimer of warranties and limitation-of-liability clause, (3) that buyer, by paying for and accepting precipitator without notifying seller of objection to additional terms contained in warranty disclaimer and limitation-of-liability clause, accepted counteroffer thus proposed in seller's acknowledgment and became bound by all terms of such counteroffer, including disclaimer of warranties, (4) that such disclaimer was sufficient under UCC § 2-316(2), and (5) that it effectively excluded all express and implied warranties respecting precipitator, except warranty concerning repairs and replacement of defective parts, which seller did not breach. *Gilbert & Bennett Mfg. Co. v. Westinghouse Elec. Corp.*, 445 F. Supp. 537 (D. Mass. 1977).

Disclaimer for consequential loss contained in seller's "acknowledgment of order" was sufficiently material to require express conversation between parties over its inclusion or exclusion in contract; and absent such conversation, such disclaimer did not become part of contract. *Air Prods. & Chems., Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414, 78 A.L.R.3d 619 (1973).

10. —Objection within a reasonable time.

Addition of arbitration clause constitutes per se material alteration of contract; accordingly, provision in confirmation form requiring that any controversy arising out of contract be submitted to binding arbitration was not enforceable, even though recipient of form did not object to provision. *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135 (4th Cir. N.C. 1979).

In action by assignee of account of buyer of carpeting for balance due on such account, where (1) buyer ordered carpeting from seller-assignor on discount terms specified by buyer, (2) invoice mailed after goods were shipped contained different discount terms, (3) buyer continued to hold goods, although claiming that it had rejected them, and (4) entire shipment of goods was later destroyed by fire at buyer's warehouse, court held (1) that under UCC § 2-206(1)(b), when seller-assignor

shipped goods to buyer, it accepted buyer's offer to purchase goods, (2) that even if UCC § 2-207 superficially applied to alter terms of parties' contract, buyer properly objected under UCC § 2-207(2)(c) to different credit terms on seller-assignor's invoice and such terms did not apply, (3) that contract therefore was on buyer's own credit terms, (4) that there was nothing that buyer could reject as nonconforming, since goods were admittedly satisfactory, (5) that contract had not been breached by either party, (6) that since there had been no breach, risk of loss under UCC § 2-509(3) passed to buyer on his receipt of goods, and buyer thus had to bear loss of goods by fire, and (7) that under UCC § 2-210(2), assignment of buyer's account to plaintiff was valid. *Trust Co. Bank v. Barrett Distribs., Inc.*, 459 F. Supp. 959 (S.D. Ind. 1978).

Where (1) seller of heat-and-chemical-recovery boiler, in response to buyer's request for revised sale proposal, informed buyer by letter on July 27, 1970 of seller's firm price for boiler and stated that such price was "firm for acceptance by August 15, 1970," (2) seller on August 7, 1970 submitted revised sale proposal to buyer which excluded all express and implied warranties, except one-year warranty for repairs and replacement of parts, and also all liability for consequential damages, (3) buyer on August 12, 1970 sent seller letter of intent to purchase which stated boiler's price, terms of payment, shipping schedule, liquidated damages for breach of contract, and authorization to seller to begin work immediately subject only to cancellation charges, and (4) buyer on February 15, 1971 sent seller formal purchase order which contained certain conditions that were never agreed to by seller, court held (1) that under UCC § 2-204(1), contract to purchase boiler was entered into in August, 1970; (2) that such contract consisted of seller's offer-as contained in seller's letters of July 27, 1970 and August 7, 1970, and seller's revised proposal of August 7, 1970-and buyer's acceptance of seller's offer in buyer's letter of intent on August 12, 1970; (3) that such contract also contained seller's proposed commercial terms and conditions of sale, including seller's disclaimer of warranties, limi-

tation of liability to repairs and replacement of defective parts for one year, and exclusion of liability for consequential damages; and (4) such commercial terms of sale were not modified, under UCC § 2-207(2)(c) by buyer's subsequent inclusion of conflicting commercial terms in buyer's confirming purchase order of February 15, 1971, since seller had objected in writing within reasonable time to buyer's proposed changes. *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 445 F. Supp. 507 (D. Me. 1977).

Where merchants in textile business entered into series of contracts with buyer who placed oral order, seller sending order acknowledgment, and buyer sending purchase order, where seller's order acknowledgment made clear reference to terms on reverse side which included arbitration clause and stated that such terms would be binding unless objected to, and where arbitration clauses were commonly used in textile industry, arbitration clause was not material alteration and was binding on buyer when he failed to object to arbitration clause within reasonable time after receipt of order acknowledgment under UCC § 2-207. *Gaynor-Stafford Indus., Inc. v. Mafco Textured Fibers*, 52 A.D.2d 481 (1st Dep't 1976).

In view of common practice in textile industry to include arbitration provisions in written confirmations of all sales between merchants, it was incumbent upon textile buyers who received written confirmation to examine it and to make timely objection to allegedly unauthorized arbitration clause contained therein; thus, upon failure of buyers to make such objection within 10 days and upon receipt of goods in accordance with their instructions they were bound to arbitrate when they attempted to cancel balance of contract. *C.M.I. Clothesmakers, Inc. v. A.S.K. Knits, Inc.*, 85 Misc. 2d 462 (1975).

Experienced farmer, who previously sold soy beans, kept abreast of soy bean market, and sold livestock and other farm products from time to time, was "chargeable with the knowledge or skill of merchants" referred to UCC § 2-104(3) in selling his current crop of soy beans; thus, where he offered to sell 1,500 bushels of soy beans for \$5 per bushel in cash, and

purchaser orally accepted offer and immediately sent him written confirmation, stating terms and standards to be met, and providing that failure to make timely correction was acknowledgement and acceptance of contract as stated, and farmer made no response but sold his soy beans to another, he was liable to purchaser for damages suffered from his breach of the contract. *Ohio Grain Co. v. Swisshelm*, 40 Ohio App. 2d 203, 318 N.E.2d 428 (1973).

With respect to an option to sell some 30,500 shares of then unregistered corporation stock, such option requiring defendant to purchase or find a purchaser for such number of shares whether or not registered at a fixed price or make up the difference if sold to another for less, defendant being required to buy an additional number of shares at the fixed price as might be necessary to total \$800,000, a defect in the notice which could have been readily cured by giving defendant ten additional days to purchase the additional shares necessary to make the required total would not defeat exercise of the option where defendant failed to reject the notice or object to the variance. *Steinthal v. Cohn*, 22 A.D.2d 644 (1st Dep't 1964), aff'd, 16 N.Y.2d 767, 262 N.Y.S.2d 494, 209 N.E.2d 815 (1965), reargument denied, 16 N.Y.2d 883 (1965).

11. Conduct of parties.

In order to give effect to the expectations of the parties, UCC § 2-207 recognizes that a proposed deal, which in commercial understanding has in fact been closed, is to be treated as a contract. Thus, under UCC § 2-207(1), a definite and seasonable expression of acceptance operates as an acceptance, even though it states terms additional to, or different from, those offered or agreed on. If a contract is recognized under UCC § 2-207(1), the additional terms in the acceptance are treated under UCC § 2-207(2) as proposals for additions to the contract and, as between merchants, become part of the contract unless certain specified conditions render the proposals inoperative. UCC § 2-207(1) provides, however, that if an acceptance is expressly conditioned on the offeror's assent to the new terms and no assent is forthcoming, the entire transaction aborts. In other words, the conse-

quence of a clause that conditions acceptance on assent to the additional or different terms is that, as of the writings, no contract exists. Nevertheless, under UCC § 2-207(3), if the parties' conduct recognizes the existence of a contract for sale by performance, it is sufficient to establish such a contract. In such case, the terms of the contract are those on which the writings of the parties agree, together with supplemental provisions of the code. *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 380 N.E.2d 571 (1978).

In action for breach of contract for sale of teletypewriters, where there was evidence from which trial court could have inferred under UCC § 2-207(3) that parties had reached agreement with respect to sale of two lots of teletypewriters, and where there was also evidence that no such agreement had been reached, trial court's finding that no agreement had been reached would be affirmed in absence of error of law by court in making such determination. *Kleinschmidt Div. of SCM Corp. v. Futuronics Corp.*, 41 N.Y.2d 972, 363 N.E.2d 701 (1977).

12. —Conflicting terms.

In suit by gasket manufacturer for damages for defective materials furnished by defendant supplier, where (1) supplier's acceptance of manufacturer's purchase order was expressly conditioned on manufacturer's assent to new terms contained in supplier's acceptance, (2) manufacturer did not assent to such terms, and (3) both parties nevertheless performed what they believed to be their contractual obligations, as evidenced by the shipping and acceptance of the goods, conduct of parties was sufficient under UCC § 2-207(3) to establish a contract, and the terms of such contract were those on which writings of parties agreed, as supplemented by provisions of UCC § 2-314 dealing with implied warranty of merchantability. *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 380 N.E.2d 571 (1978).

Where buyer's written acceptance of offer to sell used steel pipe changed final delivery date from October 15, 1975 to December 15, 1975, but seller's confirmation of buyer's acceptance specified origi-

nal final delivery date of October 15, 1975, such conflicting dates under UCC § 2-207(1) and (2), and Comment 6 thereto, cancelled each other out. In such case, time for final delivery under UCC § 2-309(1) was reasonable time under circumstances of situation. *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 567 P.2d 1246 (1977), appeal dismissed, cert. denied, 434 U.S. 1056, 98 S. Ct. 1225, 55 L. Ed. 2d 757 (1978).

Where seller's acknowledgment form contained statement that seller's acceptance was expressly conditional on buyer's assent to arbitration provision and where buyer never expressly assented to challenged arbitration term, under UCC § 2-207(1), exchange of forms between seller and buyer did not result in formation of contract under UCC § 2-207(1) and seller's form became counteroffer; although there was no contract, both parties proceeded to performance, seller by delivering and buyer by paying for steel coils, which was sufficient under UCC § 2-207(3) to establish contract based on "conduct by both parties which recognizes the existence of a contract;" however, arbitration clause did not become part of contract since, under UCC § 2-207(3), parties did not agree on arbitration and it would not be brought back into contract as "supplementary term" within meaning of UCC § 2-207(3). *C. Itoh & Co. (Am.) v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. Ill. 1977).

Under UCC 2-207, no contract to arbitrate was made where arbitration clauses contained in buyer's order form and seller's confirmation form were in hopeless conflict, one calling for arbitration under law of New York while other called for arbitration under law of Hong Kong. *Lea Tai Textile Co. v. Manning Fabrics, Inc.*, 411 F. Supp. 1404 (S.D.N.Y. 1975).

Failure of plaintiff to object to purchase order for fewer containers than had previously been agreed upon did not limit plaintiff to actual out-of-pocket expenses following defendant's repudiation of contract; and reasonable cash value of lost profits on whole contract was proper measure of damages, where plaintiff was not merchant, but manufacturer and contractor, and there was evidence that defendant did not consider contract to be for

number of containers specified in purchase order which was prepared by defendant's employee after some containers had already been delivered to plaintiff. LTV

Aerospace Corp. v. Bateman, 492 S.W.2d 703 (Tex. Civ. App. 1973), *ref. n.r.e.* (July 11, 1973).

RESEARCH REFERENCES

ALR. What are additional terms materially altering contract within meaning of UCC § 2-207(2)(b). 72 A.L.R.3d 479.

Farmers as "merchants" within provisions of UCC Article 2, dealing with sales. 95 A.L.R.3d 484.

What constitutes acceptance "expressly made conditional" converting it to rejection and counteroffer under UCC § 2-207(1). 22 A.L.R.4th 939.

Am Jur. 67 Am. Jur. 2d, Sales §§ 140, 143 *et seq.*

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:41 *et seq.* (Complaint, petition, or

declaration; against merchant; subsequent revocation of offer).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2-Sales, §§ 253:361 *et seq.* (Additional terms in offer and acceptance).

27 Am. Jur. Proof of Facts 2d 559, Offeree's Acceptance of Contract Offer.

27 Am. Jur. Proof of Facts 2d 605, Acts Constituting Rejection of Contract Offer.

CJS. 77 C.J.S., Sales § 34 *et seq.*

§ 75-2-208. Course of performance or practical construction.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205) [Section 75-1-205].

(3) Subject to the provisions of Section 75-2-209 on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

SOURCES: Codes, 1942, § 41A:2-208; Laws, 1966, ch. 316, § 2-208, *eff* March 31, 1968.

Cross References — General definitions, see § 75-1-201.

Explanation or supplementation of final written expression of agreement, see § 75-2-202.

Modification, rescission, and waiver, see § 75-2-209.

Buyer's rights on improper delivery, see § 75-2-601.

Waiver of right to reject goods by failure to state particular defect, see § 75-2-605.

Effect of acceptance of goods by buyer, see § 75-2-607.

JUDICIAL DECISIONS

1. In general.

Where in 1969 United States, through Bureau of Indian Affairs ("BIA") on behalf of Indian tribe entered into timber sale contract with lumber company and, although contract was to have been fully performed before December 31, 1969, not all timber subject to contract was taken during 1969 and written extension of contract to December 31, 1970, was executed by lumber company and tribe with approval of BIA, where additional one-year extension was requested by lumber company in December, 1970, tribe agreed to extension and signed agreement was forwarded by BIA to lumber company on or about January 28, 1971, although extension was never executed by lumber company's surety, and where in December, 1971, lumber company requested additional extension of contract to December 31, 1972, but where no logging took place under contract after September 15, 1969, evidence showed that tribe intended to grant and BIA to approve second extension agreement and, thus, under UCC §§ 2-208(3) and 2-209(4) such attempted modification of contract operated as waiver of requirement that lumber company fully perform during one-year extension of contract. In re Humboldt Fir, Inc., 426 F. Supp. 292 (N.D. Cal. 1977), aff'd, 625 F.2d 330 (9th Cir. 1980).

Under UCC § 2-208(2), an ambiguous contract can be construed by reference to course of performance, prior course of dealing, and usage of trade (holding that provision to "import, grade, and compact clay fill \$2.75 cu yd." was ambiguous, and that parol evidence was admissible to explain it). *Riemer Bros. v. Marlis Constr. Co.*, 64 Ill. App. 3d 80, 380 N.E.2d 1160 (2d Dist. 1978).

Buyer purchased used truck "as is" and could not raise implied warranty claim against his seller where buyer insisted on closing sale without inspecting truck, although seller repeatedly advised buyer of risk he was taking by purchasing truck without inspection, and where buyer admitted that he purchased truck "as it was"; under UCC § 2-316(3)(c) implied warranty could be excluded or modified by

course of performance and fact that exclusion in present case, raised by parties' course of performance, was oral did not vitiate its utility or relevance; under UCC § 2-202(a) parol evidence was admissible to explain and supplement lease-purchase agreement and to establish oral waiver of implied warranties. *Robinson v. Branch Moving & Storage Co.*, 28 N.C. App. 244, 221 S.E.2d 81 (1976).

In action by buyer against seller arising out of nondelivery of wheat under oral sales contract, original oral contract was not rendered unenforceable by UCC § 2-201 statute of frauds, where seller admitted existence of contract. Nor was oral modification of contract as to delivery date due to unavailability of elevator space rendered unenforceable by statute of frauds requirement under UCC §§ 2-209 and 2-201 where pursuant to UCC §§ 1-103 and 2-209, seller waived statute of frauds defense through his course of performance under UCC §§ 2-208 and 1-205 in delivering 36 truckloads of wheat well after original delivery date without making timely objection. *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 552 P.2d 63 (1976).

Under UCC § 1-208, conditional vendor of automobile was justified in exercising its "insecurity clause" and accelerating payment of balance due under conditional sales contract where conditional purchaser was charged with illegally transporting controlled substances in violation of state law, thereby subjecting vehicle to possible forfeiture proceedings by state and federal governments. *Blaine v. GMAC*, 82 Misc. 2d 653 (1975).

Mere fact that lender accepted late payments from automobile purchaser on five different occasions did not operate as waiver of conditional sales contract provisions relating to timeliness of installment payments, in view of contract language to effect that waiver or indulgence of any default or failure to exercise any right under contract would not be construed as agreement to modify terms of instrument or to operate as waiver of any subsequent default, and particularly in view of fact that on one occasion purchaser obtained

written 90-day extension of due date of note from lender; contract provision in question was not rendered inoperative by UCC § 2-209(2), even though contract provision was not separately set out and separately executed by borrower, since UCC provision applies only to merchants and there was no evidence in record that automobile purchaser was "merchant" as defined in UCC § 2-104(1). *Trust Co. v. Montgomery*, 136 Ga. App. 742, 222 S.E.2d 196 (1975).

Shipping instructions issued by buyer calling for delivery of 10,000 tons of fertilizer during first 25 working days of month, freight prepaid, to places other than buyer's plant, did not constitute anticipatory repudiation of contract under which seller agreed to sell and ship, and buyer agreed to buy and receive at its plant, 10,000 tons of fertilizer within eight-month period of time where (1) quantity requested in shipping instructions did not exceed quantity specified in contract; (2) evidence established that prepayment of freight and shipping to place other than buyer's plant were in accord with course of dealing between parties and, even without course of dealing, there was nothing in language of contract repugnant to place or manner of shipment specified in shipping instructions; (3) seller failed to demonstrate that buyer's demanding entire season's supply in one month was commercially unreasonable and not made in good faith as required by UCC § 2-311(1). *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. Ill. 1974).

Under contract for delivery of peach brandy during 1968 and 1969 seasons, evidence supported finding that parties mutually terminated executory portion of contract for 1969 delivery, where both exchanged modification proposals eliminating this provision, both repeatedly referred to their "termination agreement", and seller neither offered to make nor made any brandy for buyer from 1969 peach crop. *Pirrone v. Monarch Wine Co.*, 497 F.2d 25 (5th Cir. Ga. 1974).

Description of cotton covered by contracts for sale of future cotton crop, i. e., purchase of cotton grown on specified approximate acreage, was not so vague as to

render contracts unenforceable under Code where it appeared, by contracts in question, that each seller intended to sell his entire cotton crop for the year to buyer. *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075 (M.D. Ga. 1973), *aff'd*, 494 F.2d 41 (5th Cir. Ga. 1974).

In action by car dealer against buyer to recover alleged unpaid balance due on sale of car, dealer was not entitled to offer parole testimony under UCC § 2-202(a) that buyer had agreed to deliver insurance check covering wrecked trade-in vehicle as part of consideration where insurance check was not mentioned in contract and contract was, by its own terms, complete and exclusive statement of terms of agreement; nor did evidence disclose course of dealing and usage of trade as defined by UCC § 2-205 or course of performance as defined by UCC § 2-208 which would permit introduction of such evidence. *Noble v. Logan-Dees Chevrolet-Buick, Inc.*, 293 So. 2d 14 (Miss. 1974).

In action by seller of rebuilt automobile parts against purchaser on open and stated account, trial court's refusal to allow purchaser's witness to testify as to seller's "custom and practice" when goods were returned was not reversible error where, *inter alia*, court permitted witness to answer as to what was done when goods were returned and this effectively answered question and complied with requirements of UCC § 2-208(1). *Curry Motor Co. v. Rebuilt Parts Whse., Inc.*, 53 Ala. App. 719, 304 So. 2d 221 (Civ. App. 1974).

Where writings of parties to contract for sale of sand failed to supply any definition of term "truck measure," but buyer accepted and paid for large quantity of sand at price which had been computed in accordance with seller's understanding of disputed phrase, buyer's course of performance could be viewed as complete acquiescence in seller's interpretation of phrase "truck measure." *Blue Rock Indus. v. Raymond Int'l, Inc.*, 325 A.2d 66 (Me. 1974).

Express terms of agreement governed when evidence of course of dealing or performance is offered but is inconsistent with agreement. *Division of Triple T Serv., Inc. v. Mobil Oil Corp.*, 60 Misc. 2d 720 (1969), *aff'd*, 34 A.D.2d 618, 311 N.Y.S.2d

961 (2 Dep't 1970), stay denied, 26 N.Y.2d 1020 (1970), appeal denied, 26 N.Y.2d 614 (1970).

Even in the absence of a written agreement with respect to every term of a contract, great weight attaches to the course of dealing of the parties, and where it appears from the conduct of the parties that their mode of calculating price, although not accepted formally by signature of a written instrument, was adhered to by both parties during an extensive course

of dealing, during which the purchaser received, accepted, and paid for over \$800,000 worth of merchandise, this course of dealing must be held applicable and governing with respect to remaining merchandise which was received, accepted, but not paid for. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 236 F. Supp. 879 (W.D. Pa. 1965), vacated on other grounds, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

RESEARCH REFERENCES

Am Jur. 17 Am. Jur. 2d, Contracts §§ 144 et seq., 357, 358, 363, 364.

38 Am. Jur. 2d, Guaranty § 5.

67 Am. Jur. 2d, Sales §§ 259 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), General Provisions, Form 1:33. (Instruction to jury; "course of dealing" defined; effect on construction of agreement).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:381 et seq. (Course of performance).

26 Am. Jur. Proof of Facts 2d 229, Meaning of Abbreviation, Word, or Phrase According to Usage of Trade.

CJS. 77 C.J.S., Sales §§ 82-85, 87.

§ 75-2-209. Modification, rescission and waiver.

(1) An agreement modifying a contract within this chapter needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this chapter (Section 2-201) [Section 75-2-201] must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

SOURCES: Codes, 1942, § 41A:2-209; Laws, 1966, ch. 316, § 2-209, eff March 31, 1968.

Cross References — Obligation of good faith, see § 75-1-203.

Definitions of "termination" and "cancellation", see § 75-2-106.

Explanation or supplementation of final written expression of agreement, see § 75-2-202.

Course of performance or practical construction, see § 75-2-208.

Excuse for delay in delivery or nondelivery, see §§ 75-2-615, 75-2-616.

Buyer's right to cancel home solicitation sale, limitation on such right, and tender back to buyer on cancellation, see §§ 75-66-1 et seq.

JUDICIAL DECISIONS

1. In general; scope.
2. Purpose.
3. Consideration.
4. Requirements for valid modification.
5. —Good faith.
6. Express agreement to limit modification.
7. Waiver.
8. Particular applications.

1. In general; scope.

Building subcontract for electrical work under which subcontractor had obligation to furnish exterior unit switchgear was not "contract for sale" within meaning of UCC § 2-106(1); thus, UCC § 2-209(1) was inapplicable and alleged modification for which no consideration was given was ineffective. *J & R Elec. Div. of J.O. Mory Stores, Inc. v. Skoog Constr. Co.*, 38 Ill. App. 3d 747, 348 N.E.2d 474 (4th Dist. 1976).

In action by seller against buyer seeking recovery under retail installment sales contract for purchase price of furniture which had been delivered to buyer and destroyed by fire, where contract provided that seller would procure insurance on property but where seller claimed that buyer had orally waived insurance provision, UCC § 2-209(4) relating to oral modification of sales contracts did not apply and contract was governed by Retail Installment Home Solicitation Sales Act. *Cook-Davis Furn. Co. v. Duskin*, 134 Ga. App. 264, 214 S.E.2d 565 (1975).

Where there has been anticipatory breach of prior agreements, UCC § 2-209 is, by its terms, inapplicable, and UCC § 2-610 becomes applicable to show what alternatives are available to the party aggrieved by an anticipatory breach. *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782 (1972).

2. Purpose.

The purpose of UCC § 2-209(2) is to protect against false claims of the oral modification of written contracts and, in effect, permits the parties to make their own statute of frauds with respect to fu-

ture modifications. *Inwood Knitting Mill Co. v. Budge Mfg. Co.*, 29 Pa. D. & C.2d 462 (1962).

3. Consideration.

UCC § 2-209(1) unequivocally declares that consideration is not needed to modify a contract, (applying Georgia UCC; affg in part and revg in part on other grounds *Fratelli Gardino, S.p.A. v. Caribbean Lumber Co.* (1978, SD Ga) 447 F Supp 1337), reh den (CA5 Ga) 590 F.2d 333. *Fratelli Gardino, S.p.A. v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. Ga. 1979), reh'g denied, 590 F.2d 333 (5th Cir. Ga. 1979).

Under UCC § 2-209(1), no consideration was required to support alleged oral waiver or modification of contract to sell cotton that was relied on by seller in buyer's action for damages for cotton that was not delivered under the contract. *Barnwell & Hays, Inc. v. Sloan*, 564 F.2d 254 (8th Cir. Ark. 1977).

Assuming all the furniture and fixtures situated in a liquor store were goods as defined in §§ 2-105(1) and 2-107(2), buyer's defense that there had been an oral modification, without consideration, of the written sales contract sued on would be a valid one under the provisions of subsec (1) of this section; but if on the trial the proof showed that some of the articles sold were not goods as defined in the UCC, subsec (1) would be inapplicable where the agreement sued on was an entire contract. *Lunsford v. Wilson*, 113 Ga. App. 602, 149 S.E.2d 515 (1966).

In view of the provision of subsection (1) of the instant section that an "agreement modifying a contract within this Article needs no consideration to be binding", a contention that an oral modification of a contract of purchase and sale was not supported by consideration cannot prevail. *Skinner v. Tober Foreign Motors, Inc.*, 345 Mass. 429, 187 N.E.2d 669 (1963).

Under clause (1) of this section, if parties consent to a modification of a com-

pleted agreement, no problem as to consideration arises. *Gateway Co. v. Charlotte Theatres, Inc.*, 297 F.2d 483 (1st Cir. Mass. 1961).

4. Requirements for valid modification.

In action for breach of implied warranties of merchantability and fitness for particular purpose of airplane purchased by plaintiff, summary judgment for defendant manufacturer-seller, on ground that defendant's written disclaimer of implied warranties under UCC § 2-316(2) precluded plaintiff's reliance on such warranties, was improperly granted because (1) disclaimer was not shown to have been part of contract of sale when contract was entered into, (2) plaintiff did not sign, as required by UCC § 2-209(1) and (3), any modification agreement accepting a modified warranty scheme, (3) postcard sent by plaintiff to defendant, which did not contain disclaimer or incorporate it by reference and which was also not signed by plaintiff, was ineffective to operate as signed modification of sale contract in accordance with UCC § 2-209(1) and (3), and (4) such postcard also did not operate as waiver by plaintiff of implied warranties sued on. *Van Den Broeke v. Bellanca Aircraft Corp.*, 576 F.2d 582 (5th Cir. 1978).

In replevin action by buyer against seller to obtain possession of Ferrari sports car of limited availability ordered for buyer from another dealer, where order form and bill of sale identified car by name, year of manufacture, model number, and serial number, and stated that car was "used" car and that buyer had made \$15,000 deposit on purchase price of \$17,500; where half of such deposit was paid by buyer's personal check (on which was written name of car, year of manufacture, and serial number) and other half by cashier's check issued by bank making loan to buyer, which check was payable to joint order of both buyer and seller and which contained restrictive indorsement requiring "payee" to record first lien on car in bank's favor; where car, when received by seller from other dealer, proved to be virtually new racing vehicle, not intended for highway use, that seller wished to retain for himself; and where seller in-

formed buyer that he would try to locate another Ferrari for him, sale was governed by UCC Art 2 and buyer was entitled to maintain replevin action, despite seller's contention that since car was "new" it was not what buyer had ordered, since (1) under UCC § 2-209, parties had modified their prior oral agreement concerning sale of "used" car by entering into written agreement, evidenced by purchase order and bill of sale prepared by seller, which identified car sold by make, year of manufacture, model number, and serial number; (2) parties' modification of prior oral agreement also was evidenced by seller's acceptance of buyer's personal check and by negotiation by both seller and buyer of bank cashier's check bearing restrictive indorsement; (3) under UCC § 2-106(2), car delivered to seller conformed to modified contract; (4) buyer had right under UCC § 2-601(b) and § 2-606(1)(a) to accept car that did not conform to purchase order, had delivery been tendered by seller; and (5) since car was identified to contract by purchase order and bill of sale which were in buyer's possession, title to car passed to buyer under UCC § 2-401(3)(a), even though seller retained vehicle. *Tatum v. Richter*, 280 Md. 332, 373 A.2d 923 (1977).

Where buyer and seller entered into oral contract for sale of cattle, without any disclaimer of warranty, prior to delivery, where buyer signed receipt for cattle upon delivery stating that cattle were in good condition and relieving seller of liability for loss due to "health, shipping fever or death of any cattle" which occurred after delivery, and where, when receipt was presented to buyer by seller for his signature, only few seconds elapsed, buyer signed receipt on hood or fender of truck used to haul last load of cattle, buyer did not read disclaimer clause, words were not conspicuous, seller did not read words to buyer, nor did seller tell buyer to read words before he signed receipt, there was no assent by buyer to subsequent modification of contract for sale. *Cambren v. Hubbling*, 307 Minn. 168, 238 N.W.2d 622 (1976).

Under contract for delivery of peach brandy during 1968 and 1969 seasons, evidence supported finding that parties

mutually terminated executory portion of contract for 1969 delivery, where both exchanged modification proposals eliminating this provision, both repeatedly referred to their "termination agreement", and seller neither offered to make nor made any brandy for buyer from 1969 peach corp. *Pirrone v. Monarch Wine Co.*, 497 F.2d 25 (5th Cir. Ga. 1974).

In action to recover for loss of ore shipment due to sinking of barge, original provision of contract by which title was to pass to buyer at port of discharge was effectively modified under UCC § 2-209 to provide that title would pass upon arrival, where letter between parties was clear written evidence of their agreement to modify contract. *U.S. Ore Corp. v. Commercial Transp. Corp.*, 369 F. Supp. 792 (E.D. La. 1974).

Where conduct was unequivocally referable to oral understanding, modification of written contract by performance was effective. *All-Year Golf, Inc. v. Products Investors Corp.*, 34 A.D.2d 246 (4th Dep't 1970), appeal denied, 27 N.Y.2d 485 (1970).

5. —Good faith.

Finding that extension of date for delivery of soybeans by purchaser was not made in good faith, and thus was ineffective under UCC § 2-209, was supported by substantial evidence where price of soybeans throughout period in question was rising, where severe weather conditions made it apparent that purchaser could not expect seller to fulfill contract quantities, and where seller offered to pay damages on original termination date, despite fact that seller delivered some soybeans to purchaser after original termination date and accepted payment at contract price, which was lower than current market price. *Ralston Purina Co. v. McNabb*, 381 F. Supp. 181 (W.D. Tenn. 1974).

In action by seller to recover unpaid balance allegedly due from buyer for purchase of 11 truck loads of lumber, where buyer claimed that some lumber was defective and that in compromise and settlement of disputed claim seller had issued credit to buyer for unpaid balance: under UCC § 2-209 seller's agreement to take less than whole amount of liquidated

claim was enforceable notwithstanding there was no consideration for seller's promise; seller's letter confirming allowance of credit satisfied requirements of statute of frauds; and there was sufficient evidence to support finding that buyer did not act in bad faith with intent to coerce seller, but acted in good faith, and that there was bona fide controversy between parties as result of buyer's contention that 11 shipments included defective lumber. *Ruble Forest Prods., Inc. v. Lancer Mobile Homes of Or., Inc.*, 269 Or. 315, 524 P.2d 1204 (1974).

6. Express agreement to limit modification.

An instalment purchase agreement which expressly provides that no waiver or change in the contract shall bind the holder of the security interest unless made in writing and signed by one of its officers cannot be orally, or otherwise modified or changed. *C.I.T. Corp. v. Jonnet*, 419 Pa. 435, 214 A.2d 620 (1965).

7. Waiver.

A "no-waiver" provision of a gas purchase contract did not preclude the seller from waiving the floor pricing provision of the contract by an oral modification agreement, since the word "waiver" was not used as a term of art which would bring the contract out from the operation of § 75-2-209(4), and thus the court properly concluded that the seller waived enforcement of the floor pricing provision, in view of the parties' oral agreement to modify, coupled with the course of performance wherein the seller accepted payments below the floor provisions for 4 ½ years. *Exxon Corp. v. Crosby-Mississippi Resources, Ltd.*, 40 F.3d 1474 (5th Cir. 1995).

A stamped notation on the backs of checks purporting to reserve the seller's rights (§ 75-1-207), which was done in the ordinary course of business, did not preclude a finding that the seller waived enforcement of the floor pricing provision of the parties' contract. *Exxon Corp. v. Crosby-Mississippi Resources, Ltd.*, 40 F.3d 1474 (5th Cir. 1995).

A party may waive the protection of the Statute of Frauds. *Canizaro v. Mobile Communications Corp. of Am.*, 655 So. 2d 25 (Miss. 1995).

In action for balance due on purchase price of 15 miles of used railroad track, (1) defendant buyer's amendment of its original purchase order, which changed dimensions of materials described in original purchase order, supported conclusion that original purchase order was not intended to be final expression of parties, within meaning of UCC § 2-202, concerning quantities and sizes of materials purchased and thus did not bar admission of parol evidence to establish actual terms of agreement; (2) under UCC § 2-209(4), buyer by orally agreeing to pay for 110-pound materials at contract price waived contract requirement that such materials must be 90-pound materials; and (3) as result of buyer's inspection of purchased materials before delivery, there was under UCC § 2-316(3)(b) no implied warranty with regard to defects in materials that buyer's inspection should have disclosed. *Durbano Metals, Inc. v. A & K R.R. Materials, Inc.*, 574 P.2d 1159 (Utah 1978).

Term "waiver" in UCC § 2-209(4) means intentional relinquishment of known right and may be shown by course of conduct or oral statements (holding that parol evidence was admissible to show waiver by seller under UCC § 2-209(4) of rights under written contract for sale of dry-cleaning machine). *Lease Fin., Inc. v. Burger*, 40 Colo. App. 107, 575 P.2d 857 (1977).

In action arising out of delivery of tile after time specified in contract, buyer waived performance date under UCC § 2-209 and, thus, seller had under UCC § 2-309 reasonable time beyond time specified in contract to perform where buyer acquiesced in repeated delays in performance by seller and elected not to terminate contract for non-performance when delivery was not made by final contract date. *United States ex rel. Shankle-Clairday, Inc. v. Crow*, 414 F. Supp. 160 (M.D. Tenn. 1976).

If UCC applied to licensing of motion picture for distribution, oral agreement to modify written agreement for distribution of movie could constitute under UCC § 2-209 waiver of "no modification unless in writing" and "entire agreement" clauses in written contract. *The Savage Is Loose Co. v. United Artists Theatre Circuit, Inc.*, 413 F. Supp. 555 (S.D.N.Y. 1976).

In action by buyer against seller arising out of nondelivery of wheat under oral sales contract, original oral contract was not rendered unenforceable by UCC § 2-201 statute of frauds, where seller admitted existence of contract. Nor was oral modification of contract as to delivery date due to unavailability of elevator space rendered unenforceable by statute of frauds requirement under UCC §§ 2-209 and 2-201 where pursuant to UCC §§ 1-103 and 2-209, seller waived statute of frauds defense through his course of performance under UCC §§ 2-208 and 1-205 in delivering 36 truckloads of wheat well after original delivery date without making timely objection. *Farmers Elevator Co. v. Anderson*, 170 Mont. 175, 552 P.2d 63 (1976).

Mere fact that lender accepted late payments from automobile purchaser on five different occasions did not operate as waiver of conditional sales contract provisions relating to timeliness of installment payments, in view of contract language to effect that waiver or indulgence of any default or failure to exercise any right under contract would not be construed as agreement to modify terms of instrument or to operate as waiver of any subsequent default, and particularly in view of fact that on one occasion purchaser obtained written 90-day extension of due date of note from lender; contract provision in question was not rendered inoperative by UCC § 2-209(2), even though contract provision was not separately set out and separately executed by borrower, since UCC provision applies only to merchants and there was no evidence in record that automobile purchaser was "merchant" as defined in UCC § 2-104(1). *Trust Co. v. Montgomery*, 136 Ga. App. 742, 222 S.E.2d 196 (1975).

Although UCC § 2-209(3) provides that statute of frauds (UCC § 2-201) must be satisfied if contract as modified is within its provisions, under UCC § 2-209(4) attempted oral modification may operate as waiver of statute of frauds and, once waived, there is no barrier to oral modification of terms of written contract; thus, trial court erred in granting summary judgment for defendant seller on ground that he had effectively terminated written

sales agreement pursuant to cancellation provision where there was attempted oral modification of agreement to eliminate seller's right of cancellation which raised material issues of fact as to (1) whether there was waiver of statute of frauds, (2) whether there was oral modification of agreement removing seller's right of cancellation, and (3) whether seller's purported retraction of waiver pursuant to UCC § 2-209(5) met notice requirements. *Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F.2d 292 (3d Cir. Pa. 1973).

Although attempt at modification does not satisfy statute of frauds, if contract as modified is within its provisions, it can operate as waiver. *Ryder Truck Lines v. Scott*, 129 Ga. App. 871, 201 S.E.2d 672 (1973).

Where in 1969 United States, through Bureau of Indian Affairs ("BIA") on behalf of Indian tribe entered into timber sale contract with lumber company and, although contract was to have been fully performed before December 31, 1969, not all timber subject to contract was taken during 1969 and written extension of contract to December 31, 1970, was executed by lumber company and tribe with approval of BIA, where additional one-year extension was requested by lumber company in December, 1970, tribe agreed to extension and signed agreement was forwarded by BIA to lumber company on or about January 28, 1971, although extension was never executed by lumber company's surety, and where in December, 1971, lumber company requested additional extension of contract to December 31, 1972, but where no logging took place under contract after September 15, 1969: (1) Evidence showed that tribe intended to grant and BIA to approve second extension agreement and, thus, under UCC §§ 2-208(3) and 2-209(4) such attempted modification of contract operated as waiver of requirement that lumber company fully perform during one-year exten-

sion of contract; (2) however, waiver of performance to December 31, 1970, did not operate as waiver of performance for 1971 and, under UCC §§ 2-209(5) and 2-609, letters from BIA to lumber company constituted sufficient notice that strict performance of contract would be required, upon receipt of which, lumber company was obligated to provide adequate assurance of performance. In re *Humboldt Fir, Inc.*, N.D.Cal.1977, 426 F. Supp. 292, affirmed 625 F.2d 330.

Although a modification is not effective because oral, it may nevertheless be effective as a waiver. *Inwood Knitting Mill Co. v. Budge Mfg. Co.*, 29 Pa. D. & C.2d 462 (1962).

In view of the fact that UCC § 2-209(4) has not been judicially construed, judgment will not be entered on demurrer because the case is not clear due to the uncertainty as to the exact meaning of that section. *Inwood Knitting Mill Co. v. Budge Mfg. Co.*, 29 Pa. D. & C.2d 462 (1962).

8. Particular applications.

Under written contract for sale of machinery, executed oral modification evidenced by written memorandum which provided that payments would be changed from specified monthly amount to time-use amount with first payments made on open account, did not constitute novation and was not sufficient to convert seller-buyer relationship to one of lessor-lessee. *Davies Mach. Co. v. Pine Mt. Club, Inc.*, 39 Cal. App. 3d 18 (5th Dist. 1974).

Providing of payment book amounted only to convenience to buyer and was not required under title retention contract in question, and since there was no evidence of excusal of payment, omission of coupons from payment book mailed to buyer at his request after original book was lost would not amount to such excusal and alteration of terms of contract. *Chrysler Credit Corp. v. Tremer*, 48 Ala. App. 675, 267 So. 2d 467 (Civ. App. 1972).

RESEARCH REFERENCES

ALR. Necessity of real-estate purchaser's election between remedy of rescission

and remedy of damages for fraud. 40 A.L.R.4th 627.

Am Jur. 17 Am. Jur. 2d, Contracts §§ 524, 525.

67 Am. Jur. 2d, Sales §§ 113, 348, 355, 356, 360 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:61-2:68. (Modification, rescission, and waiver).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code, Article 2 — Sales, §§ 253:391 et seq. (Modification, rescission, and waiver).

CJS. 77 C.J.S., Sales §§ 109 et seq.

§ 75-2-210. Delegation of performance; assignment of rights.

(1) A party may perform his duty through a delegate unless otherwise agreed or unless the other party has a substantial interest in having his original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach.

(2) Except as otherwise provided in Section 75-9-406, unless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of subsection (2) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

(4) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance.

(5) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract.

(6) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without preju-

dice to his rights against the assignor demand assurances from the assignee (Section 75-2-609).

SOURCES: Codes, 1942, § 41A:2-210; Laws, 1966, ch. 316, § 2-210, eff March 31, 1968; Laws, 2001, ch. 495, § 7, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, in (2), inserted “Except as otherwise provided in Section 75-9-406” at the beginning, and made a punctuation change; inserted (3) and redesignated the remaining subsections accordingly; and substituted “(Section 75-2-609)” for “(Section 2-609)” in (6).

Cross References — Output, requirements, and exclusive dealings, see § 75-2-306. Right to adequate assurance of performance, see § 75-2-609.

Letters of credit, see §§ 75-5-101 et seq.

Secured transactions, see §§ 75-9-101 et seq.

JUDICIAL DECISIONS

1. In general.

In action by assignee of account of buyer of carpeting for balance due on such account, where (1) buyer ordered carpeting from seller-assignor on discount terms specified by buyer, (2) invoice mailed after goods were shipped contained different discount terms, (3) buyer continued to hold goods, although claiming that it had rejected them, and (4) entire shipment of goods was later destroyed by fire at buyer's warehouse, court held (1) that under UCC § 2-206(1)(b), when seller-assignor shipped goods to buyer, it accepted buyer's offer to purchase goods, (2) that even if UCC § 2-207 superficially applied to alter terms of parties' contract, buyer properly objected under UCC § 2-207(2)(c) to different credit terms on seller-assignor's invoice and such terms did not apply, (3) that contract therefore was on buyer's own credit terms, (4) that there was nothing that buyer could reject as nonconforming, since goods were admittedly satisfactory, (5) that contract had not been breached by either party, (6) that since there had been no breach, risk of loss under UCC § 2-509(3) passed to buyer on his receipt of goods, and buyer thus had to bear loss of goods by fire, and (7) that under UCC § 2-210(2), assignment of buyer's account to plaintiff was valid. *Trust Co. Bank v. Barrett Distribs., Inc.*, 459 F. Supp. 959 (S.D. Ind. 1978).

In action for damages for breach of warranty of merchantability of houseboat that defendant boat company contracted to build for plaintiffs, defendant's subse-

quent assignment of contract to another boat company before completing houseboat's construction did not, where defendant failed to establish that novation had taken place among the parties, relieve defendant under UCC § 2-210(1) of its duty to perform contract or its liability for nonperformance. *Tarter v. MonArk Boat Co.*, 430 F. Supp. 1290 (E.D. Mo. 1977), *aff'd*, 574 F.2d 984 (8th Cir. Mo. 1978).

Bank to which seller had assigned installment contract for purchase of used car, and not seller, was real party in interest and proper party to sue for balance owed on car, since (1) UCC § 2-210(2) provides that contract can be assigned by buyer or seller unless otherwise agreed, (2) contract in suit did not prohibit assignment by seller, and (3) assignment was supported by valid consideration. *First Nat'l Bank v. Schrader*, 176 Ind. App. 391, 375 N.E.2d 1124 (1st Dist. 1978).

Provisions found in UCC §§ 2-210(2) and 9-318(4), nullifying effects of anti-assignment provisions, had no application to contract for installation of heating and air conditioning systems in apartment complex which contained clause prohibiting assignment of contract “or any part thereof” without written consent of other party, since contract was not one for sale of goods but was contract for services and labor with incidental furnishing of equipment and materials. *Mingledorff's, Inc. v. Hicks*, 133 Ga. App. 27, 209 S.E.2d 661 (1974).

In an action by a Massachusetts collecting bank against a Puerto Rican firm with

offices in New York, which had bought yarn from an Italian corporation, and its New York guarantor, to recover the amount credited to the depository bank in Italy upon receipt of a check drawn on a Tennessee bank, which check was lost after the collecting bank had taken steps to present the check for payment to the Tennessee bank, it was held that since the Puerto Rican firm because of the non-payment of the check never discharged its obligation under its contract of sale with the Italian firm, the Italian firm had a cause of action against the Puerto Rican firm and its guarantor, which cause of action was assignable to the collecting bank. *National Shawmut Bank v. International Yarn Corp.*, 322 F. Supp. 116 (S.D.N.Y. 1970).

Failure of consideration can be raised as a defense either against the assignee or assignor of a lease or sales contract, in the absence of a specific waiver of such defense on the part of the buyer or lessor.

Noblett v. GECC, 400 F.2d 442 (10th Cir. Okla. 1968), cert. denied, 393 U.S. 935, 89 S. Ct. 295, 21 L. Ed. 2d 271 (1968).

The mere transfer by a buyer of his rights in merchandise purchased under an instalment purchase contract does not under the provisions of subdivision (1) of this section, relieve him of his liability to pay. *C.I.T. Corp. v. Jonnet*, 419 Pa. 435, 214 A.2d 620 (1965).

Subsection (4) of the instant section was referred to as not governing an assignment made before the effective date of the instant section, in a case in which it was held that whether the assignee of a contract undertook to perform the duties of the assignor under the contract depended, in the absence of an express contract provision, upon an interpretation of the entire assignment read in the context of the circumstances. *Chatham Pharmaceuticals, Inc. v. Angier Chem. Co.*, 347 Mass. 208, 196 N.E.2d 852, 141 U.S.P.Q. 145 (1964).

RESEARCH REFERENCES

ALR. Sale, assignment, or transfer of retail instalment contracts. 10 A.L.R.2d 447.

Am Jur. 6 Am. Jur. 2d, Assignments §§ 17 et seq., 21-27, 113-118, 133, 161, 162, 165, 166.

67 Am. Jur. 2d, Sales §§ 375, 377-381.

2 Am. Jur. Pl & Pr Forms (Rev), Assignments, Forms 21 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:81 et seq. (Complaint, petition, or

declaration; damages for sellers breach of contract of sale; by assignee of purchaser; general form).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:823. (Instruction to jury; right to adequate assurance of performance).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:411 et seq. (Assignment of rights; delegation of performance).

CJS. 77 C.J.S., Sales §§ 88, 89.

PART 3.

GENERAL OBLIGATION AND CONSTRUCTION OF CONTRACT.

SEC.

- 75-2-301. General obligations of parties.
- 75-2-302. Unconscionable contract or clause.
- 75-2-303. Allocation or division of risks.
- 75-2-304. Price payable in money, goods, realty, or otherwise.
- 75-2-305. Open price term.
- 75-2-306. Output, requirements and exclusive dealings.
- 75-2-307. Delivery in single lot or several lots.
- 75-2-308. Absence of specified place for delivery.
- 75-2-309. Absence of specific time provisions; notice of termination.
- 75-2-310. Open time for payment or running of credit; authority to ship under reservation.

- 75-2-311. Options and cooperation respecting performance.
- 75-2-312. Warranty of title and against infringement; buyer's obligation against infringement.
- 75-2-313. Express warranties by affirmation, promise, description, sample.
- 75-2-314. Implied warranty; merchantability; usage of trade; sale of specified animals; computer hardware and software.
- 75-2-315. Implied warranty; fitness for particular purpose.
- 75-2-315.1. Limitation of exclusion or modification of warranties to consumers.
- 75-2-317. Cumulation and conflict of warranties express or implied.
- 75-2-318. Third party beneficiaries of warranties express or implied.
- 75-2-319. F.O.B. and F.A.S. terms.
- 75-2-320. C.I.F. and C. & F. terms.
- 75-2-321. C.I.F. or C. & F.: "net landed weights," "payment on arrival," warranty of condition on arrival.
- 75-2-322. Delivery "ex-ship".
- 75-2-323. Form of bill of lading required in overseas shipment; "overseas."
- 75-2-324. "No arrival, no sale" term.
- 75-2-325. "Letter of credit" term; "confirmed credit."
- 75-2-326. Sale on approval and sale or return; consignment sales and rights of creditors.
- 75-2-327. Special incidents of sale on approval and sale or return.
- 75-2-328. Sale by auction.

§ 75-2-301. General obligations of parties.

The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

SOURCES: Codes, 1942, § 41A:2-301; Laws, 1966, ch. 316, § 2-301, eff March 31, 1968.

Cross References — Remedies to be liberally administered, see § 75-1-106.

Course of dealing and usage of trade, see § 75-1-205.

Course of performance or practical construction, see § 75-2-208.

Modification, rescission, and waiver, see § 75-2-209.

Performance generally, see §§ 75-2-501 et seq.

Cure by seller of improper tender or delivery, see § 75-2-508.

Breach, repudiation, and excuse for nonperformance, see §§ 75-2-601 et seq.

Assurance of due performance, see § 75-2-609.

Breach of "installment contracts", see § 75-2-612.

Remedies for breach of obligations of seller or buyer, see §§ 75-2-701 et seq.

JUDICIAL DECISIONS

1. In general.

In seller's action for buyer's breach of contract to buy specified quantity of potatoes suitable for processing into potato chips, in which potatoes were to be delivered to buy "as needed," trial court correctly concluded (1) that contract, pursuant to UCC § 1-102(3), varied normal rules for tender contained in Uniform Commercial Code in that contract required buyer to request delivery of quan-

tity of potatoes, which buyer at no time did, before seller would become obligated to tender delivery, and (2) that as a result, seller's failure to tender delivery of any potatoes at all during entire contract period did not relieve buyer of liability for payment under UCC § 2-301 and § 2-507(1) (also holding that even if potatoes in seller's warehouse were not suitable for buyer's use throughout entire contract period, buyer still breached contract by not

requesting any deliveries at all during such period). *Halverson v. Pet, Inc.*, 261 N.W.2d 887 (N.D. 1978).

Seller neither tendered delivery nor delivered concrete forms to buyer pursuant to UCC §§ 1-201(14), 2-301 and 2-503(1), and seller breached express warranties under UCC § 2-313 that forms were free from encumbrance and that seller would warrant and defend against demands of all other persons, where third party claimed storage lien on forms, refused to allow buyer to take possession, and seller was unsuccessful in securing release from third party of his claimed lien. *Goosic Constr. Co. v. City Nat'l Bank*, 196 Neb. 86, 241 N.W.2d 521 (1976).

In an auction sale, particularly of farm crops, a tender of the goods is not a condition precedent to the obligation to pay. *Diefenbach v. Gorney*, 93 Ill. App. 2d 51, 234 N.E.2d 813 (3d Dist. 1968).

Where supplier in New York proved it shipped goods to a manufacturer in Louisville, and manufacturer did not affirmatively plead that the goods were not received, supplier had fulfilled its duty and established a prima facie case of debt. *Permalum Window & Awning Mfg. Co. v. Permalum Window Mfg. Corp.*, 412 S.W.2d 863 (Ky. 1967).

The cost of meals which an airline furnishes its passengers during flight being included in the cost of the ticket, a sale of the meals occurs when and where the

ticket is purchased, and when the ticket is purchased in Georgia a sale occurs in that state, regardless of where the aircraft is when the meal is served. *Undercofler v. Eastern Air Lines*, 221 Ga. 824, 147 S.E.2d 436 (1966).

The fact that the actual delivery of meals furnished by an airline to its in-flight passengers does not occur until later does not prevent perfection of its sale of the meals at the time of the purchase of the passenger ticket, for the passenger at the time the ticket is purchased impliedly consents for delivery of the meal to be made during the flight. *Undercofler v. Eastern Air Lines*, 221 Ga. 824, 147 S.E.2d 436 (1966).

Where a seller had agreed for a certain price to sell, deliver, and install a machine, and to provide an instructor to show the purchaser the way to operate the machine, the seller was not entitled to recover the balance of the purchase price of the machine before its delivery and installation, and the supplying of the instructor. *Boehnke v. C.H. Babb Co.*, 38 Mass. App. Dec. 33 (1967).

Where a seller failed to perform his contract of sale at the time specified in the agreement of sale, the buyer became entitled to a return of the deposit given at the time the contract was made. *Boehnke v. C.H. Babb Co.*, 38 Mass. App. Dec. 33 (1967).

RESEARCH REFERENCES

ALR. Seller's right to retain down payment on buyer's unjustified refusal to accept goods. 11 A.L.R.2d 701.

Place, in absence of written provision in sales contract, where cash consideration for goods purchased is payable. 49 A.L.R.2d 1350.

Reasonableness or personal judgment of buyer as test where goods are sold subject to being satisfactory to the buyer. 86 A.L.R.2d 200.

Nature, construction, and effect of "Lay Away" or "Will Call" plan or system. 10 A.L.R.3d 456.

Am Jur. 11 Am. Jur. 2d, Bills and Notes § 116.

17 Am. Jur. 2d, Contracts § 494.

67 Am. Jur. 2d, Sales §§ 520 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:101. (Complaint, petition, or declaration; failure of seller to deliver goods).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:102. (Complaint in federal court; diversity of citizenship; refusal of buyer to accept and pay for goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:471 et seq. (General obligations of parties).

3 Am. Jur. Proof of Facts, Credit, Proof No. 1 (proof of extension of credit).

9 Am. Jur. Proof of Facts 2d, Commercial defamation caused by erroneous credit report issued by credit reporting

agency, §§ 11 et seq. (Proof of commercial report issued by credit reporting agency).
 defamation caused by erroneous credit CJS. 77 C.J.S., Sales §§ 152 et seq.

§ 75-2-302. Unconscionable contract or clause.

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

SOURCES: Codes, 1942, § 41A:2-302; Laws, 1966, ch. 316, § 2-302, eff March 31, 1968.

JUDICIAL DECISIONS

A. In general.

1. Generally.
2. Scope.
3. —Bills and notes.
4. —Damages.

B. Procedure.

5. In general; question of law or fact.
6. [Reserved for future use].
7. Reasonable opportunity to present evidence.
8. —Summary judgment precluded.
9. —Summary judgment not precluded.
10. Appellate review.

C. Unconscionability of Particular Matters.

11. In general.
12. Bargaining position.
13. —Adhesion contracts.
14. Consent provisions.
15. Disclaimer of warranties; unconscionable.
16. —Enforceable.
17. Exculpatory clauses; unconscionable.
18. —Enforceable.
19. Finance charges.
20. Price; unconscionable.
21. —Enforceable.
22. Procedural limitations.
23. —Form of action; election of remedies.

24. —Forum selection.

25. —Waiver of defenses.

26. Repossession.

27. Termination or cancellation; unconscionable.

28. —Enforceable.

29. Other matters as unconscionable.

A. In general.

1. Generally.

The Uniform Commercial Code merely codified, in UCC § 2-302(1), the doctrine of unconscionability which was used by the common-law courts to invalidate contracts under certain circumstances. At common law, an unconscionable contract was one that "no man in his senses and not under delusion would make on the one hand," and one that "no honest and fair man would accept on the other." In re Estate of Friedman, 64 A.D.2d 70 (2d Dep't 1978).

A reading of the Uniform Commercial Code and many cases discussing unconscionability indicates that there never was an intent on the part of the legislature to give a definition of the term unconscionable, since to do so would limit its application. *Nu Dimensions Figure Salons v. Becerra*, 73 Misc. 2d 140 (1973).

The purpose of UCC Sec 2-302 is to extend equity practice to the field of the

law merchant. *Fairfield Lease Corp. v. Colonial Aluminum Sales, Inc.*, 3 U.C.C. Rep. Serv. 858 (1966, NY Sup).

2. Scope.

UCC § 2-302, which deals with unconscionable contracts or clauses therein, is part of the Uniform Commercial Code and has no relevancy to proceedings for dissolution of a marriage. *Wilkerson v. Wilkerson*, 555 S.W.2d 689 (Mo. Ct. App. 1977).

Statutory standards to avoid unconscionability in the law of contracts is set forth in article 2 of the Uniform Commercial Code and is restricted to sales contracts. *Wasserbauer v. Marine Midland Bank*, 92 Misc. 2d 388 (1977).

UCC § 2-302 did not apply to provision in commodities signature card permitting liquidation of customer's account without demand or notice since commodities signature card standing alone was not contract for sale of "goods" within meaning of UCC §§ 2-102 and 2-105(1). *Geldermann & Co. v. Lane Processing, Inc.*, 527 F.2d 571 (8th Cir. Ark. 1975).

"Exclusive right to sell" contract giving realtor exclusive right to sell property for 30 days from date of contract and commission on sale of property by vendor for 90 days thereafter, if buyer's attention had been called to property during 30-day period, was not unconscionable. *Kaye v. Coughlin*, 443 S.W.2d 612 (Civ. App. 1969).

The statute is intended to encompass the price term of an agreement. *Jones v. Star Credit Corp.*, 59 Misc. 2d 189 (1969).

In view of the expressed exclusion of security transaction made by § 2-201, the unconscionability provision of Article 2 does not apply to a secured transaction. In *re Advance Printing & Litho Co.*, 277 F. Supp. 101 (W.D. Pa. 1967), *aff'd*, 387 F.2d 952 (3d Cir. Pa. 1967).

Contract executed prior to enactment of U.C.C.—That this section was enacted subsequent to the execution of a contract which the court feels may be unconscionable does not mean that the common law of the jurisdiction was otherwise prior to the time of its enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law. *Williams v.*

Walker-Thomas Furn. Co., 350 F.2d 445, 18 A.L.R.3d 1297, 121 U.S. App. D.C. 315 (1965).

3. —Bills and notes.

Prohibition of unconscionability in § 75-2-302 literally applies only to transactions in goods, not to secured transactions. *OMP v. Security Pac. Bus. Fin., Inc.*, 716 F. Supp. 239 (N.D. Miss. 1988).

Statutory standards to avoid unconscionability in the law of contracts are set forth in UCC Art 2 and are restricted to sales contracts (action attacking formula used by banks to recover attorneys' fees in cases involving default judgment obtained on promissory note or other instrument evidencing individual loan). *Wasserbauer v. Marine Midland Bank*, 92 Misc. 2d 388 (1977).

In addition to fact that execution of promissory note is not covered by Article 2 of UCC, creditor's conduct in attempting to collect 4-year-old debt represented by note was not unreasonable or unconscionable under UCC § 2-302. *American Express Co. v. Brown*, 392 F. Supp. 235 (S.D.N.Y. 1975).

Unconscionability clause of UCC § 2-302 applies to transactions in goods, and was therefore inapplicable to agreement guaranteeing payment on promissory note. *Bankers Trust Co. v. Walker*, 49 A.D.2d 670 (4th Dep't 1975).

Contractual term asking guaranty of faithful performance of undertakings of principal obligor before promissory notes would be taken, held not unconscionable. *Blount v. Westinghouse Credit Corp.*, 432 S.W.2d 549 (Tex. Civ. App. 1968).

4. —Damages.

UCC § 2-302 merely gives court right of refusal to enforce unconscionable contract; it makes no provision for damages and none may be recovered thereunder. Thus, although it was unconscionable for seller of jade carvings to charge buyers \$67,000 for carvings worth only \$14,750, buyers could not assert cause of action for damages against seller. However, seller's counterclaim for \$18,000, unpaid balance of purchase price represented by two post-dated checks, would be dismissed since court would not enforce contract by requiring buyers to pay balance of purchase

price which was unconscionable. *Vom Lehn v. Astor Art Galleries, Ltd.*, 86 Misc.2d 1 (1976).

This section does not provide any damages to a party who enters into an unconscionable contract. This section gives the court the power to refuse to enforce such an unconscionable contract or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. *Pearson v. National Budgeting Sys.*, 31 A.D.2d 792 (1st Dep't 1969).

B. Procedure.

5. In general; question of law or fact.

Issue of unconscionability presented question of law for court, not question of fact for jury. *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 544 P.2d 20 (1975).

UCC § 2-719(3), by its use of work "unconscionable," incorporates standards set forth in UCC § 2-302(1) and (2), and finding of unconscionability was matter of law to be determined by court, without jury, although there might be taking of evidence under UCC § 2-302(2) as to contract's commercial setting, purpose, and effect. *Monsanto Co. v. Alden Leeds, Inc.*, 130 N.J. Super. 245, 326 A.2d 90 (1974).

Unconscionability is question of law for court to decide in light of background and commercial setting of contractual provision being considered. *R.C. Craig, Ltd. v. Ships of the Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972).

6. [Reserved for future use].

7. Reasonable opportunity to present evidence.

In every trial when unconscionability of contractual provision is viable issue, either party should be permitted right granted by UCC § 2-302(2), reasonable opportunity to present evidence as to commercial setting, purpose and effect of contract or any clause thereof to aid court in making determination as to unconscionability. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 86 A.L.R.3d 839 (Iowa 1975).

Trial court erred in declaring output-requirements contract between tenant of farmland and buyer of cotton unconscio-

nable, and therefore void as against one-fourth interest in cotton which landlord held as rent, since UCC § 2-306(1) expressly authorized such contracts; moreover, § 2-302 required trial court to provide parties opportunity to present evidence on issue of unconscionability prior to declaring clause unconscionable. *Darden v. Ogle*, 293 Ala. 699, 310 So. 2d 182 (1975).

In action to enforce contracts for advance sale of cotton fiber, motion to dismiss on ground that contracts were unconscionable on their faces was dismissed where statute expressly provided for evidentiary hearing before contract, or some clause thereof, could be found unconscionable under UCC § 2-302. *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426 (N.D. Miss. 1974).

UCC § 2-719(3), by its use of word "unconscionable," incorporates standards set forth in UCC § 2-302(1) and (2), and finding of unconscionability was matter of law to be determined by court, without jury, although there might be taking of evidence under UCC § 2-302(2) as to contract's commercial setting, purpose, and effect. *Monsanto Co. v. Alden Leeds, Inc.*, 130 N.J. Super. 245, 326 A.2d 90 (1974).

A contract not unconscionable on its face may in fact be unconscionable in light of its commercial setting, purpose and effect; a hearing must be held, in this case, to make this fact determination. *Central Ohio Co-op. Milk Producers v. Rowland*, 29 Ohio App. 2d 236, 281 N.E.2d 42 (1972).

Court's determination of issue of unconscionability of limiting recovery to purchase price of seeds could not be made without hearing. *Zicari v. Joseph Harris Co.*, 33 A.D.2d 17 (4th Dep't 1969), appeal denied, 26 N.Y.2d 610 (1970).

Courts have the power to determine the issue of unconscionability and may limit the application of a clause found to be so in order to avoid an unconscionable result, and such a hearing is mandatory rather than discretionary once the court has initially accepted a possibility of unconscionability. *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc. 2d 446 (1966).

Where at the trial the parties were not afforded an opportunity to present evi-

dence as required by paragraph (2) of this section, the judgment of the trial court for the defendant, on the ground that the provision of a truck rental agreement which made the lessee absolutely liable for all loss regardless of fault, was unconscionable, must be vacated and a new trial ordered. *E.F. Lynch, Inc. v. Piccirilli*, 28 Mass. App. Dec. 49, 5 U.C.C. Rep. Serv. 830 (1964).

8. —Summary judgment precluded.

In light of UCC § 2-302(2), providing that parties shall be given an opportunity to present evidence as to whether a contract is unconscionable, a court is not authorized to dispose of an issue concerning the alleged unconscionability of a contract under the rules governing summary judgments (stating that since disclaimer clauses in purely commercial transactions are prima facie conscionable, burden of establishing that such a clause is unconscionable lies on party attacking it). *Butcher v. Garrett-Enumclaw Co.*, 20 Wash. App. 361, 581 P.2d 1352 (1978), review denied, 91 Wash. 2d 1004 (1978).

In action brought by buyer of automobile against manufacturer for loss of automobile by fire allegedly caused by defective fuel line, summary judgment determination that disclaimer clause in Basic Warranty excluding liability for loss by fire was not unconscionable was improper; finding as to unconscionability under UCC § 2-302 must be by hearing affording parties reasonable opportunity to present evidence as to commercial setting, purpose, and effect of contract or clause thereof to aid court in making determination. *Haugen v. Ford Motor Co.*, 219 N.W.2d 462 (N.D. 1974).

Buyer who paid \$939.75 plus a credit service charge of \$242.47 for a 1959 Buick and expended \$570 repairing defects existing at the time of purchase, and who contended as a defense to an action on the sales contract that the price was unconscionable, was entitled to a reasonable opportunity, as provided by subsec (2), to present evidence to aid the court in determining the issue of unconscionability, and plaintiff's motion for summary judgment was accordingly denied. *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620 (1967).

9. —Summary judgment not precluded.

UCC § 2-302(2) relating to unconscionability does not preclude granting of summary judgment. *Block v. Ford Motor Credit Co.*, 286 A.2d 228, 63 A.L.R.3d 1 (D.C. 1972).

10. Appellate review.

Where trial court's findings of fact, conclusions of law, and memorandum did not find that contract for sale of potatoes was oppressive and unconscionable, appellate court would not conclude from mere comment made by trial court at time of hearing that such contract was unconscionable. *Halverson v. Pet, Inc.*, 261 N.W.2d 887 (N.D. 1978).

Where contract for sale of popcorn provided that buyer was to pay for shipments of popcorn when delivered and seller repudiated contract after delivering two shipments to buyer's processing plant (for which shipments seller did not demand on-the-spot payment and buyer did not offer to pay at such place, since it customarily paid its obligations from its business office in another city), seller breached his obligation of good faith under UCC § 1-203 in performance of contract, as "good faith" is defined by UCC § 1-201(19), by failing to demand payment after delivery of each shipment and by hastily reselling undelivered part of popcorn crop to another buyer at nearly twice the contract price; trial court, in finding absence of good faith by seller, did not err in employing unconscionability concept of UCC § 2-302 in interpreting contract, since court's statement as to unconscionability was only dictum. *Baker v. Ratzlaff*, 1 Kan. App. 2d 285, 564 P.2d 153 (1977).

C. Unconscionability of Particular Matters.

11. In general.

Provisions of contract for sale of certain machinery were not unconscionable, since they were provisions which Code itself specifically permitted. *Avery v. Aladdin Prods. Div., Nat'l Serv. Indus., Inc.*, 128 Ga. App. 266, 196 S.E.2d 357 (1973).

12. Bargaining position.

Viewed as a contract of sale rather than a consignment, a contract between the

widow of an artist and an art dealer is unconscionable on its face, where, by its terms, she made an absolute conveyance to him of title to more than 300 works of the artist, in return for which she received neither the payment of a purchase price at the time of the contract nor the right to receive a fixed price within a definite time in the future, but only a promise by him to use his best efforts to sell the art works and to give her 50% of the proceeds if and when sales were effected, with complete control over the timing of any future sales being placed in his hands; in addition to the substantive unconscionability of this contract when viewed as a contract of sale, there are elements of procedural unconscionability attendant upon its execution, including the age of the artist's widow at the time, her limited formal education, her lack of business experience, the fact that she was not represented by counsel and, in contrast, the art dealer's experience and the fact that he was represented by his own attorney, who drafted the agreement and explained it to the widow. *Matter of Friedman* (2 Dept. 1978) 64 A.D.2d 70, 407 N.Y.S.2d 999 *In re Estate of Friedman*, 64 A.D.2d 70 (2d Dep't 1978).

In action arising out of grain contract, clause which permitted buyer to extend time of shipment if shipments were not made as otherwise specified in contract was not unconscionable under UCC § 2-302, where seller and buyer were both merchants, oppressive tactics were not shown, it was not shown that inequality of bargaining positions resulted in seller being compelled to accept extension clause, seller was familiar with such clauses which were normally employed in the grain business, and clause was not extreme under mores and business practices considered in light of needs of grain business. *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 413 F. Supp. 764 (D.N.D. 1976), *rev'd on other grounds*, 552 F.2d 1285 (8th Cir. N.D. 1977).

In action by assignee of computer-equipment lease for rent due under lease, (1) although applicable provisions of UCC Article 2 should be applied to equipment leases, entire article would not be applied on theory that equipment lease is transaction in goods under UCC § 2-102; (2)

lease in issue was not unconscionable under UCC § 2-302, since it conferred rights and imposed duties on both lessor and lessee, and parties to lease had virtually equal bargaining power; (3) language in lease disclaiming implied warranties of merchantability and fitness were sufficiently conspicuous under UCC § 2-316(2); and (4) since defense that plaintiff was not assignee in good faith within meaning of UCC § 9-206(1) presented fact issue that could not be resolved solely as issue of law, trial court erred in dismissing defendant's amended answer on ground that it raised insufficient defense as matter of law. *Walter E. Heller & Co. v. Convalescent Home of First Church of Deliverance*, 49 Ill. App. 3d 213, 365 N.E.2d 1285 (1st Dist. 1977).

Where railroad car went off end of siding track and damaged storage bins that grain company maintained on land leased from railroad, indemnity clause in lease agreement saving railroad harmless from liability for damage to grain company was not unconscionable under UCC § 2-302 given business experience of grain company and comparative simplicity of contract terms, even though railroad possessed superior bargaining power. *Lamoille Grain Co. v. St. Johnsbury & L.C.R.R.*, 135 Vt. 5, 369 A.2d 1389 (1976).

Provision in contract for sale of building supplies requiring payment of attorney's fees liquidated in amount of 30 per cent of amount recovered on breach was not unconscionable under UCC § 2-302 where parties were commercial entities dealing at arm's length with relative equality of bargaining power, where buyer did not show that contract terms were unfair or nonnegotiable or that it would have been unable to obtain building supplies from another seller without being subject to provision for attorney's fees, and where buyer knew of attorney's fees provision. *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 344 N.E.2d 391, 98 A.L.R.3d 577 (1976).

The fact that one party makes a large profit and that the other runs risks does not make the contract unconscionable where the contract was freely entered into, after much negotiation, and the parties had equal bargaining power, and the

contract was not a contract of adhesion. *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. V.I. 1967).

13. —Adhesion contracts.

Contract for sale of gas burner and related equipment was unconscionable and unenforceable under UCC § 2-302 where seller induced buyer to enter agreement through use of high-pressure sale tactics, and where seller did not provide Spanish-speaking interpreter to explain matters to buyers, who spoke and wrote only Spanish. *Brooklyn Union Gas Co. v. Jimenez*, 82 Misc. 2d 948 (1975).

Where sellers entered into three grain contracts calling for delivery of wheat and durum to elevator company on or before April 30 and May 15, 1973, where each contract provided in part that in case of default in delivery of grain, sellers agreed to pay elevator company "as liquidated damages" difference between contract price and market price on specified date (i.e., April 30, May 15, and May 30, respectively), where, pursuant to contract, deliveries of part of grain called for were made and accepted periodically from January through July 11, 1973, but where on July 12 sellers notified elevator company they would make no further deliveries pursuant to contracts, elevator company was bound by liquidated damages clause in contract: (1) liquidated damage clause, without evidence to contrary, was so inconsistent with any other damage remedy as to require conclusion that it contemplated exclusiveness within meaning of UCC § 2-719(1)(b); (2) furthermore, clause would not be held unconscionable particularly where contract was one of "adhesion" and challenger was drafter of contract. *Ray Farmers Union Elevator Co. v. Weyrauch*, 238 N.W.2d 47 (N.D. 1975).

Contract for tuition and fees for a "data processing technician course" was unconscionable, where defendant enrollee had an inferior education and limited comprehension of the English language, and where plaintiff school engaged in deceptive practices, including an unproven "aptitude" test to determine eligibility, giving passing grades to virtually all applicants, and encouraging defendant to continue the course despite failing grades. *Albert*

Merrill Sch. v. Godoy, 78 Misc. 2d 647 (1974).

Lack of equality between bargaining parties (car buyer had limited command of English language), contract clauses under which buyer unwittingly and unknowingly waived both warranty of merchantability and warranty of fitness for purpose, and defective condition of auto, are sufficient to render contract unconscionable and unenforceable as between buyer and seller. *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138 (1969).

14. Consent provisions.

Provision in loan agreement providing that borrower would not incur other indebtedness for borrowed money without consent of lender was not unconscionable under UCC § 2-302, since this § 2-302 is applicable only to sales transactions. Nor was clause a breach of obligation of good faith imposed by UCC § 1-203 where loan agreement was negotiated at arm's length between sophisticated commercial parties. *Interstate Sec. Police, Inc. v. Citizens & S. Emory Bank*, 237 Ga. 37, 226 S.E.2d 583 (1976).

Provision of security agreement requiring that debtor would not sell collateral without prior written consent of secured party was not unconscionable under UCC § 2-302 where debtor was required to make \$10,000 cash payment on outstanding principal from original sale as condition of consent to resale. *O'Brien v. Larson*, 11 Wash. App. 52, 521 P.2d 228 (1974).

15. Disclaimer of warranties; unconscionable.

Where operator of picnic grounds leased two incinerators from manufacturer under lease providing for 60 monthly rental payments and option to lessee to purchase units at end of lease by payment of additional sum; where original lease was hastily replaced by second lease signed by lessee at lessor's insistence because original lease was "no good"; and where second lease contained unqualified disclaimer in bold print of all express and implied warranties concerning such equipment, (1) transaction, although made in form of lease, was actually sale that caused rights of parties to be governed by UCC Art 2;

and (2) in view of circumstances under which second lease was entered into and total failure of both units to function from time they were installed on lessee's premises, disclaimer provision in second lease was unconscionable under UCC § 2-302 and could not be enforced by lessor. *Industrialease Automated & Scientific Equip. Corp. v. R.M.E. Enters., Inc.*, 58 A.D.2d 482 (2d Dep't 1977).

In action by purchaser of truck against seller for damages resulting from seller's failure to properly effectuate repairs in accordance with its warranty, where there was exclusionary clause contained in warranty, which stated in normal size print that seller was not liable for special or consequential damages, but where there were no discussions nor explicit negotiations between seller and buyer regarding limitations or disclaimers of liability and where clause was not conspicuous: (1) by its use of word "unconscionable," UCC § 2-719(3) conditions validity of exclusionary clause on one factor, the standards set forth in UCC § 2-302, and clause would be conscionable, in spite of lack of "negotiations" or its "inconspicuousness," if buyer and seller, through prior contracts had established consistently adhered to policy of excluding consequential damages, or if it was recognized practice within trade to exclude consequential damages; (2) issue of unconscionability presented question of law for court, not issue of fact for jury, and since exclusionary clauses in clearly commercial transactions were prima facie conscionable, burden of establishing that clause was unconscionable was upon seller. *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 544 P.2d 20 (1975).

Where strict language of express warranty and disclaimer placed purchaser of automobile in position such that his defective vehicle was incapable of repair pursuant to such express warranty and disclaimer because he could not identify any part, replacement of which would remedy defect, such result made disclaimer unconscionable and void within meaning of UCC 2-302. Furthermore, where seller was unable to cure defect in purchaser's automobile, express warranty and its disclaimer which provided for contractual

modification and limitation of rights and remedies of purchaser, failed of its essential purpose and, thus, "circumstances caused an exclusive or limited remedy to fail of its essential purpose" within meaning of UCC § 2-719(2), and could not be deemed exclusive remedy. *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

The court assumed without question that a waiver of warranties contained in an equipment lease was subject to the limitation of the prohibition against unconscionability. *Electronics Corp. of Am. v. Lear Jet Corp.*, 55 Misc. 2d 1066 (1967).

16. —Enforceable.

In action against manufacturer for damages for breakdown and failure of two air-conditioning units to function properly, plaintiff's claim of breach of warranty could not be sustained where (1) manufacturer's express warranty covered such equipment for 12 months after "start-up" or 18 months after shipment, whichever came first, and such warranty period had expired with respect to both units; (2) express warranty also contained effective disclaimer under UCC § 2-316(2) of any implied warranties of merchantability and fitness for particular purpose; and (3) plaintiff did not contend that such disclaimer was unconscionable under UCC § 2-302. *Alfred N. Koplin & Co. v. Chrysler Corp.*, 49 Ill. App. 3d 194, 364 N.E.2d 100 (2d Dist. 1977).

Provision on face of one page contract for sale of cabbage seed disclaiming warranties, express or implied, of merchantability and fitness for purpose and limiting seller's liability for breach of warranty or contract to purchase price of seeds, which was set off from other provisions on form and appeared in boldface print, was conspicuous within meaning of UCC § 1-201(10) and was effective to disclaim implied warranty of merchantability under UCC § 2-316(2); given inherent element of risk present in all agricultural enterprises, clause limiting liability to purchase price of seeds was valid under UCC § 2-719 and was not unconscionable under UCC # 2-302; inasmuch as buyer was commercial farmer, he was subject to standards of marketplace wherein he sought to operate and would be bound by

order form which he signed notwithstanding claim that he was illiterate. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), review allowed, 289 N.C. 296, 222 S.E.2d 695 (1976), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976).

Even though seller effectively disclaimed implied warranties under UCC § 2-316 and warranted only that products were in accordance with published specifications and that obligation under such warranties was limited to repairing or replacing nonconforming products, buyer was not precluded from consequential damages under UCC § 2-719 where seller allegedly failed to repair or replace as provided in contract; but conduct of seller was not such as would render disclaimer of warranties unconscionable under UCC § 2-302. *Koehring Co. v. A.P.I., Inc.*, 369 F. Supp. 882 (E.D. Mich. 1974).

Provisions in purchase money contract disclaiming all warranties unless they appeared in writing signed by seller and waiving defenses against assignees were not unconscionable within meaning of UCC § 2-302. *Westinghouse Credit Corp. v. Chapman*, 129 Ga. App. 830, 201 S.E.2d 686 (1973).

Buyer of equipment covered by purchase money security interest could not assert defenses of breach of warranty and failure of consideration against seller's assignee where, after default, assignee repossessed and sold equipment and brought action for balance due on contract, and where contract contained provisions disclaiming warranties and waiving defenses against assignees: (1) provision disclaiming warranties was not unconscionable within meaning of UCC § 2-302; (2) provision waiving defenses against assignees was not unconscionable and, in fact, was expressly authorized by UCC § 9-206(1); (3) evidence that assignee paid full value for note, that at time of assignment assignee had no knowledge that equipment was defective, that none of seller's employees or officers were officers or employees of assignee and that seller and assignee were two separate and distinct companies, established assignee's right to enforce provision waiving defenses and, since defenses raised by buyer could not be raised against holder in due

course, they could not be raised by buyer in present action. *Westinghouse Credit Corp. v. Chapman*, 129 Ga. App. 830, 201 S.E.2d 686 (1973).

17. Exculpatory clauses; unconscionable.

In buyer's action for breach of warranty in sale of computer and computer programs, (1) trial court properly admitted parol evidence under UCC § 2-202(b) to show that parties had entered into contract of sale, rather than security agreement; (2) seller's claim that admission of extrinsic evidence as to oral warranties contradicted warranty-disclaimer clause on reverse side of contract violated parol evidence rule codified in UCC § 2-202(b) was immaterial because warranty-disclaimer clause was not part of sale contract; (3) since limitation-of-damages provision also was not part of sale contract, whether trial court was correct in holding such provision unconscionable under UCC § 2-302(1) was also immaterial; and (4) trial court's finding that seller did not supply goods as promised and warranted was supported by ample evidence in record. *Burroughs Corp. v. Chesapeake Petro. & Supply Co.*, 282 Md. 406, 384 A.2d 734 (1978).

Buyer of fire protection system who sought damages for injuries caused by system's discharging white powder throughout kitchen of buyer's restaurant was not bound by limitation-of-liability clause contained in paragraph in sales contract setting forth seller's express warranty with respect to system's performance, since nothing in such limitation-of-liability clause, express warranty, or sales contract suggested that seller had waived implied warranties of merchantability or fitness for use, which waiver is required by UCC § 2-316 to be in writing. In such case, limitation-of-liability clause contained in seller's express warranty applied only to claims based on such warranty and had no application to claim based on breach of implied warranty of fitness for use. Furthermore, since limitation-of-liability clause was concealed in paragraph which clearly suggested that benefit in form of guarantee was being conferred on buyer, and since nothing in heading of such paragraph indicated ex-

istence of sharp limitation on seller's overall liability, such limitation-of-liability clause was unconscionable and unenforceable under UCC § 2-302. *Jutta's, Inc. v. Fireco Equip. Co.*, 150 N.J. Super. 301, 375 A.2d 687 (App. Div. 1977).

Limitations of remedy to return of purchase price of soybean inoculant, contained in manufacturer's promotional brochure and stamped on inoculant packages, and provisions of manufacturer's contract with retailer limiting damages to return of purchase price of inoculant and requiring any claim to be filed with manufacturer within 120 days after receipt of allegedly defective inoculant were unconscionable, both as to buyer of product and as between retailer and manufacturer, within meaning of UCC §§ 2-719(3) and 2-302, where alleged defect was latent, manufacturer knew that effectiveness of product was questionable, and exclusion would have had effect of foreclosing any recovery by buyer, a farmer, for large and foreseeable consequential damages for crop failure. *Majors v. Kalo Lab., Inc.*, 407 F. Supp. 20 (M.D. Ala. 1975).

In action by buyers of automobile tires against seller and manufacturer for personal injuries allegedly resulting from blowout of tire, clause purporting to limit buyers' remedy solely to replacement tire and purporting to exclude liability for both personal injury and property damage was unconscionable under UCC § 2-719(3), in absence of any evidence to contrary, and was ineffective. *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 347 A.2d 253 (1975).

Contract for basement waterproofing which contained 4 disclaimers of liability denying responsibility for work performed unless customer would agree to additional work at added cost was unconscionable in its entirety as being against public policy. *Nosse v. Vulcan Basement Waterproofing, Inc.*, 35 Ohio Misc. 1, 299 N.E.2d 708 (1973).

18. —Enforceable.

In action by advertiser against telephone company for damages by reason of omission of advertising contracted for in yellow pages directory, contract which limited company's liability for errors and

omission to amount equal to cost of advertising was not unconscionable under UCC § 2-302 in that (1) plaintiff was no worse off by reason of omission of ad in yellow pages than if he had made no contract at all and (2) plaintiff was experienced businessman for whom it was reasonable to assume was familiar with printed form contracts, the terms of which were not one-sided or oppressive. *Wille v. Southwestern Bell Tel. Co.*, 219 Kan. 755, 549 P.2d 903 (1976).

In light of facts and commercial background of transaction involving purchase and sale of machinery for unproven manufacturing process, both parties realized that purpose of contract was to allocate risks associated with this type of transaction, so that limitation clauses contained in contract were neither oppressive nor unfair. *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F. Supp. 449 (E.D. Mich. 1972), *aff'd*, 509 F.2d 1043 (6th Cir. Mich. 1975).

In action by seller of sectional steel plate against buyer for balance due under contract of sale, in which contract contained provision limiting seller's warranty liability for defective material to replacement or refund of purchase price at seller's option, limitation of liability clause was not unconscionable under UCC § 2-302, where contract was not made under circumstances involving oppression and unfair surprise, there was no great disparity of bargaining power between parties, and buyer was aware of at least one other company capable of supplying it with required plates. *Earl M. Jorgensen Co. v. Mark Constr., Inc.*, 56 Haw. 466, 540 P.2d 978 (1975).

UCC § 2-302 would not be applied to disclaimer of liability contained in repairman's work order form to effect that repairman was not responsible for loss or damages to vehicles or articles left in vehicles in case of fire, theft or any other cause beyond repairman's control, which was signed by owner of trailer when he left it with repairman for repairs, and, thus, repairman was not liable to owner for loss of trailer which was stolen from repairman's premises. *Haynie v. A & H Camper Sales, Inc.*, 132 Ga. App. 509, 208 S.E.2d 354 (1974), *rev'd* on other grounds,

233 Ga. 654, 212 S.E.2d 825 (1975), vacated, 134 Ga. App. 187, 213 S.E.2d 550 (1975).

Provisions in contract between electric utility and manufacturer of turbine generator whereby manufacturer limited its liability for breach of contract in connection with sale and installation of generator were not unconscionable under UCC § 2-302(1) where terms of agreement were subject of extensive negotiations over three-year period and parties were of equal bargaining power. *Royal Indem. Co. v. Westinghouse Elec. Corp.*, 385 F. Supp. 520 (S.D.N.Y. 1974).

In action by door manufacturing company against electronics manufacturer for breach of contract and negligence in manufacture and installation of electronic system for curing glue in production of plaintiff's hollow-core wooden doors, provision in contract limiting defendant's liability for any consequential damages caused by failure of its equipment to produce in accordance with contract was not unconscionable and was enforceable where, inter alia, both parties anticipated machine in question might not produce in accord with plaintiff's requirements and where defendant specially agreed that if equipment did not produce in accord with terms of contract, plaintiff could return part of equipment and get two-thirds of its money back. *Raybond Elecs., Inc. v. Glen-Mar Door Mfg. Co.*, 22 Ariz. App. 409, 528 P.2d 160 (1974).

Clause in which airplane manufacturer stated that it "shall not be liable for failure or delay in making delivery for any cause whatsoever" and allowing buyer to cancel order with full deposit refunded, is not unconscionable when judged, not in abstract, but in commercial setting as to prototype airplane construction and industry practice as to delivery dates and remedies for failure to deliver. *Dow Corning Corp. v. Capitol Aviation, Inc.*, 411 F.2d 622 (7th Cir. Ill. 1969).

In commercial context, contractual exclusion of liability for special or consequential damages is not unconscionable. *K. & C., Inc. v. Ald, Inc.*, 117 Pitts. Legal J. 396 (Pa. 1969).

19. Finance charges.

Automobile sales contract could not be held "unconscionable" in absence of any

evidence concerning availability of alternative forms of financing from banks, other automobile dealers, credit unions, etc. *Block v. Ford Motor Credit Co.*, 286 A.2d 228, 63 A.L.R.3d 1 (D.C. 1972).

Retail instalment contracts charging from two to six times the cost per unit to the sellers were "unconscionable" within the meaning of this section, and were therefore unenforceable. *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39 (1966).

A contract is unconscionable under this section where a person engaged in the business of extending credit fails to furnish concurrently with the consummation of the transaction a clear statement in writing setting forth the finance charges and rate of interest, where the homeowner was paying in excess of \$2500 for goods and services worth less than \$1000. *American Home Imp., Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886, 14 A.L.R.3d 324 (1964).

20. Price; unconscionable.

Where (1) buyer purchased right to cut and remove timber under timber deed granted by seller of such right, (2) buyer represented to seller that buyer was experienced as to value of timber and informed seller that timber in question was worth about \$20,000, and (3) evidence showed that timber was worth more than \$50,000, court under unconscionable-contract provision of UCC § 2-302(1) affirmed chancellor's setting aside of buyer's timber deed. *Davis v. Kolb*, 263 Ark. 158, 563 S.W.2d 438 (1978).

Where freezer, which expert witness testified had maximum value of \$300, was sold for over \$1000, exorbitant price made contract unconscionable and therefore unenforceable. *Toker v. Perl*, 103 N.J. Super. 500, 247 A.2d 701 (L. Div. 1968), aff'd, 108 N.J. Super. 129, 260 A.2d 244 (1970).

The sale of a freezer unit having a retail value of \$300 for \$900 (\$1439.69 including credit charges and \$18 sales tax) held unconscionable as a matter of law (holding that where more than \$600 had been paid toward the purchase of the \$300 freezer, the application of the payment provision should be limited to amounts already paid and the contract be reformed and amended by changing the payments

called for to equal the amount of payment actually so paid by the purchaser). *Jones v. Star Credit Corp.*, 59 Misc. 2d 189 (1969).

Excessively high prices may constitute unconscionable contractual provisions within the meaning of this section. *Central Budget Corp. v. Sanchez*, 53 Misc. 2d 620 (1967).

Where prices charged in retail installment contracts executed in connection with sales of appliances were from two to six times the cost of the goods to the seller, the contracts were unconscionable under the provisions of this section; and sellers should be enjoined both from inducing customers to execute such contracts and from enforcing them, either directly or indirectly. *State ex rel. Lefkowitz v. ITM, Inc.*, 52 Misc. 2d 39 (1966).

21. —Enforceable.

Where forward contracts for sale of cotton crop made at or before planting time provided for payment at price less than half of market value of cotton at delivery time, which increase was unexpected and unforeseeable, and where buyer of cotton made immediate re-sale of 75 percent of cotton purchased under forward contracts, dispelling any inference that expertise of buyer enabled it to foresee future price increase, contracts were not unconscionable under UCC § 2-302. *Bradford v. Plains Cotton Coop. Ass'n*, 539 F.2d 1249 (10th Cir. Okla. 1976), cert. denied, 429 U.S. 1042, 97 S. Ct. 743, 50 L. Ed. 2d 754 (1977).

Clause in contract between publisher and author providing that "in no event" should amount payable by publisher to author in any one calendar year exceed \$3,000 in respect to three books, and \$4,000 in respect to fourth book, under which approximately \$50,000 remained in hands of publisher as credit to account of author's estate, would not be set aside as unconscionable under UCC § 2-302 where, upon publication, publisher assumed risk of being unable to sell first printing thereby subjecting itself to loss of advance payment as well as much of cost of editing, printing, distribution, promotion and selling costs, and where at time of contracting, date of death was unknown, and success or failure of book

matter of conjecture; under these circumstances, lack of interest payments, despite possible accumulation of royalties in hands of publisher, could not be deemed unconscionable. In *re Young's Estate*, 81 Misc. 2d 920 (1975).

Contract for sale of cotton, including its provisions relating to price, production, harvesting or ginning of cotton, was not so unreasonable and onesided as to make it unconscionable under UCC § 2-302 where, in light of commercial needs of cotton business, contract was normal and could inure to benefit of producer by assuring him not only of market for his cotton but at guaranteed price for fluctuating commodity, where price at which contracts were executed was fair price at time, where meteoric rise in price of cotton between planting and harvest could hardly have been anticipated by parties, and where buyer sold most of contracted cotton several months later at prices substantially below highest point reached by market later in year. *R.L. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 214 S.E.2d 360 (1975).

Contract between cotton grower and textile manufacturer for sale of cotton at 32 cents per pound was not unconscionable under UCC § 2-302 although, at time of delivery, price of cotton had risen to approximately 80 cents per pound. *West Point-Pepperell, Inc. v. Bradshaw*, 377 F. Supp. 154 (M.D. Ala. 1974).

In action for declaratory judgment by cotton growers seeking determination that contracts providing that growers would plant and deliver certain cotton acreage for stipulated price were unconscionable under UCC § 2-302(1), contracts when reviewed under circumstances that existed at time they were made, were not unconscionable where growers considered prices offered for cotton to be good based on prior years, there was no claim that merchants knew of drastic price increases which were to occur later, and prices could have fallen as easily as they could have risen. *J.L. McEntire & Sons v. Hart Cotton Co.*, 256 Ark. 937, 511 S.W.2d 179 (1974).

22. Procedural limitations.

Although confession of judgment clauses are not unconscionable per se, this

confession of judgment clause was unconscionable within UCC § 2-302(1) where it was not separated from other portions of agreement and was not placed in a way so as to note special attention; in short, it was unconscionable because it caused unfair surprise by manner in which it appeared. *Architectural Cabinets, Inc. v. Gaster*, 291 A.2d 298 (Del. Super. 1971).

It was stipulated that defendant had appeared generally and waived service of summons, that debt would be paid, and that in the event of non-payment plaintiff might file summons and enter judgment without further notice; held, stipulation was not unconscionable on its face. *Gimbel Bros. v. Swift*, 62 Misc. 2d 156 (1970).

Terms set forth in a signature card executed by plaintiff-depositor and the statements of account which were referred to therein constituted a valid contract between the depositor and defendant-bank, and a clause whereby both parties waived a jury trial was effective. The agreement was neither unconscionable nor offensive to public policy which imposes no limitation or restriction on the freedom of contract between a bank and its depositor. *David v. Manufacturers Hanover Trust Co.*, 59 Misc. 2d 248 (1969).

23. —Form of action; election of remedies.

If party can bring arbitration clause within unconscionability provisions of UCC § 2-302, this indicates lack of meaningful bargaining with regard to such clause and should invalidate it. *Board of Educ. v. Western Harley Miller, Inc.*, 160 W. Va. 473, 236 S.E.2d 439 (1977).

In action for damages by buyer of meat containing excess fat content, settlement formula in purchase contract was exclusive remedy of buyer within meaning of UCC § 2-719(1), even though word "exclusive" was not used, where parties had numerous previous transactions and on one such occasion had utilized the settlement formula as the measure of damages and where the formula was not unconscionable within meaning of UCC § 2-302(1) in light of parties prior dealings and status as professional traders. *J.D. Pavlak, Ltd. v. William Davies Co.*, 40 Ill. App. 3d 1, 351 N.E.2d 243 (1st Dist. 1976).

Contractual limitations upon remedies are generally to be enforced unless unconscionable. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

24. —Forum selection.

In action by buyer against sellers to compel arbitration in accord with arbitration provisions located on reverse side of soy bean sales contract which sellers signed, there was nothing about contracts or facts surrounding their execution that could reasonably be characterized as fraudulent or unconscionable in either design of forms or conduct of buyer's agents, notwithstanding sellers' claims that buyers' agent did not call their attention to arbitration provisions, that they did not read provisions, and that they did not intend by signing contracts to agree to arbitration, where, inter alia, each seller had been party to contract to sell grain to buyer on at least one prior occasion and contracts had been made on identical forms containing identical arbitration provisions, where sellers were experienced farmers who annually farmed from 800 to 2,000 acres, where sellers had ample opportunity to read contracts and to know their every term, and where there was notice on front of contract near signature line in large bold-face capital letters that terms appearing on back of form were part of contract. *Bunge Corp. v. Williams*, 45 Ill. App. 3d 359, 359 N.E.2d 844 (5th Dist. 1977).

Where a contract was made and breached in Massachusetts between a corporation licensed to do business in that state and a Massachusetts consumer, a provision included by the seller in its contract that any law suit under the contract would be brought in New York is clearly designed to harass the buyer who does not stand in a position of bargaining equality and will therefore be deemed not binding because unconscionable. *Paragon Homes of New England, Inc. v. Langlois*, 4 U.C.C. Rep. Serv. 16 (1967, NY Sup); *Paragon Homes of Midwest, Inc. v. Crace*, 4 U.C.C. Rep. Serv. 19 (1967, NY Sup).

In an action by a New York corporation as assignee of a contract made by a Maine corporation to make improvements to defendant's home in Brockton, Massachu-

setts, defendant's motion to dismiss the complaint on the ground that the court lacked jurisdiction over the person of the defendants was granted, notwithstanding a contract clause reciting that the agreement shall be deemed to have been made in Nassau County and that the parties submitted to the jurisdiction of the Supreme Court in that county to adjudicate their rights and liabilities under the contract, since the clause was deemed grossly unfair and unconscionable. *Paragon Homes, Inc. v. Carter*, 56 Misc. 2d 463 (1968), *aff'd*, 30 A.D.2d 1052, 295 N.Y.S.2d 606 (2d Dep't 1968).

25. —Waiver of defenses.

Buyer of equipment covered by purchase money security interest could not assert defenses of breach of warranty and failure of consideration against seller's assignee where, after default, assignee repossessed and sold equipment and brought action for balance due on contract, and where contract contained provisions disclaiming warranties and waiving defenses against assignees: (1) provision disclaiming warranties was not unconscionable within meaning of UCC § 2-302; (2) provision waiving defenses against assignees was not unconscionable and, in fact, was expressly authorized by UCC § 9-206(1); (3) evidence that assignee paid full value for note, that at time of assignment assignee had no knowledge that equipment was defective, that none of seller's employees or officers were officers or employees of assignee and that seller and assignee were two separate and distinct companies, established assignee's right to enforce provision waiving defenses and, since defenses raised by buyer could not be raised against holder in due course, they could not be raised by buyer in present action. *Westinghouse Credit Corp. v. Chapman*, 129 Ga. App. 830, 201 S.E.2d 686 (1973).

Provisions in purchase money contract disclaiming all warranties unless they appeared in writing signed by seller and waiving defenses against assignees were not unconscionable within meaning of UCC § 2-302. *Westinghouse Credit Corp. v. Chapman*, 129 Ga. App. 830, 201 S.E.2d 686 (1973).

A provision in a conditional sale agreement whereby the buyer agreed to waive, as against an assignee of the seller, any defenses which the buyer might have against the seller is void as against public policy. *Quality Fin. Co. v. Hurley*, 337 Mass. 150, 148 N.E.2d 385 (1958).

26. Repossession.

Where retail purchaser bought several appliances from seller at different times, financing each purchase under seller's time sales plan, and where seller replevied all appliances bought by purchaser after purchaser failed to make scheduled monthly payments under plan, time sales agreement giving seller security interest in all goods sold was not unconscionable under UCC § 2-302; even assuming cross-collateral security agreements are unconscionable, seller's time sales agreement did not create such collateral since each payment was applied against cost of items in order purchased and all items were replevied only because first, being most expensive, had not yet been paid off. *Singer Co. v. Gardner*, 65 N.J. 403, 323 A.2d 457 (1974).

It is unconscionable for a contract to permit the seller to retain possession of repossessed goods after the buyer has made good the installments due, because of which default the goods had been repossessed, and also pays a "repossession fee" although the seller claims that it has the right to do so because of the feeling of insecurity arising out of the inability to locate the buyer's place of employment and because of the buyer's failure to produce adequate co-signers on the contract. *Robinson v. Jefferson Credit Corp.*, 4 U.C.C. Rep. Serv. 15 (1967, NY Sup).

27. Termination or cancellation; unconscionable.

Provision in contract between plaintiffs and catering establishment which called for "full amount due under this contract" in event of cancellation by plaintiffs was unenforceable as a matter of public policy. *Bogatz v. Case Catering Corp.*, 86 Misc. 2d 1052 (1976).

Termination provision in contract between service station operator and oil company which gave oil company alone right to terminate at any time upon ten

days' written notice to operator when, in oil company's sole judgment, operator had indulged in practices which tended to impair quality, good name, good will or reputation of products of oil company, but which set forth no standard by which oil company's judgment on such matters was to be determined or circumscribed and which gave no such reciprocal right of termination to operator was unconscionable on its face under UCC § 2-302. *Ashland Oil, Inc. v. Donahue*, 159 W. Va. 463, 223 S.E.2d 433 (1976).

Agreement between industrial catering company and its contractor-drivers under which many obligations were imposed on contractor-drivers, company agreed to do little and reserved right to change its terms as it pleased, duration of contract was of ephemeral nature, contractor could be discharged and deprived of his means of earning living by frivolous behavior on part of company, so that company had squeezed out of instrument whatever equity there was, was unconscionable, and thus unenforceable under Code § 2-302. *Triple D & E, Inc. v. Van Buren*, 72 Misc. 2d 569 (1972), *aff'd*, 42 A.D.2d 841, 346 N.Y.S.2d 737 (2d Dep't 1973).

Unconscionability of contract clause is to be judged not in abstract but rather in its commercial setting; and in order to prove unconscionableness in termination clause of milk marketing agreement, there must be showing not only that terms thereof are onerous, oppressive or one-sided, but also that terms bear no reasonable relation to business risks, as evident in commercial environment and not merely on face of contract alone. *Central Ohio Co-op. Milk Producers v. Rowland*, 29 Ohio App. 2d 236, 281 N.E.2d 42 (1972).

It was unreasonable, unfair, and even unconscionable for reception hall to hold plaintiff's deposit for 19 months after plaintiff had attempted to cancel contract reservation for son's Bar Mitzvah. *Lazan v. Huntington Town House, Inc.*, 69 Misc. 2d 1017 (1969), *aff'd*, 69 Misc. 2d 1019, 330 N.Y.S.2d 751 (1972).

28. —Enforceable.

Termination provisions in whiskey distributorship contracts which provided for termination upon three months notice in

one case, and 60 days notice in the other, were not unconscionable under UCC § 2-302 where contracts were entered into by respective corporations pursuant to substantial negotiations, where there was no showing of exceptional circumstances such as would justify departure from general rule of non-application of unconscionability doctrine to contracts formed in commercial setting and where there was no showing that termination provisions and their notice periods were substantively unconscionable. *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221 (S.D.N.Y. 1975).

Wholesale parts distributor was not entitled to recover damages from manufacturer resulting from termination of distributorship contract where contract provided that either party could terminate at any time on written notice of 90 days, where, although distributor was required to carry "adequate" inventory of manufacturer's parts, contract also gave manufacturer option to refuse to repurchase inventory upon termination, and where manufacturer terminated contract and refused to repurchase distributor's inventory. Distributor failed to show that repurchase provision was unconscionable within meaning of UCC § 2-302 at time of formation of contract: there was no showing that manufacturer's reasons for reserving repurchase option in its distributorship agreements were not reasonably related to business risks involved; it was not unreasonable per se for manufacturer to reserve right to refuse to repurchase at least portions of distributor's inventory upon termination; and, although manufacturer may have had superior bargaining power, under Code, bona fide allocation of risks would not be disturbed merely because one party had superior bargaining position, particularly where both parties were sophisticated business people. Furthermore, repurchase provision was not unduly one-sided or oppressive; although provision appeared to be unqualified, on its face, any exercise of repurchase election by manufacturer was restricted by manufacturer's obligation to act in good faith pursuant to UCC § 1-203, and, although proof that manner in which repurchase election was exercised

at time of termination amounted to breach of manufacturer's implied obligation of good faith and fair dealing would have been independent basis for recovery of damages, neither distributor's complaint nor theory under which case was tried supported findings for distributor based on breach of implied covenant of good faith and fair dealing. *W.L. May Co. v. Philco-Ford Corp.*, 273 Or. 701, 543 P.2d 283 (1975).

Provision in truck franchise agreement giving either party right to terminate contract without cause was specifically sanctioned by Pennsylvania Uniform Commercial Code, and was not unconscionable practice within meaning of Code § 2-302. *Artman v. International Harvester Co.*, 355 F. Supp. 482 (W.D. Pa. 1973).

Termination clause providing for termination at end of any three-year period of contract (original or renewal) by 90-day notice from either party to other is not unconscionable per se. *Division of Triple T Serv., Inc. v. Mobil Oil Corp.*, 60 Misc. 2d 720 (1969), *aff'd*, 34 A.D.2d 618, 311 N.Y.S.2d 961 (2 Dep't 1970), stay denied, 26 N.Y.2d 1020 (1970), appeal denied, 26 N.Y.2d 614 (1970).

Contract for wholesale purchase of beer between brewery and local beverage company providing that the agreement could be terminated by either party at any time without cause or notice was not unconscionable, considering only factors at time contract was made, and 10-day notice of cancellation by brewery was valid. *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc. 2d 446 (1966).

29. Other matters as unconscionable.

In action by buyer of portable sawmill against manufacturer-seller for latter's breach of express and implied warranties, trial court properly excluded from evidence purchase order for sawmill which (1) stated that it was integrated contract that contained entire agreement of parties, (2) contained disclaimer of all warranties, express or implied, and (3) also referred to goods sold as a "motor vehicle,"

where such statements were unreasonable and unconscionable under UCC § 2-302(1) in light of evidence which showed (1) that buyer had actually purchased first production model of new type of sawmill designed by defendant, and (2) that defendant, instead of delivering its "first production model," actually delivered a second prototype that differed greatly from first prototype that buyer had previously inspected (also holding that purchase order could not be an integrated contract because of its inaccurate description of sawmill as a "motor vehicle"). *Butcher v. Garrett-Enumclaw Co.*, 20 Wash. App. 361, 581 P.2d 1352 (1978), review denied, 91 Wash. 2d 1004 (1978).

Clause in contract for sale of sailing vessel requiring buyer to furnish recordable United States preferred ship mortgage was not unconscionable in law or in fact under UCC § 2-302, notwithstanding buyer was unable to furnish such mortgage due to fact that he was resident alien and, therefore, was unable to obtain United States documentation for vessel, where requirement of recordable United States preferred ship mortgage was reasonably related to business risks involved and necessary to protect seller's interest, where contract of sale was negotiated at arm's length, and where, although corporate buyer was not represented by counsel, its principal officer was knowledgeable in documentation of foreign vessels. *R.C. Craig, Ltd. v. Ships of the Sea, Inc.*, 401 F. Supp. 1051 (S.D. Ga. 1975).

With respect to contract for sale of ship, it would be difficult to find "oppression" in requiring United States Preferred Ship Mortgage as security for purchase price on which no downpayment was to be made by foreign buyer. *R.C. Craig, Ltd. v. Ships of the Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972).

In absence of any evidence as to actual value of freezer or food purchased, contracts for purchase might be regarded as improvident but cannot be held unconscionable. *Star Credit Corp. v. Molina*, 59 Misc. 2d 290 (1969).

RESEARCH REFERENCES

ALR. "Unconscionability" as ground for refusing enforcement of contract for sale of goods or agreement collateral thereto. 18 A.L.R.3d 1305.

Unconscionability, under UCC § 2-302 or § 2-719(3), of disclaimer of warranties or limitation or exclusion of damages in contract subject to UCC Article 2 (Sales). 38 A.L.R.4th 25.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like. 41 A.L.R.4th 675.

Validity, construction, and effect of agreement exempting operator of amuse-

ment facility from liability for personal injury or death or patron. 54 A.L.R.5th 513.

Am Jur. 6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:111 et seq. (Complaint, petition, or declaration; to strike out clause for excessive credit charge; by purchaser of automobile under instalment sales contract).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:491 et seq. (Unconscionable agreement or clause).

2 Am Law Prod Liab 3d, Waiver, Exclusion, or Modification of Warranties § 22:5.

§ 75-2-303. Allocation or division of risks.

Where this chapter allocates a risk or a burden as between the parties "unless otherwise agreed," the agreement may not only shift the allocation but may also divide the risk of burden.

SOURCES: Codes, 1942, § 41A:2-303; Laws, 1966, ch. 316, § 2-303, eff March 31, 1968.

Cross References — Implication arising where "unless otherwise agree to" present in code provisions, see § 75-1-102.

Unconscionable contract or clause, see § 75-2-302.

JUDICIAL DECISIONS

1. In general.

Warranty provisions of UCC §§ 2-313 and 2-315 are clearly limited to sales of goods; thus, by enacting UCC, legislature did not preempt field as to bailments and leases, and court was free, notwithstanding UCC, to apply doctrine of strict tort liability to bailment-lease situations. *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976).

In an action by a bank which had accepted certain checks against the drawer who had stopped payment, the failure of the court to instruct the jury on the ele-

ments essential to the status of a holder in due course, or that the plaintiff bank had taken the checks for value and had a security interest therein was error. *Peoples Bank v. Haar*, 421 P.2d 817 (Okla. 1966).

A provision in the sale of a taxicab business, which included a sale of the cabs, subject to the approval of the State Public Utility Commission, that "any losses" shall be borne by the buyer includes physical damage to a cab. *Leist v. Schattie*, 197 Pa. Super. 456, 179 A.2d 277 (1962).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 416, 419-424, 428 et seq., 473.

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:501 et seq. (Allocation or division of risk).

24 Am. Jur. Proof of Facts, Buyer's defenses under Article 2 of Uniform Commercial Code to actions by seller, § 57 (proof that risk of loss had not passed to buyer when goods damaged or destroyed).

25 Am. Jur. Proof of Facts 2d, Risk of Loss; Damage to or Destruction of Goods, §§ 10 et seq. (proof that risk of loss of goods had not passed from seller to buyer at time goods were damaged or destroyed).

§ 75-2-304. Price payable in money, goods, realty, or otherwise.

(1) The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.

(2) Even though all or part of the price is payable in an interest in realty the transfer of the goods and the seller's obligations with reference to them are subject to this chapter, but not the transfer of the interest in realty or the transferor's obligations in connection therewith.

SOURCES: Codes, 1942, § 41A:2-304; Laws, 1966, ch. 316, § 2-304, eff March 31, 1968.

Cross References — Rules of construction, see § 75-1-102.

Supplementary general principles of law applicable, see § 75-1-103.

Construction against implicit repeal, see § 75-1-104.

Recovery of price by seller, see § 75-2-709.

JUDICIAL DECISIONS

1. In general.

Where (1) under Texas pre-UCC law, transfer of properties lacking agreed values was an exchange of property and transfer of properties at agreed values was a sale, and where (2) horses involved in suit were traded at agreed values, court would refrain from deciding whether Texas UCC § 2-304(1) should be interpreted to retain pre-UCC distinction between sale and exchange of property (applying Texas law; denying plaintiff recovery for defendant's alleged breach of express and implied warranties provided for by UCC § 2-313(1) and § 2-314(1)). *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. Tex. 1978).

Since trade-in of boat constituted sale under UCC § 2-304(1), seller, although he did not expressly warrant title to boat, nevertheless impliedly warranted title thereto under UCC § 2-312(1) by virtue of

his failure to show, as required by UCC § 2-312(2), that such implied warranty was excluded or modified by specific language or by circumstances that gave buyer reason to know that seller did not claim title in himself and that he purported to sell only such right or title as he had. *Gunderland Marine Supply, Inc. v. Bray*, 570 S.W.2d 542 (Tex. Civ. App. 1978), writ ref'd n.r.e., (Nov. 29, 1978).

Plaintiff's purchase of stock from a named individual at the request of defendant would serve as consideration for defendant's agreement to transfer common stock purchase warrants to the plaintiff; and the transaction between plaintiff and defendant constituted a "sale" within the meaning of the Uniform Commercial Code, which to be enforceable must be in writing. *Mortimer B. Burnside & Co. v. Havener Sec. Corp.*, 25 A.D.2d 373 (1st Dep't 1966).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 176, 177, 185 et seq., 214.
18 Am. Jur. Legal Forms 2d, Uniform

Commercial Code: Article 2 — Sales, §§ 253:511 et seq. (Medium of payment).
CJS. 77 C.J.S., Sales §§ 94-98, 208.

§ 75-2-305. Open price term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

- (a) nothing is said as to price; or
- (b) the price is left to be agreed by the parties and they fail to agree; or
- (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

SOURCES: Codes, 1942, § 41A:2-305; Laws, 1966, ch. 316, § 2-305, eff March 31, 1968.

Cross References — Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

Contract leaving open one or more terms, see § 75-2-204.

Agreement leaving particulars of performance to be specified by one of parties, see § 75-2-311.

Anticipatory repudiation, see § 75-2-610.

Seller's resale including contract for resale, see § 75-2-706.

Buyer's procurement of substitute goods, see § 75-2-712.

Buyer's right to specific performance or replevin, see § 75-2-716.

JUDICIAL DECISIONS

1. In general.

Conduct "sufficient to show agreement" (§ 75-2-204) was shown by the acts of agents of a railroad who accepted diesel fuel from a supplier and signed an invoice which omitted price but included quantity; the law would supply a reasonable price in the absence of an agreement. However, judgment in favor of the sup-

plier pursuant to a motion for a peremptory instruction would be reversed where a triable issue of fact existed as to the supplier's status as an agent of an oil company. *Alabama G.S.R.R. v. McVay*, 381 So. 2d 607 (Miss. 1980).

In airline's suit against oil company for breach of contract to supply aviation fuel under contract containing escalation

clause that provided for price adjustments for aviation fuel based on posted prices for crude oil from which such fuel was refined, court held (1) that agreed pricing standard in parties' contract, which consisted of "arithmetic average price" computed from two posted prices for "Wyoming Sweet Crude Oil," no longer existed as result of 1973 oil crisis and oil embargo against United States by Arab oil-producing nations, (2) that as a consequence, price of aviation fuel to be supplied to plaintiff was not set by such agreed standards, (3) that when such standard failed, price for aviation fuel to be supplied to plaintiff was "reasonable price," as required by UCC § 2-305(1)(c), and (4) that such "reasonable price" should be determined by district court on remand of case. *North Cent. Airlines v. Continental Oil Co.*, 574 F.2d 582, 187 U.S. App. D.C. 371 (1978).

In seller's action for buyer's breach of requirements contract under which buyer was to purchase from seller all acid, brine, and fresh water that buyer needed, (1) contract was enforceable under UCC § 2-305(1), even though price of goods had never been agreed on by parties; (2) omission of contract's duration from parties' written agreement did not invalidate contract because it was valid for reasonable time under UCC § 2-309(2); and (3) although contract was terminable at will under UCC § 2-309(2) and (3) on reasonable notification, buyer had burden of asserting that contract had been terminated because seller had been given notice, and seller's failure to allege lack of notice in no way signified failure to state claim on which relief could be granted. *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

Contracts under which farmers delivered soybeans to warehouseman for storage and subsequent sale at price to be agreed on at later date, and pursuant to which weight tickets or statement sheets were issued as receipts with words "hold," "stored," or "on storage" appearing on such receipts together with name of individual farmer, were bailments and not present sales with price to be fixed in the future within meaning of UCC § 2-106(1), UCC § 2-204(3), and UCC § 2-305(1), since

such code sections did not contemplate farmers' right at their discretion to require a return of the same or equivalent fungible goods (stating that fact that weight tickets and statement sheets issued as receipts had words indicating that soybeans were being stored also refuted contention that transactions were sales). *NYTCO Servs., Inc. v. Wilson*, 351 So. 2d 875, 23 U.C.C. Rep. Serv. 25 (Ala. 1977).

UCC § 2-305(1) is not by the terms of the Uniform Commercial Code applicable to a lease of real estate (applying principle incorporated in UCC § 2-305(1) to renewal option in lease of realty which was allegedly unenforceable because option did not specify amount of rental for renewal term). *Aycock v. Vantage Mgt. Co.*, 554 S.W.2d 235 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Dec. 7, 1977).

Open price provisions are enforceable in contracts for sale of goods, provided party that is to set price does not have power to act arbitrarily. *American Trading & Prod. Corp. v. Fairfax County Bd. of Supvrs.*, 214 Va. 382, 200 S.E.2d 529 (1973).

In open price term contract, where only evidence of reasonable price for equipment was expert's testimony that the fair price for a consumer sale was "approximately \$9,000," it was error to award a sum in excess of that figure. *Morris Co. v. Athas*, 221 Pa. Super. 239, 289 A.2d 758 (1972).

Where seller had paid \$6,178 for equipment and charged buyer \$9,715 therefor under open-price term agreement, and where only evidence of "reasonable price" was \$9,000, lower court erred in awarding \$9,715, and judgment should be modified by \$715. *Morris Co. v. Athas*, 221 Pa. Super. 239, 289 A.2d 758 (1972).

In a case involving an exchange of unlisted securities for shares in an open-end investment company, where it was contended by owners of the securities that the valuation placed upon their securities was not a proper one and that the investment company did not make proper payment for their securities, relying in part on the provisions of subsection (3) of the instant section that "When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may...himself fix a reason-

able price", it was held that the instant section was inapplicable because the prospectus under which the exchange was made provided that the price of the securities would be "the last quoted bid price...known to the person...making such determination", and because there was nothing in the record to show that there was any failure to fix the price because of the fault of the investment company or of its custodian. *Saphier v. Devonshire St. Fund, Inc.*, 352 Mass. 683, 227 N.E.2d 714 (1967).

A buyer who was quoted sand at 45 cents per ton and waited two years after the quotation to order the same, during which time the price had increased to 55 cents per ton, had waited an unreasonable length of time to accept the lower price and was required to pay the reasonable value of the sand at the time of its delivery which was 55 cents per ton, as if nothing had been said as to price originally. *Ameri-*

can Sand & Gravel, Inc. v. Clark & Fray Constr. Co., 2 Conn. Cir. Ct. 284, 198 A.2d 68 (1963).

Where there has been a series of transactions between the buyer and seller with an "understanding" that prices would be charged according to the current catalogue listing, the seller is entitled to recover the reasonable value of the goods at the time of delivery (note that the court did not refer to the catalogue price). *Republic-Odin Appliance Corp. v. Consumers Plumbing & Heating Supply Co.*, 29 Pa. D. & C.2d 307 (1961).

Account alleging that a buyer of goods delivered to and accepted by him orally agreed to pay for them, without alleging what charge was agreed upon was, in view of this section, not subject to a motion for a more specific complaint. *Elray Tool & Die Corp. v. Knox*, 68 Dauph. Co. 7 (Pa. 1955).

RESEARCH REFERENCES

ALR. Validity and enforceability of contract which expressly leaves open for future agreement or negotiation the terms of payment for property. 68 A.L.R.2d 1221.

Construction and application of UCC § 2-305 dealing with open price term contracts. 91 A.L.R.3d 1237.

Am Jur. 67 Am. Jur. 2d, Sales §§ 212-221, 303-308, 680.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:131. (Complaint, petition, or dec-

laration; to recover price based on reasonable value of goods specially altered by buyer's needs).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:134. (Answer; defense; agreement not to become binding until price established by parties).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:561 et seq. (Open price term).

CJS. 77 C.J.S., Sales §§ 94-98.

§ 75-2-306. Output, requirements and exclusive dealings.

(1) A term which measures the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

SOURCES: Codes, 1942, § 41A:2-306; Laws, 1966, ch. 316, § 2-306, eff March 31, 1968.

Cross References — Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-205.

Assignment of rights, see § 75-2-210.

Right to adequate assurance of performance, see § 75-2-609.

JUDICIAL DECISIONS

1. In general; output contracts.
2. Requirements contracts.
3. Good faith.
4. Unreasonably disproportionate quantity.

1. In general; output contracts.

Contracts for sale of cotton under which buyer agreed to buy all cotton produced by seller on specified acreage at specified price for specified grades were "output" contracts, as defined in UCC § 2-306(1), for sale of all of farmers' cotton produced by them during crop year 1973, were not vague and indefinite as to quantity and subject matter, and were sufficient to satisfy requirements of statute of frauds, UCC § 2-201(1). Furthermore, specific performance of contracts was available to buyers since parties stipulated that cotton involved was unique. *R.L. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 214 S.E.2d 360 (1975).

Trial court erred in declaring output-requirements contract between tenant of farmland and buyer of cotton unconscionable, and therefore void as against one-fourth interest in cotton which landlord held as rent, since UCC § 2-306(1) expressly authorized such contracts, moreover, § 2-302 required trial court to provide parties opportunity to present evidence on issue of unconscionability prior to declaring clause unconscionable. *Darden v. Ogle*, 293 Ala. 699, 310 So. 2d 182 (1975).

"Outputs" contract under which bakery agreed to sell all breadcrumbs produced by it to promisee did not carry with it implication that bakery was obligated to manufacture breadcrumbs for full term of contract; rather, good faith termination of production of breadcrumbs was permissible under contract. Thus, summary judgment could not be entered in favor of either party to suit for breach of contract where unresolved issues of fact remained as to whether bakery acted in good faith in

ceasing production of crumbs because of alleged economic unfeasibility. *Feld v. Henry S. Levy & Sons*, 37 N.Y.2d 466, 335 N.E.2d 320 (1975).

In contract for sale of growing cotton, quantity was sufficiently shown for "output" contract for sale of all defendants' cotton produced on their 825 acres under UCC § 2-306(1). *Harris v. Hine*, 232 Ga. 183, 205 S.E.2d 847 (1974).

City may not take undue advantage of its favorable contract with oil supplier and increase its wholesale exchange of energy with neighboring system; such increases must be regarded as beyond contemplation of parties and scope of contract, and must be taken into account as limiting factor in determining damages to be awarded city for breach of oil supply contract. *City of Lakeland v. Union Oil Co.*, 352 F. Supp. 758 (M.D. Fla. 1973).

2. Requirements contracts.

In action by supplier against subcontractor for latter's alleged breach of contract to purchase limestone, which district court had ruled was contract to purchase specific quantity of limestone, court held (1) that contract was supported by consideration and thus was enforceable, (2) that contract satisfied statute-of-frauds requirement in UCC § 2-201(1) as to presence of "quantity term" in the agreement, since by incorporating certain bid documents by reference, it obligated supplier to furnish limestone "of a grade and quality to conform to specified requirements" in such bid documents, (3) that as a result of provisions in incorporated bid documents, the contract, instead of being agreement for fixed amount of limestone, was a requirements contract within meaning of UCC § 2-306(1), (4) that subcontractor did not breach such contract by directing supplier not to supply any limestone at all, since subcontractor had no requirements as result of decision by National Parks Service not to use limestone

on project that subcontractor was working on, and (5) that although limiting language of UCC § 2-306(1) would seem to prevent subcontractor from reducing its requirements to zero, such language did not in fact preclude a good-faith reduction in a party's requirements that was highly disproportionate to such party's normal prior requirements or stated estimates (applying District of Columbia UCC). *R.A. Weaver & Assocs. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 190 U.S. App. D.C. 418 (1978).

In seller's action for buyer's breach of contract to purchase seller's product line of floor sweepers and also, on "pay-as-used basis," inventory for such product line, (1) seller's oral acceptance by telephone of buyer's written offer, in conjunction with seller's written confirmation of its acceptance and buyer's failure to object in writing to contents of confirmation within ten days after it was received, satisfied exception to statute of frauds contained in UCC § 2-201(2) and rendered contract enforceable, (2) contract was binding, even though both parties expected that it would be reduced to formal writing by their attorneys, (3) seller was entitled to recover contract price under UCC § 2-709(1)(b) because seller, after buyer refused to perform, was unable to resell sweeper line at reasonable price to another person, and (4) buyer's liability for sweeper-line inventory, which buyer had purchased on "pay-as-used basis," was analogous to good-faith liability of a buyer under a requirements contract provided for in UCC § 2-306(1) (applying Wis law). *Lambert Corp. v. Evans*, 575 F.2d 132 (7th Cir. Wis. 1978).

Generally, the buyer in a requirements contract is merely required to exercise good faith in determining his requirements, and the seller assumes the risk of all good-faith variations in the buyer's requirements, even to the extent of a determination to liquidate or discontinue the business (construing Wis law). *Lambert Corp. v. Evans*, 575 F.2d 132 (7th Cir. Wis. 1978).

In seller's action for buyer's breach of alleged oral contract under which seller was to supply all potatoes required by buyer's chain of restaurants, (1) contract

was sufficiently definite in quantity to be enforceable under UCC § 2-306(1), but (2) since buyer in its pleading did not admit making of contract within meaning of UCC § 2-201(3)(b), and since deposition testimony of buyer's former employees, which admitted existence of oral contract sued on, did not constitute binding admission against buyer under UCC § 2-201(3)(b) because of witnesses' lack of authority at time depositions were taken, contract was unenforceable under statute of frauds set forth in UCC § 2-201(1). *Miller v. Sirloin Stockade*, 224 Kan. 32, 578 P.2d 247 (1978).

Purchase order "To cover a possible requirement of (500,000) gallons of propane" did not constitute binding requirements contract under UCC § 2-306 where buyer made no express or implied promise to purchase propane exclusively from seller (applying Kentucky law). *Propane Indus., Inc. v. GMC*, 429 F. Supp. 214 (W.D. Mo. 1977).

Letter from subcontractor to contractor by which subcontractor proposed to furnish contractor with specified type of readymix concrete at \$21 per yard, net, in such quantity as contractor required for specified project constituted definite and certain offer with intent that, if accepted, it would result in contract; language in letter asserting that price would be guaranteed to hold throughout job could be considered as measuring quantity of concrete by requirement of buyer as recognized in UCC § 2-306(1). *Maryland Supreme Corp. v. Blake Co.*, 279 Md. 531, 369 A.2d 1017 (1977).

Letter signed by president of plastics supplier which provided that supplier would maintain supply of certain plastics "in sufficient amounts to supply all of the plastic" for furniture manufacturer's use, satisfied requirements of statute of frauds and was binding on supplier. *Fortune Furn. Mfg. Co. v. Mid-South Plastic Fabric Co.*, 310 So. 2d 725 (Miss. 1975).

In action between general contractor for construction of housing project and subcontractor who had agreed to supply all concrete needed on project arising when labor dispute caused general contractor to purchase balance of concrete requirements elsewhere, under UCC §§ 2-306(1)

and 2-309(1) agreement was enforceable requirements contract where duration of contract was sufficiently determined by occurrence of completion of project; depending on circumstances, labor dispute may give rise to defense of impossibility of performance under UCC § 2-615. *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 310 N.E.2d 363, 70 A.L.R.3d 1259 (1974).

In taxpayer suit challenging authority of Department of Property and Supplies to accept and open bids for school buses in kinds and numbers to meet estimated requirements of certain school districts and intermediate units, fact that school districts were not bound by contract to purchase their requirements from successful bidder did not preclude existence of valid requirements contract under UCC § 2-306 between Department and vendor. *Schaefer v. Commonwealth*, 13 Pa. Commw. 349, 318 A.2d 365 (1974).

Under Code 2-306(1), municipal "requirement" is not too indefinite a term in contract for purchase of parking meters, since it is held to mean actual good faith requirements of city when dealing according to commercial standards of fairness; and further contract provision for furnishing "part" of city's requirements likewise does not render agreement illusory or lacking in mutuality, in light of further contract provision for furnishing "approximately 7650" parking meters, word "approximately" being used in this contract merely to indicate that precision in quantity is not intended (applying Kentucky law). *City of Louisville v. Rockwell Mfg. Co.*, 482 F.2d 159 (6th Cir. Ky. 1973).

Where unavailability of certified seed was known to potato seller before modification of contract, including identification of seller's grower, the unavailability of seed did not excuse seller's failure to fully perform under UCC § 2-306(1) relating to quantity requirement contracts, unless seller notified buyer of expected shortage prior to such modification. *Deardorff-Jackson Co. v. National Produce Distribs., Inc.*, 447 F.2d 676 (7th Cir. Ill. 1971).

3. Good faith.

In action by supplier against subcontractor for latter's alleged breach of contract to purchase limestone, which district

court had ruled was contract to purchase specific quantity of limestone, court held (1) that contract was supported by consideration and thus was enforceable, (2) that contract satisfied statute-of-frauds requirement in UCC § 2-201(1) as to presence of "quantity term" in the agreement, since by incorporating certain bid documents by reference, it obligated supplier to furnish limestone "of a grade and quality to conform to specified requirements" in such bid documents, (3) that as a result of provisions in incorporated bid documents, the contract, instead of being agreement for fixed amount of limestone, was a requirements contract within meaning of UCC § 2-306(1), (4) that subcontractor did not breach such contract by directing supplier not to supply any limestone at all, since subcontractor had no requirements as result of decision by National Parks Service not to use limestone on project that subcontractor was working on, and (5) that although limiting language of UCC § 2-306(1) would seem to prevent subcontractor from reducing its requirements to zero, such language did not in fact preclude a good-faith reduction in a party's requirements that was highly disproportionate to such party's normal prior requirements or stated estimates. *R.A. Weaver & Assocs. v. Asphalt Constr., Inc.*, 587 F.2d 1315, 190 U.S. App. D.C. 418 (1978).

Buyer of premixed concrete, under contract requiring seller to furnish all concrete to be used by buyer in construction of state hospital, had no good-faith need under UCC § 2-306(1) for such concrete after state terminated hospital construction project and thus was not obligated, after project's termination, to buy any more concrete pursuant to terms of buyer's requirements contract with seller. *Wilsonville Concrete Prods. v. Todd Bldg. Co.*, 281 Or. 345, 574 P.2d 1112 (1978).

In utility company's action for damages for supplier's breach of fuel-oil supply contract, demand by plaintiff for more than double its contract estimates was, as matter of law, unreasonably disproportionate to such estimates under UCC § 2-306(1), and supplier was justified in refusing to meet demand where plaintiff's requirements were not incurred in good faith

(applying NJ law pursuant to provision in contract sued on, and expressly refusing to adopt factor of more than twice the contract estimates as an inflexible yardstick). *Orange & Rockland Utils., Inc. v. Amerada Hess Corp.*, 59 A.D.2d 110, 96 A.L.R.3d 1263 (2d Dep't 1977).

Where the seller could terminate a supply contract on thirty-day's notice, at the expiration of which period the buyer was required to return any unsold merchandise, the seller was not required to fill an order for more than the ordinary thirty-day supply, where the order in fact was more than the supply for half a year, which large order was explainable only on the ground that the buyer was in bad faith trying to evade the power of the seller to terminate on thirty-days notice. *Massachusetts Gas & Elec. Light Supply Corp. v. V-M Corp.*, 387 F.2d 605 (1st Cir. Mass. 1967).

4. Unreasonably disproportionate quantity.

Term "unreasonably disproportionate" in UCC § 2-306(1) is not equivalent of term "lack of good faith." Term "unreasonably disproportionate" is keyed to stated estimates or, if there are no stated estimates, to "normal or otherwise comparable prior requirements." *Orange & Rockland Utils., Inc. v. Amerada Hess Corp.*, 59 A.D.2d 110, 96 A.L.R.3d 1263 (2d Dep't 1977).

It is unwise to define the phrase "unreasonably disproportionate" in UCC § 2-306(1) in terms of rigid quantities. Instead, when construing the phrase, the following factors should be considered: (1) the amount by which the requirements exceeded the contract estimate; (2)

whether the seller had any reasonable basis on which to forecast or anticipate the requested increase; (3) the amount, if any, by which the market price of the goods exceeded the contract price; (4) whether such an increase in market price was itself fortuitous; and (5) the reason for the increase in requirements. *Orange & Rockland Utils., Inc. v. Amerada Hess Corp.*, 59 A.D.2d 110, 96 A.L.R.3d 1263 (2d Dep't 1977).

Contract requiring seller to sell specified products from time to time when ordered by buyer during term of agreement did not constitute "requirements" agreement obliging seller to fill all orders placed by buyer; even assuming that provision was "term which measures the quantity by...the requirements of the buyer," seller could not be called upon to furnish buyer "quantity unreasonably disproportionate...to any normal or otherwise comparable prior...requirements" since contract contained no "stated estimate" within meaning of UCC § 2-306(1). *Copylease Corp. of Am. v. Memorex Corp.*, 397 F. Supp. 853 (S.D.N.Y. 1975).

A contract which obligated a contractor to furnish his subcontractor all concrete aggregate and sand material "necessary to the preparation" of a definite amount of highway paving amounts to a "requirement contract" within the meaning of subdivision (1) of this section, and whether the contractor in good faith delivered a quantity of material not unreasonably disproportionate to normal requirements for the purpose for which it was delivered is a question of fact to be determined. *Gruschus v. C.R. Davis Contracting Co.*, 75 N.M. 649, 409 P.2d 500 (1965).

RESEARCH REFERENCES

ALR. Contract for sale of commodity to extent of buyer's requirements. 26 A.L.R.2d 1099.

Mutuality and enforceability of contract to furnish another with his needs, wants, desires, requirements, etc., of certain commodities. 26 A.L.R.2d 1139.

Requirements contracts under § 2-306(1) of Uniform Commercial Code. 96 A.L.R.3d 1275.

Output contracts under § 2-306(1) of Uniform Commercial Code. 30 A.L.R.4th 396.

Establishment and construction of requirements contracts under § 2-306(1) of Uniform Commercial Code. 94 A.L.R.5th 247.

Am Jur. 67 Am. Jur. 2d, Sales §§ 248 et seq., 288, 289.

6 Am. Jur. Pl & Pr Forms (Rev), Sales,

Forms 2:193-2:201. (Output, requirements, and exclusive dealing contracts).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:581 et seq. (Output, requirements, and exclusive dealing agreements).

CJS. 77 C.J.S., Sales §§ 177 et seq.

Law Reviews. Bruckel, Consideration in Exclusive and Nonexclusive Open Quantity Contracts Under the U.C.C.: A proposal for a New System of Validation. 68 Minn L Rev 117, October, 1983.

§ 75-2-307. Delivery in single lot or several lots.

Unless otherwise agreed all goods called for by a contract for sale must be tendered in a single delivery and payment is due only on such tender but where the circumstances give either party the right to make or demand delivery in lots the price if it can be apportioned may be demanded for each lot.

SOURCES: Codes, 1942, § 41A:2-307; Laws, 1966, ch. 316, § 2-307, eff March 31, 1968.

Cross References — Manner, time and place of tender of delivery, see § 75-2-503. Rejection of tender or delivery because nonconforming, see § 75-2-508.

Buyer's options where goods or tender of delivery fail to conform to contract, see § 75-2-601.

Revocation of acceptance of lot or commercial unit, see § 75-2-608.

Right to adequate assurance of performance, see § 75-2-609.

JUDICIAL DECISIONS

1. In general.

Nothing in the Uniform Commercial Code (see UCC §§ 2-328(1) and 2-307) gives an auctioneer the right to condition delivery of one lot of goods sold at an

auction sale on the payment of all lots purchased at such sale where the sale is made in the ordinary course of business. *Dulman v. Martin Fein & Co.*, 66 A.D.2d 809 (2d Dep't 1978).

RESEARCH REFERENCES

ALR. Sale, assignment, or transfer of retail instalment contracts. 10 A.L.R.2d 447.

Shipper's ratification of carrier's unauthorized delivery or misdelivery. 15 A.L.R.2d 807.

Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later installments. 32 A.L.R.2d 1117.

Am Jur. 67 Am. Jur. 2d, Sales §§ 535 et seq., 679 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:851-2:858. (Instalment contract; breach).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:681 et seq. (Single-lot and installment agreements).

CJS. 77 C.J.S., Sales §§ 181, 208.

§ 75-2-308. Absence of specified place for delivery.

Unless otherwise agreed

(a) the place for delivery of goods is the seller's place of business or if he has none his residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.

SOURCES: Codes, 1942, § 41A:2-308; Laws, 1966, ch. 316, § 2-308, eff March 31, 1968.

Cross References — Manner, time and place for tender of delivery, see § 75-2-503.

Where seller authorized to send goods to buyer, see § 75-2-504.

Seller's shipment under reservation, see § 75-2-505.

Payment by buyer before inspection, see § 75-2-512.

Collection of documentary drafts, see §§ 75-4-501 et seq.

JUDICIAL DECISIONS

1. In general.

Contracts for sale of fall cotton crops at specified price were not uncertain and indefinite, but were sufficient in that they contained all material details necessary for contract to buy and sell; even if contracts were insufficient as to time or place for performance, such deficiencies would be remedied by UCC §§ 2-308 and 2-309 (applying Georgia law). *Taunton v. Allenberg Cotton Co.*, 378 F. Supp. 34 (M.D. Ga. 1973).

UCC § 2-308, being silent as to computation of time for notice of rejection, non-Code statute will be looked to, which, in this case dictates that day of sending of notice will not be counted in computing time specified in Code, so that objection which was mailed on tenth day after confirmation was timely. *Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz. App.

415, 493 P.2d 1220, 56 A.L.R.3d 1028 (1972).

When the parties to a contract of sale and purchase know at the time the contract is made that the specific goods sold were in some other place than the place of business or residence of the seller, then the place where the goods are located is the place of delivery. *Herning v. Wigger*, 398 P.2d 1002 (Alaska 1965).

Sale of machines was consummated in Ohio, where the sales contract therefor was negotiated, acknowledged and accepted in Ohio by defendant's sales agents, the machines were manufactured at defendant's plant in that state, and shipped to purchaser in Michigan, f. o. b. city of manufacture. *Welding Eng'rs, Inc. v. Aetna-Standard Eng'g Co.*, 84 Ohio Law Abs. 283, 169 F. Supp. 146, 119 U.S.P.Q. 489 (W.D. Pa. 1958).

RESEARCH REFERENCES

ALR. Shipper's ratification of carrier's unauthorized delivery or misdelivery. 15 A.L.R.2d 807.

Am Jur. 67 Am. Jur. 2d, Sales §§ 297, 299, 394, 520.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:141. (Complaint, petition, or declaration; allegation; known situs of identified goods at time of contracting as place of delivery).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:142. (Instruction to jury; place for delivery of goods in absence of agreement).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:711 et seq. (Place for delivery).

CJS. 77 C.J.S., Sales § 168.

§ 75-2-309. Absence of specific time provisions; notice of termination.

(1) The time for shipment or delivery or any other action under a contract if not provided in this chapter or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

SOURCES: Codes, 1942, § 41A:2-309; Laws, 1966, ch. 316, § 2-309, eff March 31, 1968.

Cross References — Obligation of good faith, see § 75-1-203.

Definitions, see §§ 75-2-103, 75-2-106.

Formation of contract generally, see § 75-2-204.

Cost and freight terms, see §§ 75-2-320, 75-2-321.

Shipment by seller, see § 75-2-504.

Payment by buyer, see §§ 75-2-511 to 75-2-514.

Right to adequate assurance of performance, see § 75-2-609.

Repudiation of contract with respect to performance not yet due, see § 75-2-610.

Seller's remedies generally, see § 75-2-703.

JUDICIAL DECISIONS

1. In general.
2. Absence of specific time provisions.
3. Duration of contract.
4. Termination of contract.
5. —Reasonable notification.

1. In general.

In action by buyer, a manufacturer of cup boosters, against seller of aluminum blanks used in manufacture of cup boosters for breach of option authorizing buyer to increase original order by 100 per cent, buyer was entitled to consequential damages pursuant to UCC § 2-715 for costs attributable to extra freight for blanks obtained from substitute supplier, and loss of profits in connection with contract for sale of finished cup boosters to United States which resulted from change in delivery schedule caused by seller's breach; however, buyer could not recover under UCC § 2-715 for transportation of its agent in seeking substitute blanks, and for down time of machinery due to seller's breach, where those damages were not satisfactorily proved (applying Missouri law). *R.L. Pohlman Co. v. Keystone Consol. Indus., Inc.*, 399 F. Supp. 330 (E.D. Mo. 1975).

Auctioneer must be held to obligation of implied warranty of title in connection

with sale of automobile, where bidder was not told, and could not ascertain, name of selling dealer until after sale had already been consummated. *Universal C.I.T. Credit Corp. v. State Farm Mut. Auto. Ins. Co.*, 493 S.W.2d 385 (Mo. Ct. 1973).

Although seller of automobile believed that auctioneer who had conducted public auction at which seller had purchased automobile had had good title to automobile, and even though seller checked visible apparent identification number with police and was told that automobile was not stolen, seller was still liable to buyer for breach of both express and implied warranty of title, when automobile was identified as stolen vehicle and taken from buyer by police. *Itoh v. Kimi Sales, Ltd.*, 74 Misc. 2d 402 (1973).

2. Absence of specific time provisions.

Contract under which seller agreed to manufacture cooling systems for incorporation into electronic countermeasure (ECM) pods for United States Air Force was breached by buyer when it failed to furnish seller with source-control drawings for such systems within commercially reasonable time implied in contract by UCC § 2-309(1) and UCC § 1-204(2) (applying Md. law). *Westinghouse Elec. Corp.*

v. Garrett Corp., 437 F. Supp. 1301 (D. Md. 1977), *aff'd*, 601 F.2d 155 (4th Cir. Md. 1979).

Where (1) seller and manufacturer, in their "New Equipment Warranty," expressly warranted that buyer of tractor would receive machine "free from defects in material and workmanship under normal use and service," but limited their liability, under UCC § 2-719(1)(a), for breach of such warranty to repair or replacement of parts shown to be defective within specified period, and (2) where defendants' warranty did not state time for performance of their repair-or-replacement obligation, court held that defendants, under UCC § 2-309(1), were obligated to repair or replace defective parts within reasonable time in order to prevent limited remedy from failing in its essential purpose within meaning of UCC § 2-719(2). *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

In seller's action for buyer's breach of requirements contract under which buyer was to purchase from seller all acid, brine, and fresh water that buyer needed, (1) contract was enforceable under UCC § 2-305(1), even though price of goods had never been agreed on by parties; (2) omission of contract's duration from parties' written agreement did not invalidate contract because it was valid for reasonable time under UCC § 2-309(2); and (3) although contract was terminable at will under UCC § 2-309(2) and (3) on reasonable notification, buyer had burden of asserting that contract had been terminated because seller had been given notice, and seller's failure to allege lack of notice in no way signified failure to state claim on which relief could be granted. *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

Where buyer's written acceptance of offer to sell used steel pipe changed final delivery date from October 15, 1975 to December 15, 1975, but seller's confirmation of buyer's acceptance specified original final delivery date of October 15, 1975, such conflicting dates under UCC § 2-207(1) and (2), and Comment 6 thereto, cancelled each other out. In such case, time for final delivery under UCC § 2-309(1) was reasonable time under circum-

stances of situation. *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, 98 Idaho 495, 567 P.2d 1246 (1977), appeal dismissed, cert. denied, 434 U.S. 1056, 98 S. Ct. 1225, 55 L. Ed. 2d 757 (1978).

In buyer's suit for specific performance, where seller, after agreeing to sell all cotton produced by him during 1973 crop year, cancelled contract two months later for buyer's failure to furnish required performance bond within two-week deadline set by seller and buyer thereafter furnished seller with letter of credit (which would expire before cotton was picked) in amount of such bond before buyer finally sent bond itself, (1) since written contract between parties did not specify time bond was to be furnished, UCC § 2-309(1) applied and required that bond be furnished within reasonable time; (2) in determining what was reasonable time, Comment 6 to UCC § 2-309(1) would be followed; (3) under Comment 6, effective communication of proposed time limit calls for response, and failure to reply constitutes acquiescence in such time limit; (4) although buyer did not acquiesce in seller's proposed time limit which was sufficient for answering, new trial would be necessary on issue as to whether buyer furnished bond within reasonable time because buyer's response communication did not answer such issue; and (5) if at new trial buyer should be found to have furnished bond within reasonable time, buyer's remedy would not be suit for specific performance under UCC § 2-716(1), but would be suit under UCC § 2-712(2) for damages for breach of contract, since buyer could have purchased other cotton on open market as cover for cotton not furnished by seller (applying Miss. law). *Weathersby v. Gore*, 556 F.2d 1247 (5th Cir. 1977).

Although UCC § 2-309(1) did not apply where contracts for sale of grain contained specified delivery times, in absence of express statement that time was of essence or unless there were special circumstances, time was not necessarily of essence, since therefore reasonable delay in delivery or acceptance of grain did not constitute breach of contract. *Farmers Union Grain Term. Ass'n v. Hermanson*, 549 F.2d 1177 (8th Cir. N.D. 1977).

Even though terms of contract may be indefinite and incomplete as to time of performance, UCC § 2-309(1) mandates that such incomplete provisions be settled according to standard of reasonableness (holding that contract for sale of used car, which was indefinite only as to time for making payment, valid since such time could reasonably be determined under guidelines contained in parties' tentative understanding). *Acuri v. Figliolli*, 91 Misc. 2d 831 (1977).

In action arising out of delivery of tile after time specified in contract, buyer waived performance date under UCC § 2-209 and, thus, seller had under UCC § 2-309 reasonable time beyond time specified in contract to perform where buyer acquiesced in repeated delays in performance by seller and elected not to terminate contract for non-performance when delivery was not made by final contract date (applying Tennessee law). *United States ex rel. Shankle-Clairday, Inc. v. Crow*, 414 F. Supp. 160 (M.D. Tenn. 1976).

Under UCC §§ 2-204(1) and 1-201(3), buyer was not justified in terminating orders of submarine valves for alleged failure to meet delivery dates specified in contracts, notwithstanding alleged promise by seller to meet or improve upon delivery dates originally requested by buyer, where buyer requested certain delivery dates when it placed orders, seller clearly and unequivocally rejected buyer's requested dates and promised delivery at later dates, buyer merely appealed to seller to conform to requested dates and later appealed to seller to expedite one shipment, and buyer gave no notice to seller that seller breached contract by failing to meet required delivery dates. *Crane Co. v. Roberts Supply Co.*, 196 Neb. 67, 241 N.W.2d 516 (1976).

Where contract between manufacturer and distributor for sale of certain product was to run for "initial term," defined to commence on date of execution and to "continue for a period of 12 months from the date of the first shipment" of specified product, and granted distributor right to renew for successive 12-month periods provided distributor maintained certain level of purchases, but where no such specified product was shipped or ordered

prior to manufacturer's repudiation of contract a little more than one year after execution of contract, "initial term," and thus contract, did not expire one year after date of execution; question as to what constituted "reasonable time" for distributor's performance under contract depended upon circumstances of transaction and course of performance and, in view of dispute which had arisen between parties, it was not unreasonable for distributor to refrain from ordering specified product until contract renegotiations were resolved (applying California law). *Copylease Corp. of Am. v. Memorex Corp.*, 403 F. Supp. 625 (S.D.N.Y. 1975).

Under UCC §§ 2-201(1) and 2-309, oral contract to supply plastic pipe which did not include times for delivery was enforceable beyond extent to which it had been performed (applying Alabama law). *Owens v. Clow Corp.*, 491 F.2d 101 (5th Cir. Ala. 1974).

Contracts for sale of fall cotton crops at specified price were not uncertain and indefinite, but were sufficient in that they contained all material details necessary for contract to buy and sell; even if contracts were insufficient as to time or place for performance, such deficiencies would be remedied by UCC §§ 2-308 and 2-309 (applying Georgia law). *Taunton v. Allenberg Cotton Co.*, 378 F. Supp. 34 (M.D. Ga. 1973).

In action arising out of agreement to provide city with municipal personnel ordinance for fixed fee, necessary elements of valid, binding contract, whether in terms of services contract or one for sale of goods, were present where UCC § 2-201(1) requirement that there be writing sufficient to indicate that contract has been made was met and where plaintiff commenced performance of its obligations within reasonable time as required by UCC § 2-309 (applying New Mexico law). *National Civil Serv. League v. City of Santa Fe*, 370 F. Supp. 1128 (D.N.M. 1973).

3. Duration of contract.

In seller's action for buyer's breach of requirements contract under which buyer was to purchase from seller all acid, brine, and fresh water that buyer needed, (1) contract was enforceable under UCC § 2-

305(1), even though price of goods had never been agreed on by parties; (2) omission of contract's duration from parties' written agreement did not invalidate contract because it was valid for reasonable time under UCC § 2-309(2); and (3) although contract was terminable at will under UCC § 2-309(2) and (3) on reasonable notification, buyer had burden of asserting that contract had been terminated because seller had been given notice, and seller's failure to allege lack of notice in no way signified failure to state claim on which relief could be granted. *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

Contract between city water authority and utility company to provide water and sewer service to landowners within certain area contemplated continuing or successive performance, making it indefinite in duration and terminable at will of either party under UCC § 2-309. *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385 (Tex. 1977).

In action between general contractor for construction of housing project and subcontractor who had agreed to supply all concrete needed on project arising when labor dispute caused general contractor to purchase balance of concrete requirements elsewhere, under UCC §§ 2-306(1) and 2-309(1) agreement was enforceable requirements contract where duration of contract was sufficiently determined by occurrence of completion of project; depending on circumstances, labor dispute may give rise to defense of impossibility of performance under UCC § 2-615. *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 310 N.E.2d 363, 70 A.L.R.3d 1259 (1974).

In action for breach of implied franchise agreement, question of reasonable duration of agreement should have been submitted to jury, in view of evidence regarding difficulty in building sales in early years, losses during those early years, and investment by plaintiff dealer in time and money in building franchise (applying Minnesota law). *McGinnis Piano & Organ Co. v. Yamaha Int'l Corp.*, 480 F.2d 474 (8th Cir. Minn. 1973).

Plaintiffs who agreed to purchase defendant's beer for cash, only as long, and in

such quantities as they wished were bound to nothing, and the agreement, at most, was one at will terminable by either party. *Weilersbacher v. Pittsburgh Brewing Co.*, 421 Pa. 118, 218 A.2d 806 (1966).

4. Termination of contract.

In seller's action for buyer's breach of requirements contract under which buyer was to purchase from seller all acid, brine, and fresh water that buyer needed, (1) contract was enforceable under UCC § 2-305(1), even though price of goods had never been agreed on by parties; (2) omission of contract's duration from parties' written agreement did not invalidate contract because it was valid for reasonable time under UCC § 2-309(2); and (3) although contract was terminable at will under UCC § 2-309(2) and (3) on reasonable notification, buyer had burden of asserting that contract had been terminated because seller had been given notice, and seller's failure to allege lack of notice in no way signified failure to state claim on which relief could be granted. *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

Distributorship agreement between paper manufacturer and paper distributor, which contained no express provision regarding its duration, was terminable at will of either party under UCC § 2-309(3) (applying Michigan law). *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 429 F. Supp. 1039 (E.D. Mich. 1976).

Under UCC § 2-309(2), in absence of any controlling contractual provisions, agreement with plaintiff to operate retail gasoline service station could be terminated by oil company without cause (applying Pennsylvania law). *Goldinger v. Boron Oil Co.*, 375 F. Supp. 400 (W.D. Pa. 1974), *aff'd*, 511 F.2d 1393 (3d Cir. Pa. 1975), *cert. denied*, 423 U.S. 834, 96 S. Ct. 59, 46 L. Ed. 2d 52 (1975).

Grain elevator breached agreement to purchase 4,000 bushels of wheat for March delivery where elevator purchased more grain for cash during contract delivery period than amount involved in contract with seller, but refused to accept delivery of seller's grain during contract period and for 2 months thereafter; thus, seller was entitled to cancel contract under UCC § 2-703(6) and resell wheat at

private sale; since seller exercised his right to cancel contract under UCC § 2-703, and since he was not seeking to recover damages, he was not required to give notice of his intent to resell under UCC § 2-706, nor was he required to notify elevator under UCC § 2-309 that he was “terminating” contract. *Mott Equity Elevator v. Svihovec*, 236 N.W.2d 900 (N.D. 1975).

Provision in truck franchise agreement giving either party right to terminate contract without cause was specifically sanctioned by Pennsylvania Uniform Commercial Code, and was not unconscionable practice within meaning of Code § 2-302 (applying Pennsylvania law). *Artman v. International Harvester Co.*, 355 F. Supp. 482 (W.D. Pa. 1973).

The requirement of good faith of the Code is an overriding provision that applies to the termination provision. *TeleControls, Inc. v. Ford Indus., Inc.*, 388 F.2d 48 (7th Cir. Ill. 1967).

Contract for wholesale purchase of beer between brewery and local beverage company providing that the agreement could be terminated by either party at any time without cause or notice was not unconscionable, considering only factors at time contract was made, and 10-day notice of cancellation by brewery was valid. *Sinkoff Beverage Co. v. Jos. Schlitz Brewing Co.*, 51 Misc. 2d 446 (1966).

5. —Reasonable notification.

A distributorship agreement is an agreement for the sale of goods and is subject to the provisions of Article 2 of the Uniform Commercial Code. Therefore, under UCC § 2-309(3), reasonable notification is required to terminate an on-going oral agreement for the sale of goods in a manufacturer-supplier or dealer-distributor relationship. *Leibel v. Raynor Mfg. Co.*, 571 S.W.2d 640 (Ky. Ct. App. 1978).

UCC § 2-309(3) recognizes that the application of the principles of good faith and sound commercial practice normally call for such notification of the termination of a going contract relationship as will give the other party reasonable time to seek a substitute arrangement. An arrangement that dispenses with notification or limits the time for seeking a substitute arrangement is, of course, valid under UCC § 2-

309(3), unless the result of putting it into operation would create an unconscionable state of affairs. *Leibel v. Raynor Mfg. Co.*, 571 S.W.2d 640 (Ky. Ct. App. 1978).

The requirement of reasonable notification under UCC § 2-309(3) does not relate to the method of giving notice. Instead, it relates to the circumstances under which notice is given and the extent of advance warning of termination that it provides. What length of time constitutes reasonable notice, however, is a question of material fact to be decided in each case. *Leibel v. Raynor Mfg. Co.*, 571 S.W.2d 640 (Ky. Ct. App. 1978).

Where seller did not give buyer notice of change in price of egg feed, difference between prices stated on feed invoices sent to buyer and prices listed on wholesale price lists, which seller had stopped sending to buyer, did not constitute all notice of price changes that buyer could reasonably expect to receive under UCC § 2-309(3), requiring that reasonable notification of termination of contract by one party must be received by the other party. *Agway, Inc. v. Ernst*, 394 A.2d 774 (Me. 1978).

In seller's action for buyer's breach of requirements contract under which buyer was to purchase from seller all acid, brine, and fresh water that buyer needed, (1) contract was enforceable under UCC § 2-305(1), even though price of goods had never been agreed on by parties; (2) omission of contract's duration from parties' written agreement did not invalidate contract because it was valid for reasonable time under UCC § 2-309(2); and (3) although contract was terminable at will under UCC § 2-309(2) and (3) on reasonable notification, buyer had burden of asserting that contract had been terminated because seller had been given notice, and seller's failure to allege lack of notice in no way signified failure to state claim on which relief could be granted. *McCasland v. Prather*, 92 N.M. 192, 585 P.2d 336 (Ct. App. 1978).

Oral contract under which plaintiff acted as defendant's sales representative in specified territory from April, 1972 to May 15, 1975 lasted “for a reasonable time” under UCC § 2-309(2), and plaintiff received “reasonable notification” of con-

tract's termination under UCC § 2-309(3) when defendant gave plaintiff written notification of such termination on April 17, 1975. In such case, moreover, since defendant was entitled under state law to terminate arbitrarily its relationship with plaintiff, a third party who was joined as a codefendant also was not liable to plaintiff for inducing such breach of contract (applying Ind law and holding that UCC governed agency agreements like contract in issue). *Rockwell Eng'g Co. v. Automatic Timing & Controls Co.*, 559 F.2d 460 (7th Cir. Ind. 1977).

Distributorship agreement between paper manufacturer and paper distributor, which contained no express provision regarding its duration, was terminable at will of either party upon giving reasonable notice in accord with § 2-309(3); reasonable notice was given where, *inter alia*, distributor has sufficient notice to enable him to find new source of supply, even in tight market conditions existing at time of termination (applying Michigan law). *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 429 F. Supp. 1039 (E.D. Mich. 1976).

RESEARCH REFERENCES

ALR. Shipper's ratification of carrier's unauthorized delivery or misdelivery. 15 A.L.R.2d 807.

Necessity and reasonableness of vendor's notice to vendee of requisite time of performance of real-estate sales contract after prior waiver or extension of original time of performance. 32 A.L.R.4th 8.

Am Jur. 67 Am. Jur. 2d, Sales § 532.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:151. (Complaint, petition, or declaration; allegation; failure to give reasonable notice of termination of contract).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:156. (Instruction to jury; time for

shipment or delivery in absence of agreement).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:731 et seq. (Time and termination).

24 Am. Jur. Proof of Facts, Buyer's defenses under Article 2 of Uniform Commercial Code to actions by seller, § 56 (proof of unconscionability of contract sought to be enforced by seller).

2 Am. Jur. Proof of Facts 2d, Status as "buyer in ordinary course of business", §§ 12 et seq. (Proof of status as "buyer in ordinary course").

§ 75-2-310. Open time for payment or running of credit; authority to ship under reservation.

Unless otherwise agreed

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513) [Section 75-2-513]; and

(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

SOURCES: Codes, 1942, § 41A:2-310; Laws, 1966, ch. 316, § 2-310, eff March 31, 1968.

Cross References — Time for delivery, see § 75-2-307.

Place for delivery, see § 75-2-308.

Reservation by seller of security interest when goods shipped, see § 75-2-505.

Risk of loss where contract requires or authorizes seller to ship, see § 75-2-509.

Tender of payment, see § 75-2-511.

Contract requiring payment before inspection, see § 75-2-512.

Buyer's right to inspection of goods before payment or acceptance, see § 75-2-513.

Bank deposits and collections, see §§ 75-4-101 et seq.

JUDICIAL DECISIONS

1. In general.

Where contract for sale of mobile home for sum of \$5,000 was silent as to manner of payment, under UCC § 2-310(a) full purchase price was due at time and place at which buyer was to receive goods. *Lewis v. Hughes*, 276 Md. 247, 346 A.2d 231, 88 A.L.R.3d 406 (1975).

Although the purchaser of goods is obligated to pay for the goods received at the

time and place of delivery unless otherwise agreed, where the purchaser is a town, no obligation to pay for the goods delivered arises unless an itemized voucher shall have been presented to the town board or comptroller and shall have been audited and allowed. *J.C. Georg Serv. Corp. v. Town of Summit*, 28 A.D.2d 578 (3d Dep't 1967).

RESEARCH REFERENCES

ALR. Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for property. 68 A.L.R.2d 1221.

Am Jur. 67 Am. Jur. 2d, Sales § 520.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:571 et seq. (Complaint, petition, or declaration; to recover damages for failure to pay purchase price of goods; delay in inspecting goods constituted waiver of right to inspect; by seller).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:152-2:155. (Times and termination; time and place of payment).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:761 et seq. (Time and place of payment).

CJS. 77 C.J.S., Sales § 208.

§ 75-2-311. Options and cooperation respecting performance.

(1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of Section 2-204) [Section 75-2-204(3)] to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1)(c) and (3) of Section 2-319 [Section 75-2-319(1)(c) and (3)] specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is

necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

(a) is excused for any resulting delay in his own performance; and,

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods.

SOURCES: Codes, 1942, § 41A:2-311; Laws, 1966, ch. 316, § 2-311, eff March 31, 1968.

Cross References — Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

When action is taken seasonably, see § 75-1-204.

Buyer's duty to name vessel where term is f.o.b. vessel, see § 75-2-319.

Assurance of due performance, see § 75-2-609.

Substituted performance, see § 75-2-614.

JUDICIAL DECISIONS

1. In general.

Where contract for sale of sailing vessel required buyer to obtain new documents for ship and buyer's inability to perform was not caused by seller's failure to obtain United States documentation for ship, but rather buyer's alien status precluded documenting vessel in United States, and want of United States documentation prevented performance as to buyer's furnishing preferred ship mortgage, buyer's breach was not excused under UCC § 2-311 on grounds that seller failed to cooperate in obtaining proper documents of title (applying Georgia law). *R.C. Craig, Ltd. v. Ships of the Sea, Inc.*, 401 F. Supp. 1051 (S.D. Ga. 1975).

Shipping instructions issued by buyer calling for delivery of 10,000 tons of fertilizer during first 25 working days of month, freight prepaid, to places other than buyer's plant, did not constitute anticipatory repudiation of contract under

which seller agreed to sell and ship, and buyer agreed to buy and receive at its plant, 10,000 tons of fertilizer within eight-month period of time where (1) quantity requested in shipping instructions did not exceed quantity specified in contract; (2) evidence established that prepayment of freight and shipping to place other than buyer's plant were in accord with course of dealing between parties and, even without course of dealing, there was nothing in language of contract repugnant to place or manner of shipment specified in shipping instructions; (3) seller failed to demonstrate that buyer's demanding entire season's supply in one month was commercially unreasonable and not made in good faith as required by UCC § 2-311(1) (apparently applying Illinois law). *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. Ill. 1974).

RESEARCH REFERENCES

ALR. Construction and effect of options to purchase at specified price and at price offered by third person, included in same instrument. 22 A.L.R.4th 1293.

Am Jur. 67 Am. Jur. 2d, Sales §§ 115 et seq., 511, 513 et seq.

7 Am. Jur. Pl & Pr Forms (Rev), Contracts, Form 12.1 (Answer — Defense — Laches).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:171-2:174. (Specification of performance duties).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:791 et seq. (Specification of performance duties).

51 Am. Jur. Trials 493, Structural Damage to Residential Buildings.

15 Am. Jur. Proof of Facts 2d 583, *Timeliness of Optionee's Notice of Exercise of Option to Purchase Real Property*.

24 Am. Jur. Proof of Facts 2d 269, *"Impossibility of Performing Contract."*
CJS. 77 C.J.S., Sales § 9.

§ 75-2-312. Warranty of title and against infringement; buyer's obligation against infringement.

(1) Subject to subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under subsection (1) will be excluded or modified only by a specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications.

SOURCES: Codes, 1942, § 41A:2-312; Laws, 1966, ch. 316, § 2-312, eff March 31, 1968.

Cross References — Obligation of good faith, see § 75-1-203.

Good faith purchase of goods, see § 75-2-403.

Effect of acceptance by buyer, see § 75-2-607.

Right to adequate assurance of performance, see § 75-2-609.

Measure of damages for breach of warranty generally, see § 75-2-714.

Limitation of actions, see § 75-2-725.

Warranties on negotiation or transfer of document of title, see § 75-7-507.

Warranties on transfer of security, see § 75-8-306.

False pretenses in sale of property previously sold or encumbered, see § 97-19-51.

JUDICIAL DECISIONS

1. In general.
2. Warranty of title.
3. Exclusion or modification of warranty.

1. In general.

Since trade-in of boat constituted sale under UCC § 2-304(1), seller, although he did not expressly warrant title to boat, nevertheless impliedly warranted title thereto under UCC § 2-312(1) by virtue of his failure to show, as required by UCC § 2-312(2), that such implied warranty was excluded or modified by specific language or by circumstances that gave

buyer reason to know that seller did not claim title in himself and that he purported to sell only such right or title as he had. *Gunderland Marine Supply, Inc. v. Bray*, 570 S.W.2d 542 (Tex. Civ. App. 1978), writ ref'd n.r.e., (Nov. 29, 1978).

Where substantial evidence of fraud was introduced in that (a) the defendant represented to the plaintiff that he was the owner of the automobile in question; (b) that the plaintiff had purchased the automobile from the defendant for the sum of \$1,650; and that (c) the automobile was ultimately impounded as a stolen

vehicle, the evidence established as a matter of law a right on the part of plaintiff to rescind his automobile purchase transaction and to recover the purchase price which he had paid to the defendant. *Sarad v. Tatum*, 492 P.2d 882 (Colo. Ct. App. 1971).

A corporation's sale of an aircraft while it was encumbered by a chattel mortgage was a breach of its implied warranty that the plane was free from encumbrances. *Marine Midland Trust Co. v. Halik*, 28 A.D.2d 1077 (4th Dep't 1967), *aff'd*, 23 N.Y.2d 789, 297 N.Y.S.2d 297, 244 N.E.2d 868 (1968).

A petition alleging that Zoysia lawn grass was warranted by the seller to survive winter weather, and that the grass subsequently died of the cold, states a cause of action, for the decisive test, in determining whether language used is a mere expression of opinion or a warranty, is whether it purports to state a fact upon which it may fairly be presumed the seller expects the buyer to rely, and upon which the buyer would ordinarily rely, and no particular form of words is necessary to constitute a warranty. *Bell v. Menzies*, 110 Ga. App. 436, 138 S.E.2d 731 (1964).

2. Warranty of title.

Even though seller may have acted innocently in sale of truck which turned out to be stolen, he is liable to buyer for breach of warranty of title. *Crook Motor Co. v. Goolsby*, 703 F. Supp. 511 (N.D. Miss. 1988).

In action by wholesale seller against retailer-buyer for conversion of carpeting, in which (1) seller's salesman validly sold buyer carpeting worth \$24,000 and buyer made payment with four checks, one of which was returned for insufficient funds, (2) salesman improperly obtained buyer's returned check and one of buyer's four other checks, instructed buyer to issue two checks for \$10,000 to corporation that was salesman's alter ego, and appropriated proceeds of such checks, (3) salesman later diverted shipment of carpeting worth \$76,000 from party to whom wholesaler had sold it, delivered such shipment to buyer, and appropriated \$10,000 downpayment that buyer made on such shipment, (4) buyer eventually returned part of diverted shipment to wholesaler

and sold remainder, which was worth \$30,000, and (5) wholesaler sought (a) \$5,000 spent to recover returned carpeting, (b) \$30,000 for carpeting that buyer had sold from diverted shipment, and (c) \$10,000 balance still due on carpeting that buyer had bought under valid contract with wholesaler's salesman, court held (1) that buyer, although misled by salesman into giving salesman two checks made out to corporation that was salesman's alter ego, nevertheless knew at that time that wholesaler was party to which buyer owed \$10,000 balance on buyer's valid carpet purchase from wholesaler, (2) that salesman had stolen diverted carpeting shipment from wholesaler, (3) that buyer had not acquired valid title to diverted carpeting, under UCC § 2-403(1)(d), since wholesaler had not dealt with its salesman in transaction of purchase, (4) that buyer also had not obtained valid title to diverted carpeting shipment, under entrustment provisions of UCC § 2-403(2) and (3), since wholesaler had not entrusted its salesman with such shipment, (5) that salesman's theft of diverted carpeting gave him void, instead of voidable, title to such carpeting which he could not pass on to even bona-fide purchaser, with result that wholesaler still had title to such carpeting, (6) that since buyer had converted part of diverted carpeting shipment by selling it, buyer was liable to wholesaler for such conversion, together with sum that wholesaler had spent to recover carpeting that buyer returned, and (7) that buyer's remedy, if any, was against salesman or his alter-ego corporation, in action under UCC § 2-312, for breach of implied warranty of title to carpeting in diverted shipment. *Textile Supplies, Inc. v. Garrett*, 687 F.2d 123 (5th Cir. 1982).

In action for seller's breach of warranty of good title to motor home purchased by plaintiff, where (1) original owner of home rented it for 13 days to thief who "drove off into the sunset" and was never again seen by owner, (2) thief thereafter obtained Alabama registration for home, and also Nebraska and Indiana certificates of title therefor, before trading it in to defendant dealer in Indiana as part payment for truck and trailer, (3) plaintiff purchased

home from defendants, who gave plaintiff certificate of title thereto, (4) Indiana state police seized home from plaintiff and surrendered it to original owner's insurer, (5) home's serial number proved to have been stolen, and (6) such false identification number appeared on all documents respecting home that thief had obtained in Alabama, Nebraska, and Indiana, court held (1) that rental transaction between original owner and thief constituted a "purchase" under UCC §§ 2-403(1) and § 1-201(32), since thief had acquired possessory interest in home by renting it, (2) thief did not transfer good title to defendant, as good-faith purchaser for value, since thief's title to home was void and not voidable under UCC § 2-403(1), (4) since defendant had no good title to convey to plaintiff, defendant breached its warranty of title under UCC § 2-312 and (5) evidence supported damages awarded plaintiff under UCC § 2-714(2) and (3). *McDonald's Chevrolet, Inc. v. Johnson*, 176 Ind. App. 399, 376 N.E.2d 106 (1978).

Where boat owner's broker-agent accepted seller's offer to purchase owner's boat, free and clear of all liens, owner warranted that he was owner of boat and that he was conveying warranted title free and clear of all liens or any security interest. *Allen v. Carlotti*, 400 F. Supp. 1037 (S.D. Fla. 1975), *aff'd*, 552 F.2d 1086 (5th Cir. Fla. 1977).

In suit by buyer of antique pistol against seller under UCC § 2-312(1) for breach of warranty of title, evidence that pistol was taken from buyer's possession by police on information that it was stolen property and that it was never returned to buyer was sufficient to show breach of warranty of title, and proof of theft was not required. *Trial v. McCoy*, 553 S.W.2d 199 (Tex. Civ. App. 1977).

Dealer's implied warranty of good title to modular home, or house trailer, under UCC § 2-312(1)(a) was not binding on manufacturer of home, on alleged ground that dealer was sales agent for manufacturer, where evidence showed that dealer's relationship with manufacturer was actually that of buyer and seller on credit. *Fuqua Homes, Inc. v. Evanston Bldg. & Loan Co.*, 52 Ohio App. 2d 399, 370 N.E.2d 780 (1977).

Seller of packinghouse waste processing plant was liable to buyer for labor and materialmen liens, notwithstanding that the contract did not include specific hold-harmless clause as to such liens and notwithstanding that buyer did not insist on laborer and materialmen's bond specified in contract, where contract did require that seller furnish all tools, equipment, labor and material and perform all work in accordance with plans and specifications and warranty existed under UCC § 2-312 that title of plant would be good and its transfer rightful. *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F. Supp. 1069 (D. Neb. 1976).

Under UCC §§ 2-703 and 2-705 seller's sale of appliances to buyer on credit empowered buyer to pass good title to third party by delivery of appliances, under UCC §§ 2-312, 2-401 and 2-403 buyer did not breach any implied warranty of title when appliances were delivered to third party, and under UCC §§ 2-401(2) and 2-703 third party had no obligation to pay seller or return appliances although buyer failed to pay seller. *Mamber v. Levin*, 4 Mass. App. Ct. 157, 344 N.E.2d 192 (1976).

In action for damages for breach of warranty of title, brought by buyer of stolen automobile against seller wherein buyer had undisturbed possession of automobile for period of approximately nine months, value of automobile at time buyer's possession was disturbed so that he lost use of automobile was proper measure of damages. *Ricklefs v. Clemens*, 216 Kan. 128, 531 P.2d 94, 94 A.L.R.3d 572 (1975).

Except as limited by UCC § 2-102, provisions of sales of goods chapter of UCC are applicable to sale of motor vehicle and, under UCC § 2-312(1), dealer in motor vehicles warrants he will convey good title free from any security interest or other lien or encumbrance of which buyer is without knowledge when contract of sale is made; absent express contractual language or circumstances under which person buying motor vehicle knows or should have known that only limited warranty is intended in accord with UCC § 2-312(2) (but only to extent that such warranty can be limited), automobile dealer having authority to expose floor-planned cars for

sale in ordinary course of business binds his mortgagee to deliver title to any vehicle so sold when payment is made to dealer and whether or not dealer remits proceeds to his mortgagee. *Levin v. Nielsen*, 37 Ohio App. 2d 29, 306 N.E.2d 173 (1973).

Breach of warranty of good title; held, this constitutes failure of consideration and generally gives buyer right to rescind transaction. *American Container Corp. v. Hanley Trucking Corp.*, 111 N.J. Super. 322, 268 A.2d 313 (1970).

Where the defendant insurance company had made payment to its insured and received title to an automobile that had been involved in a collision, and subsequently sold that car to plaintiff, there was attached to the sale an implied warranty of title and upon seizure of the automobile as a stolen vehicle by police, that warranty was breached rendering defendant liable for normal damages for breach or warranty of title. *John St. Auto Wrecking v. Motors Ins. Corp.*, 56 Misc. 2d 232 (1968).

Where a motor car company, warranting good title, sold a stolen automobile to another company which, also warranting good title, sold automobile to plaintiffs, and subsequently an insurance company, as assignee of owner, maintained a successful replevin action against plaintiffs, plaintiffs were entitled to maintain breach of warranty action against the sellers who, although notified, failed to appear and defend the replevin action against plaintiff. *Frank v. McCafferty Ford Co.*, 192 Pa. Super. 435, 161 A.2d 896 (1960).

3. Exclusion or modification of warranty.

Since trade-in of boat constituted sale under UCC § 2-304(1), seller, although he did not expressly warrant title to boat, nevertheless impliedly warranted title thereto under UCC § 2-312(1) by virtue of his failure to show, as required by UCC § 2-312(2), that such implied warranty

was excluded or modified by specific language or by circumstances that gave buyer reason to know that seller did not claim title in himself and that he purported to sell only such right or title as he had. *Gunderland Marine Supply, Inc. v. Bray*, 570 S.W.2d 542 (Tex. Civ. App. 1978), writ ref'd n.r.e., (Nov. 29, 1978).

Provision in contract for sale of recreation equipment located in seller's theater building which provided that seller should in no way be deemed to be liable under any guarantees or warranties concerning such equipment, including any implied warranties of title, was ineffective to disclaim warranty of title under UCC § 2-312(2), since such provision did not make disclaimer in specific language required by UCC § 2-312(2), but was couched in negative terminology that stated what seller would not be liable for, rather than what buyer was not receiving. Moreover, in such case testimony that manager of seller's theater had told buyer prior to sale that seller owned such equipment was not precluded by parol evidence rule contained in UCC § 2-202, since party may not invoke parol evidence rule to shield his own fraud. *Sunseri v. RKO-Stanley Warner Theatres, Inc.*, 248 Pa. Super. 111, 374 A.2d 1342 (1977).

Warranty of title, arising in connection with transfer of motor vehicle, may not be modified or waived; Uniform Motor Vehicle Certificate of Title and Anti-Theft Act controlled vehicle transfer, rather than UCC § 2-312, whose warranty of title may be modified or excluded. *Mulvaney v. Tri State Truck & Auto Body, Inc.*, 70 Wis. 2d 760, 235 N.W.2d 460 (1975).

Where the seller transferred all of his right, title, and interest in an antique car, stated that no other title existed to his knowledge and that the bill of sale was the original evidence of title, such language, as a matter of law, is not sufficient to exclude the warranty of title. *Jones v. Linebaugh*, 34 Mich. App. 305, 191 N.W.2d 142 (1971).

RESEARCH REFERENCES

ALR. Sale of contractual rights; defect in written record as ground for avoiding sale. 10 A.L.R.2d 728.

Am Jur. 38 Am. Jur. 2d, Guaranty § 10.

67A Am. Jur. 2d, Sales §§ 794 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:221 et seq. (Title and right to transfer; encumbrances; infringement).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:821 et seq. (Warranty of title and against infringement).

8 Am. Jur. Trials, Trademark Infringement and Unfair Competition Litigation, §§ 1 et seq.

CJS. 77 C.J.S., Sales §§ 261, 262, 272.

§ 75-2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.

SOURCES: Codes, 1942, § 41A:2-313; Laws, 1966, ch. 316, § 2-313, eff March 31, 1968.

Cross References — Varying effect of code provisions by agreement, see § 75-1-102. General principles of law and equity as supplementing code provisions, see § 75-1-103.

Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

Course of dealing; usage of trade, see § 75-1-205.

Modification, rescission, and waiver, see § 75-2-209.

Agreement to shift or divide risk or burden, see § 75-2-303.

Implied warranty of merchantability, see § 75-2-314.

Implied warranty of fitness for particular purpose, see § 75-2-315.

Construction of warranties, see § 75-2-317.

JUDICIAL DECISIONS

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38. —Opinion or commendation.
39. Reliance on warranty.
40. —Knowledgeable buyer.
41. —Opportunity to inspect.
42. —Seller's skill and judgment.
43. Disclaimers.
44. Time of nonconformity.

1. In general; scope.

Three warranties recognized by Mississippi law applicable to a chicken feeder system purchased by defendants from plaintiff on an open account are express warranties, implied warranty of merchantability, and implied warranty of fitness for particular purpose. *McLaurin v. Smith's Poultry & Farm Supply, Inc.*, 499 So. 2d 1361 (Miss. 1986).

Although UCC § 2-313(1) is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract of sale, the warranty sections of UCC Article 2 are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract (quoting Comment 2 to UCC § 2-313, and holding that that section did not inhibit finding that non-UCC express warranty attached to rebuilt transmission that had been installed in automobile by company to which defendant had granted franchise to perform such service). *Scheuler v. Aamco Transmissions, Inc.*, 1 Kan. App. 2d 525, 571 P.2d 48 (1977).

Express warranty has to do with title, character, quantity, quality, identity or condition of goods; a delay in delivery is not a breach of warranty. *A.A. Baxter Corp. v. Colt Indus., Inc.*, 10 Cal. App. 3d 144 (4th Dist. 1970).

2. —Lease or bailment.

UCC § 2-313 would be applied to lease of three motor scraper units by analogy; thus, assuming that representation made by lessor prior to written agreement created express warranties as to mechanical condition of units and position of tires, lessee waived any contractual rights arising from such express warranties upon entering into modification of lease agreement with knowledge of mechanical and tire problems. *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 541 P.2d 1184 (1975).

Contract was lease arrangement and was not covered by Uniform Commercial Code provisions relating to warranties where one party agreed to lease certain

hens, known as "Parent Stock," and eggs therefrom, known as "Hatching Eggs," to other party for purpose of producing offspring, where contract provided that first party retained title to "Parent Stock" and "Hatching Eggs" and other party was precluded from selling or otherwise disposing of same without express written consent of first party, and where contract additionally provided for termination by either party on written notice at least 30 days in advance. *DeKalb Agresearch, Inc. v. Abbott*, 391 F. Supp. 152 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1162 (5th Cir. Ala. 1975).

3. —Service contracts.

Contract for installation and maintenance by defendant of burglar alarm system on plaintiff's premises, which provided that equipment installed should remain property of defendant, did not constitute sale of equipment so as to be basis of cause of action for breach of either express warranty under UCC § 2-313(1) or implied warranties under UCC § 2-314(1) and UCC § 2-315 (also stating that implied warranties do not attach to performance of a service). *Craig v. American Dist. Tel. Co.*, 91 Misc. 2d 1063 (1977).

Warranties are limited to the sales of goods, and no warranty attaches to the performance of a service. *Aegis Prods., Inc. v. Arriflex Corp. of Am.*, 25 A.D.2d 639 (1st Dep't 1966).

4. —Mixed sales and service contracts.

Where complaint showed that furnishing of allegedly unsafe drug to decedent was incidental feature of professional services rendered by defendant physicians, no sale of such drug occurred within meaning of Uniform Commercial Code that could give rise to cause of action for breach of any express or implied warranties under UCC § 2-313(1), § 2-314(1), and § 2-315. *Osborn v. Kelley*, 61 A.D.2d 367 (3d Dep't 1978).

Even if installation of burglar alarm equipment, with the equipment to remain the property of the installer, was a lease of the burglar alarm equipment, no express or implied warranty could attach to the service portion of the contract. *Craig v. American Dist. Tel. Co.*, 91 Misc. 2d 1063 (1977).

Insofar as applicability of implied warranty provisions of Uniform Commercial Code to sale of product under hybrid sales-service contract is concerned, if service aspect of such contract is predominant and transfer of personal property is merely incidental feature of transaction, exacting warranty standards in Uniform Commercial Code for imposing liability without proof of fault will not be imported from law of sales to render liable those who perform trade or professional services, such as building services under construction contract. Those who hire experts for predominant purpose of rendering services and who rely on their special skills cannot expect infallibility. Therefore, unless the parties have contractually bound themselves to a higher standard of performance, reasonable care and competence owed generally by practitioners in the particular trade or profession define the limits of an injured party's justifiable demands (also stating that since express warranty provisions of UCC § 2-313(1)(a) apply only to contracts for sale of goods, that section would be no more applicable to contract for rendition of services than the code's implied warranty provisions). *Milau Assocs. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 368 N.E.2d 1247 (1977).

5. Persons protected; privity.

In action by purchaser of rifle against manufacturer's distributor for breach of implied warranty of merchantability and fitness of rifle for ordinary purposes for which it was to be used, (1) distributor was remote seller who could be held liable under Uniform Commercial Code for breach of either express or implied warranty; (2) unlike Uniform Commercial Code, Georgia law required existence of privity of contract before liability could be imposed on distributor or remote seller under theory of express or implied warranty; (3) requirement of privity was complied with because distributor, by written statement accompanying rifle, "fully guaranteed" its use by ultimate consumer, and such express warranty was part of bargain of sale; and (4) since distributor's express warranty contained no limitation on its provisions and also did not exclude any implied warranties attaching to rifle, distributor could be held liable under ei-

ther UCC § 2-313(1)(a) for breach of express warranty or UCC § 2-314(2)(c) for breach of implied warranty of merchantability and fitness of rifle for ordinary purposes for which it was to be used (holding that distributor failed to discharge its burden of establishing nonexistence of plaintiff's right to recover). *Jones v. Cranman's Sporting Goods*, 142 Ga. App. 838, 237 S.E.2d 402 (1977).

In products liability action by purchaser of automobile against manufacturer for injuries allegedly resulting from manufacturer's breach of express and implied warranties of fitness: (1) cause of action was governed by UCC four-year statute of limitations, § 2-725, rather than general three-year statute; (2) action was not barred under UCC by lack of privity. *Reid v. Volkswagen of Am., Inc.*, 512 F.2d 1294 (6th Cir. Mich. 1975).

Express and implied warranties rest upon sales and the existence of a buyer-seller relationship, insofar as the UCC deals with the subject. *Cheshire v. Southampton Hosp. Ass'n*, 53 Misc. 2d 355 (1967).

No privity of contract is required where there is an express warranty to the purchaser. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (1965), overruled on other grounds, *Huang v. Garner*, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1st Dist. 1984).

The instant section was referred to in a case in which it was held that plaintiff's declaration in contract for breach of warranty failed to state facts sufficient to constitute a claim against the defendant, in connection with the proposition that the declaration also showed affirmatively that there was no privity between the parties. *Spring Valley Country Club, Inc. v. Malden Supply Co.*, 349 Mass. 764, 208 N.E.2d 230 (1965).

5.5. Persons liable.

An automobile dealer was entitled to summary judgment in a breach of warranty action, notwithstanding that there was no question that the dealer used the warranty as an inducement to the purchase of a car by the plaintiff, as there was no evidence to suggest that the dealer embraced that warranty in any capacity other than as an agent of the manufac-

turer, which refused to honor the warranty. *Wright v. Paul Moak Pontiac, Inc.*, — So. 2d —, 2001 Miss. App. LEXIS 172 (Miss. Ct. App. May 1, 2001).

6. Pleading.

To plead properly cause of action for breach of warranty under Uniform Commercial Code, complaint should at least allege the following: (1) facts respecting sale of the goods; (2) identification of warranty created as being express warranty under UCC § 2-313(1), implied warranty of merchantability under UCC § 2-314(1), or implied warranty of fitness for particular purpose under UCC § 2-315; (3) facts respecting creation of such warranty; (4) facts respecting its breach; (5) giving to seller of notice of breach required by UCC § 2-607(3)(a); and (6) injuries sustained by buyer as result of breach (holding that third-party complaint failed to state cause of action because it did not comply with above list of essential allegations). *Dunham-Bush, Inc. v. Thermo-Air Serv., Inc.*, 351 So. 2d 351 (Fla. App. 1977).

In products liability action against, inter alia, manufacturer and dealer of automobile, for purpose of evaluating sufficiency of plaintiff's allegations to effect that manufacturer was liable for "secondary impact" injuries caused by design defects, based on breach of warranty, although breach of both implied and express warranties was alleged, warranties would be treated as one since both warranted automobile as being suitable for its intended purpose, i.e., provision of reasonably safe transportation. *Frericks v. GMC*, 274 Md. 288, 336 A.2d 118 (1975).

In order for a plaintiff to recover in action based on a breach of an express warranty, the plaintiff must allege and prove that the product failed to perform in accordance with the express warranties (affirmations or promises relating to the goods which were a basis of the bargain) and that such failure was not caused by its use contrary to the express warranty terms. *Elanco Prods. Co. v. Akin-Tunnell*, 474 S.W.2d 789 (Tex. Civ. App. 1971), writ ref'd n.r.e., (May 3, 1972).

UCC does not change common-law rule that in action for breach of express warranty it is unnecessary to allege or prove

scienter. *Kensair Corp. v. Peltier*, 28 Colo. App. 290, 472 P.2d 700 (1970).

The buyer will not be required to aver the name of the person making the warranty as the seller's agent since the defendant should have as good or better knowledge thereof than the plaintiff. *Santai v. Seitzinger Bros.*, Ford, 58 Schuyl. L. Rec. 42 (Pa. 1962).

7. Choice of law.

In wrongful death action involving claims based on breach of both express warranties and implied warranty of merchantability attaching to defendant's sale of radial tires to plaintiff and her deceased husband, court held (1) that under UCC § 1-105(1), since significant part of transaction, including sale, service, and use of the tires, had occurred in Florida, plaintiff's cause of action arose in Florida and was guaranteed by Florida Wrongful Death Act, (2) that plaintiffs' theory of recovery was governed by Florida's interpretation of Florida Uniform Commercial Code provisions governing actions for breach of express and implied warranties, and (3) that under Florida law, contributory negligence, assumption of the risk, and misuse were available defenses to action for breach of warranty. *Westerman v. Sears, Roebuck & Co.*, 577 F.2d 873 (5th Cir. Fla. 1978).

Where (1) under Texas pre-UCC law, transfer of properties lacking agreed values was an exchange of property and transfer of properties at agreed values was a sale, and where (2) horses involved in suit were traded at agreed values, court would refrain from deciding whether Texas UCC § 2-304(1) should be interpreted to retain pre-UCC distinction between sale and exchange of property (applying Texas law; denying plaintiff recovery for defendant's alleged breach of express and implied warranties provided for by UCC § 2-313(1) and § 2-314(1)). *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. Tex. 1978).

8. Evidence and burden of proof.

In action by operator of hog farm for breach of express and implied warranties attaching under UCC § 2-313(1)(a) and 2-314(1) to corn purchased by plaintiff to feed his hogs, evidence was sufficient to

support verdict and judgment in plaintiff's favor where it showed (1) that plaintiff's hogs became ill after eating contaminated corn purchased from defendant, (2) that samples of other corn that plaintiff at that time had also fed to his hogs, which corn was purchased from other sources, proved on analysis to be completely negative for toxins, while samples of corn sold by defendant were positive for toxins, and (3) that plaintiff's hogs had not been sick before eating corn purchased from defendant, but had become sick thereafter. *Tillman & Deal Farm Supply, Inc. v. Deal*, 146 Ga. App. 232, 246 S.E.2d 138 (1978).

In action by purchaser of stove from defendant seller for damages for destruction of plaintiff's home in fire allegedly caused by defect in stove, directed verdict for defendant was proper where plaintiff failed to introduce evidence from which jury could have found that destruction of her home had resulted from stove's alleged defect. Moreover, such verdict was proper, regardless of whether plaintiff's action was based on implied warranty of merchantability under UCC § 2-314, an express warranty governed by UCC § 2-313, or tort theory of products liability, since plaintiff under any of these theories was still required to prove that alleged defect in stove caused destruction of home. *Crocker v. Sears, Roebuck & Co.*, 346 So. 2d 921 (Miss. 1977).

Evidence was sufficient to support finding that seller breached implied warranty that feed was of merchantable quality and reasonably fit for commercial feeding of dairy cattle, where, inter alia, veterinarian testified that cows often back away from quality of mix which defendant sold plaintiff; although buyer was obligated under UCC § 2-607 to pay for goods accepted at a contract rate, he was not barred thereby from recovering damages resulting from defects in such goods. *Jorritsma v. Farmers' Feed & Supply Co.*, 272 Or. 499, 538 P.2d 61 (1975).

Where prior to using artificial insemination rancher got 95 percent calf crop via natural service, and obtained 70 percent calf crop during first year of artificial insemination, but obtained only 7 percent calf crop during second year using semen from same bull under almost identical

conditions, only logical inference was that something was wrong with semen purchased in second year and that express warranties made by breeding service company to rancher were not met, nor were implied warranties of merchantability and fitness met. *Waddell v. American Breeders Serv., Inc.*, 161 Mont. 221, 505 P.2d 417, 61 A.L.R.3d 801 (1973).

A cause of action grounded on breach of an express warranty under UCC § 2-313 does not fail because the plaintiff fails to prove a "defect" in the product—a breach of an express warranty is the failure of a product to comply with a definite warranty established by competent evidence. *Elanco Prods. Co. v. Akin-Tunnell*, 474 S.W.2d 789 (Tex. Civ. App. 1971), writ ref'd n.r.e., (May 3, 1972).

It is clear that plaintiff has not met his burden of proof of proving a cause of action under UCC § 2-313 (Express Warranty), UCC § 2-314 (Implied Warranty of Merchantability), and UCC § 2-315 (Implied Warranty of Fitness for a Particular Purpose), where no evidence was submitted by the plaintiff on the existence of such warranties or on any defect in the chemical at issue, and none is apparent from the testimony. *Toppi v. United States*, 332 F. Supp. 513 (E.D. Pa. 1971).

A statutory shift in the burden of proof from the purchaser to the seller in a breach of warranty action does not change the substantive character of the action, but is merely a change in evidentiary procedure. *Lewis v. Food Mach. & Chem. Corp.*, *John Bean Div.*, 245 F. Supp. 195 (W.D. Mich. 1965).

9. Submission to jury.

In an action to recover the purchase price of a bulldozer sold by the plaintiff to the defendant, the trial court erred in directing a verdict for the plaintiff where there was evidence that, although the plaintiff had represented that the bulldozer was in "A-1 condition" and knew the purposes for which the vehicle was intended to be used by the defendant, the bulldozer would not properly function. *Taylor v. Ward*, 393 So. 2d 1342 (Miss. 1981).

In action to recover balance of purchase price due on sale of herd of breeding cows which were later determined to be in-

fectured with disease of brucellosis, trial court's refusal to submit issue of express warranty to jury was error where there was evidence in record from which jury could have found that herd was expressly warranted to be free or reasonable free of brucellosis and where there was evidence from which jury could have found that herd was not as expressly warranted. *Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 521 P.2d 281 (1974).

Whether a person is the agent of the seller so that he has authority to bind the seller by a warranty, charge the seller with notice of a particular purpose for which the goods are desired by the buyer, or charge the seller with notice of non-conformity of the goods, is a question of fact to be determined by the jury when conflicting issues of evidence are involved. *Marble Card Elec. Corp. v. Maxwell Dynamometer Co.*, 10 Chest. Co. 145 (Pa. 1961).

10. Damages.

In action for breach of express and implied warranties attaching to contract to trade horses at agreed values, (1) although all elements of express warranty under UCC § 2-313(1) were established, plaintiff's sole remedy, under contract provision permitted by UCC § 2-719(1)(b), was to return his horse in exchange for specified monetary credit on another, and higher-priced, horse, and (2) under UCC § 2-316(3)(b), plaintiff's refusal to examine horse traded to him precluded any recovery for breach of implied warranty of merchantability. *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. Tex. 1978).

Where buyer of materials for needle point rug discovered that yarn incorporated into background varied in color, seller was liable for breach of express and implied warranties for difference in value of rug as warranted and value as made. *Barrows v. Mazaltov's, Inc.*, 312 Minn. 586, 252 N.W.2d 130 (1977).

In action against manufacturer of poultry meal for damages resulting from injury to poultry producer's chickens in that chickens fed with feed that included meal manufactured by defendant failed to achieve normal growth, gravamen of cause of action was breach of warranty of sale under UCC §§ 2-313 and 2-314 and damages sought were permissible under

and governed by UCC §§ 2-714 and 2-715, even though tortious breach on part of defendants was alleged. *Mid-South Milling Co. v. Loret Farms, Inc.*, 521 S.W.2d 586 (Tenn. 1975).

11. Affirmation of fact or promise.

New York publishing company breached express warranty, in contract for sale of publisher's business, that publisher "had not been notified of any claims which could give rise to litigation," where publisher was well aware, through oral and written communications, that author was contesting publisher's ownership interest in book series which formed substantial basis of bargain with buyer corporation, and where, after consummation of sale, author brought copyright action against resulting corporation. *Ainger v. Michigan Gen. Corp.*, 476 F. Supp. 1209 (S.D.N.Y. 1979), *aff'd*, 632 F.2d 1025 (2d Cir. N.Y. 1980).

General Business Law § 219-c was enacted at least in part to eliminate question whether art dealer's representations with respect to authorship of particular work were to be considered affirmation of fact, in which event description would create express warranty under Uniform Commercial Code § 2-313, or merely expression of dealer's opinion not giving rise to such warranty. *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461 (S.D.N.Y. 1978).

In action to rescind contract for fraud, where (1) buyer purchased baler from seller for \$2,995, based on offer in seller's letter which represented that baler was two years old and was worth \$4,250, and (2) buyer alone signed purchase agreement, court held (1) that purchase agreement did not constitute complete and exclusive statement of terms of contract, (2) that seller's letter offering baler for sale and making certain representations about it, including representations as to its age, was admissible supplementary evidence of consistent additional terms within meaning of UCC § 2-202(b), and (3) that in absence of any specification in purchase agreement about baler's age or model year, its age as set forth in seller's letter became both a consistent additional term of the purchase agreement and, by operation of law, an express warranty under UCC § 2-313(1)(a) (also holding that war-

ranty disclaimer found inferentially by trial court was inconspicuous and therefore ineffective). *Mill Printing & Lithographing Corp. v. Solid Waste Mgt. Sys.*, 65 A.D.2d 590 (2d Dep't 1978).

Supplier of natural gas which unconditionally warranted availability of large quantities of gas contracted to be delivered on basis of its expectation that most of gas would be obtained from its reserves in particular field, and which did not base contract on actual reserves in such field despite inherent uncertainty as to quantities of gas that would ultimately prove to be available therein, was not entitled to equitable relief from its contractual delivery obligations because of its mistake in overestimating quantity of gas reserves in such field (observing that same result would also obtain under UCC Art 2, which court assumed to be applicable to contract in suit, since express warranty under UCC § 2-313(1) may extend to quantity of goods to be sold). *Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062, 98 S. Ct. 1235, 55 L. Ed. 2d 762 (1978), *reh'g denied*, 435 U.S. 981, 98 S. Ct. 1632, 56 L. Ed. 2d 74 (1978), *cert. dismissed*, 435 U.S. 911, 98 S. Ct. 1462, 55 L. Ed. 2d 502 (1978).

In action for injuries suffered by plaintiff while using golf training device made by defendants, trial court properly concluded that defendants expressly warranted safety of device and that they were liable for plaintiff's injuries, where plaintiff's evidence indicated that before using device, he read and relied on words "Completely Safe Ball Will Not Hit Player", printed on container, but that when his golf club hit under ball, ball looped over club and hit him on head, and where defendants presented no evidence which could remove their assurance of safety from basis of bargain. Furthermore, trial court properly held for plaintiff on theory of breach of implied warranty of merchantability, where device failed to conform to words on container "Completely Safe Ball Will Not Hit Player", and was not fit for ordinary purposes for which such goods are normally used, and where defendants' attempt to limit scope of their warranties failed to meet requirements of UCC § 2-316 governing disclaimer and

modification of warranties. *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 74 A.L.R.3d 1282 (1975).

Cotton merchant made express warranties of quantity by stating on its 3 invoices number of bales of cotton sold thereby; and when merchant sold nonexistent cotton to broker, it breached both express and implied warranties and thereby rendered itself liable to broker for at least amount he paid therefor. *Simon v. Estate of Allen*, 497 S.W.2d 800 (Tex. Civ. App. 1973), *ref. n.r.e.*, *cert. denied*, 419 U.S. 843, 95 S. Ct. 76, 42 L. Ed. 2d 71 (1974).

A complaint which alleges the breach of an express or implied warranty of fitness arising as a consequence of the breaking of an intramedullary pin, warranted as properly manufactured and free of defects, which was surgically inserted in the plaintiff, stated a cause of action; for it might be possible for the plaintiff to prove a sale of the pin as opposed to an overall contract for hospital and medical services. *Cheshire v. Southampton Hosp. Ass'n*, 53 Misc. 2d 355 (1967).

12. —Aircraft.

Where (1) seller of used airplane told buyer that plane's engine had recently been completely overhauled and that new parts had been placed therein, (2) seller showed buyer entries in plane's engine and propeller logbook which reflected such overhaul and insertion of new parts in conformity with manufacturer's manual, (3) entries in engine logbook were false, although certified by Federal Aviation Administration inspector, and (4) buyer relied on seller's representations and logbook entries in buying plane, logbook constituted description of goods and part of basis of bargain between parties, and seller expressly warranted accuracy of information contained in logbook within meaning of UCC § 2-313(1)(b). *Miles v. Kavanaugh*, 350 So. 2d 1090 (Fla. App. 1977).

In action brought by buyer against seller of aircraft, if buyer's contention that 1968 aircraft was represented as 1969 aircraft were true, such would create express warranty under UCC § 2-313. *Crane v. Wood Motors, Inc.*, 53 Mich. App. 17, 218 N.W.2d 420 (1974).

Seller's assertions as to airplane's mechanical condition and the manner in which the aircraft had been maintained constituted express warranty and not merely casual expression intended to be understood as his opinion. *Downs v. Shouse*, 18 Ariz. App. 225, 501 P.2d 401 (1972).

13. —Boats and ships.

In action by buyer of four oil tankers against shipbuilder-seller for consequential damages under UCC § 2-714(3) and § 2-715(2) for losses incurred when tankers were inoperative because of cargo-pump and expansion-joint failures, in which shipbuilder filed third-party complaint against manufacturer of defective cargo pumps and manufacturer of pumps filed fourth-party complaint against manufacturer of defective expansion joints, (1) shipbuilder-seller breached express warranty to buyer under UCC § 2-313(1) that tankers would be built to operate efficiently and also implied warranties under UCC § 2-314(1) and § 2-315 of merchantability and fitness of tankers for particular purpose (transportation of aviation fuels); (2) buyer of tankers was entitled only to consequential damages caused by defects in design and was not entitled to damages caused by defects in materials or workmanship; (3) shipbuilder-seller's foreseeable liability to buyer was \$500,000, which was amount of adjusted revenues lost by buyer when two of its tankers were inoperative because of cargo-pump and expansion-joint failures due to defective design; (4) manufacturer of defective cargo pumps breached its express and implied warranties to shipbuilder and was liable, in amount of \$2,000,000, for losses sustained by shipbuilder as result of cargo-pump and expansion-joint failures in tankers sold to buyer (including shipbuilder's liability to buyer for lost revenues during period tankers were inoperative), but was not liable to shipbuilder for cost of installing separate stripping on each tanker; and (5) manufacturer of defective expansion joints, which were used in connection with cargo pumps, breached its express and implied warranties concerning such joints and was liable to manufacturer of pumps for costs of replacing all defective joints.

Falcon Tankers, Inc. v. Litton Sys., 380 A.2d 569 (Del. Super. 1977).

In buyer's action to rescind sale of sloop, oral assurances made by seller during course of parties' negotiations that sloop would become watertight after it had been placed into the water and allowed sufficient time to swell created express warranty under UCC § 2-313(1)(a) and (b), and evidence of such warranty was not barred by UCC § 2-202(b) since writings involved in case, which consisted of written notice of intent to purchase, bill of sale, and seller's advertisement incorporated by reference into bill of sale, did not constitute complete and exclusive statement of terms of parties' agreement (also holding that such express warranty did not merely relate to condition of sloop at time of sale, but of necessity related to time when sloop would be put into water and prepared for sailing). *Werner v. Montana*, 117 N.H. 721, 378 A.2d 1130 (1977).

The statement by the seller of a boat to the effect that it was fit, would not leak, and that he would personally guarantee that he would take care of it was an express warranty under GL c 106, § 2-313. *Luongo v. Zimmerman*, 47 Mass. App. Dec. 126 (1971).

14. —Building materials.

In action by buyer against paint manufacturer for damages for breach of warranty in sale of red barn paint, where evidence showed (1) that plaintiff was professional barn painter, (2) that he had not followed defendant's instructions when adding linseed oil to paint purchased, (3) that paint on customers' barns painted by plaintiff had faded within one to four months after its application, (4) that plaintiff had had many complaints, and (5) that defendant had admitted that a "fade problem" existed with respect to paint purchased by plaintiff, which was of "bottom-of-the-line" quality, court held, on affirming judgment for plaintiff, (1) that although plaintiff's proof of causation was not direct, jury could still infer from fact that fading of paint was quite uniform that presence or absence of linseed oil had had no effect on paint's fading; (2) that since defendant had admitted that paint had a "fade problem" which was to be expected with that brand of paint, jury

could therefore infer that paint was not "good barn paint" and that it violated defendant's express warranty made under UCC § 2-313(1)(a); (3) that jury could also infer that paint was not of merchantable quality in violation of implied warranty of merchantability created by UCC § 2-314(1) and (2)(c); (4) that, moreover, it was not fit for plaintiff's particular purpose in violation of implied warranty of fitness contained in UCC § 2-315; and (5) that trial court correctly instructed jury that it could consider whether plaintiff had complied with defendant's directions in determining whether plaintiff had been negligent, and whether such negligence had been a cause of his consequential damages (declining, since issue was first presented on appeal, to consider whether plaintiff's consequential damages should have reduced by 15 per cent to reflect proportion of fault that jury attributed to plaintiff's negligence, and stating that Minnesota courts had not determined whether comparative-fault principle should be applied in breach-of-warranty actions, although its application seemed equitable and appropriate under UCC § 2-715(2)(b)). *Chatfield v. Sherwin-Williams Co.*, 266 N.W.2d 171 (Minn. 1978).

Statement in catalogue that floor covering would absorb considerable flex without cracking was affirmation of fact constituting express warranty under UCC § 2-313, but rapid deterioration of floor covering did not constitute breach of such warranty where jury could have reasonably found that flex or movement in floor was more than considerable and more than floor material was designed to accommodate. *Interco, Inc. v. Randustrial Corp.*, 533 S.W.2d 257, 94 A.L.R.3d 720 (Mo. Ct. App. 1976).

Where record indicated that supplier of roofing material for greenhouses made several affirmations of fact relating to quality of roofing panels, jury was warranted in finding breach of express warranty when panel proved defective. *General Supply & Equip. Co. v. Phillips*, 490 S.W.2d 913 (Tex. Civ. App. 1972), writ ref'd n.r.e., (June 13, 1973).

Where buyer's particular project required homogeneous sheetrock, but in ordering "one inch" sheetrock buyer did not

specify whether it wished homogeneous or laminated type, either would comply with express warranty imposed by that description. *Tracor, Inc. v. Austin Supply & Drywall Co.*, 484 S.W.2d 446 (Tex. Civ. App. 1972), ref. n.r.e (Jan. 31, 1973).

15. —Drugs and cosmetics.

In an action for injuries sustained by plaintiff as the result of the application to her fingernails of a product sold to her by the defendant, the court erred in refusing to charge, as requested, that if the jury found that defendant had expressly warranted that the product was safe for anyone who purchased it, then the existence of the allergic reaction thereto was no defense where there was evidence from which the jury might have found an express warranty. *Drake v. Charles of Fifth Ave., Inc.*, 33 A.D.2d 987 (4th Dep't 1970).

16. —Farm goods; feed.

In action to rescind contract for fraud, where (1) buyer purchased baler from seller for \$2,995, based on offer in seller's letter which represented that baler was two years old and was worth \$4,250, and (2) buyer alone signed purchase agreement, court held (1) that purchase agreement did not constitute complete and exclusive statement of terms of contract, (2) that seller's letter offering baler for sale and making certain representations about it, including representations as to its age, was admissible supplementary evidence of consistent additional terms within meaning of UCC § 2-202(b), and (3) that in absence of any specification in purchase agreement about baler's age or model year, its age as set forth in seller's letter became both a consistent additional term of the purchase agreement and, by operation of law, an express warranty under UCC § 2-313(1)(a) (also holding that warranty disclaimer found inferentially by trial court was inconspicuous and therefore ineffective). *Mill Printing & Lithographing Corp. v. Solid Waste Mgt. Sys.*, 65 A.D.2d 590 (2d Dep't 1978).

In action by dairy farmer to recover damages from feed manufacturer for loss of milk production and injury to dairy cows allegedly caused by use of feed supplement, evidence was sufficient to es-

tablish breach of both express warranty under UCC § 2-313 and implied warranty of fitness under UCC § 2-315 where there was express representation that use of feed supplement would increase milk production and where there was decrease in milk production resulting from wrong instructions about proper way to use feed supplement. However, farmer was not entitled to recover consequential damages under UCC §§ 2-714(3) and 2-715(2): (1) considering that there were many factors which could affect production of milk, to permit use of difference between total milk production figures for whole of year during which feed supplement was used for approximately 2 months, and total production figures for whole of preceding year, as measure of damages, would constitute rankest form of speculation and conjecture; (2) with respect to damages for decrease in market value of cows affected by feed, it could not reasonably be determined how much of decline in valuation of cattle between date of injury and day on which they were sold was attributable to injury and how much to changes, if any, in market value between those dates. *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

In action by livestock owner against feed company for breach of express warranty, there was sufficient evidence to support finding of express warranty based on alleged representations of defendant company where there was evidence that employees of company verbally stated that their feed mixture would cause two-pound weight gain per day on calves belonging to livestock owner; however, there was insufficient evidence to support finding that it was this breach of warranty and not combination of number of other factors which proximately caused calves' failure to gain weight as expected. *Heil v. Standard Chem. Mfg. Co.*, 301 Minn. 315, 223 N.W.2d 37 (1974).

In action against feed company for damages to dairy herd resulting from use of feed additive, evidence that defendant's salesman told plaintiff dairy farmer that feed additive would not hurt his cattle was sufficient for jury to find express war-

ranty. *Boehm v. Fox*, 473 F.2d 445 (10th Cir. Kan. 1973).

17. —Farm goods; fertilizer and soil conditioners.

In action brought by buyer of fertilizer against seller for damages resulting when use of fertilizer on tobacco plants, represented by sellers to be appropriate and safe for tobacco, caused plants to wither and die, buyer's pleadings stated cause of action under UCC § 2-313 for breach of express warranty rather than breach of implied warranty under UCC § 2-315. *Potter v. Tyndall*, 22 N.C. App. 129, 205 S.E.2d 808 (1974), cert. denied, 285 N.C. 661, 207 S.E.2d 762 (1974).

Evidence of demonstrations and assurances that soil compaction substance would meet customer's needs supported finding that manufacturer of substance and its area dealer made express and implied warranties which were breached by manufacturer and dealer when application of substance to customer's premises proved ineffective. *Larutan Corp. v. Magnolia Homes Mfg. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973).

18. —Farm goods; herbicides and pesticides.

Where farmer purchased herbicide to control weeds in soybean field and seller agreed to mix herbicide with fertilizer and apply it to buyer's field, seller was liable for damages for low soybean yield on express warranty under UCC § 2-313(1)(a) that mixture would be properly mixed and applied, even though jury found no defect in herbicide but that mixture of herbicide and fertilizer was defective or that it was not properly applied. *Larson v. Meckling Fertilizer Co.*, 90 S.D. 521, 243 N.W.2d 167 (1976).

Under UCC § 2-313, where label on sack of insecticide, taken as a whole, not only listed chemical ingredients but also promised to potential buyer that insecticide sack contained 50 pounds of material which was insecticide developed especially for control of corn rootworm larvae, words expressing capacity of chemicals for corn rootworm larvae control were not mere words of opinion or puffing but rather there was express warranty as to effectiveness of insecticide to control corn

rootworm larvae. *Swenson v. Chevron Chem. Swenson v. Chevron Chem. Co.*, 89 S.D. 497, 234 N.W.2d 38 (1975).

While damages for loss of cattle and hay, services of veterinarian, and damage to land could and would have been prevented if plaintiff farm's employees had followed direction on container of weed killer and had not permitted cattle to graze pasture after application of weed killer, instructions on label or container were not relevant in determining breach of express warranty in action against supplier of weed killer, unless they were made "basis of bargain." *W.G. Tufts & Son v. Herider Farms, Inc.*, 485 S.W.2d 300 (Tex. Civ. App. 1972), ref. n.r.e (Feb. 7, 1973).

19. —Farm goods; livestock.

Although seller was liable under UCC § 2-313 for breach of express warranty that cows had been vaccinated for shipping fever when in fact cattle had not been vaccinated within time period needed to develop adequate immunity, and shipping fever epidemic spread throughout newly purchased herd and some of buyer's cows in old herd, buyer did not sustain burden of proving additional consequential damages as allowed under UCC § 2-715, for lost calf crop and cost of feeding and maintaining nonproductive heifers where (1) spread of shipping fever could have been significantly reduced by separating sick animals from healthy ones, (2) buyer, an experienced rancher, knew of this precautionary measure but only wooden fence separated two herds, and (3) there was conflicting expert testimony as to whether heifers could have been successfully bred at an earlier period. *Bemidji Sales Barn, Inc. v. Chatfield*, 312 Minn. 11, 250 N.W.2d 185 (1977).

In action by livestock owner against feed company for breach of express warranty, there was sufficient evidence to support finding of express warranty based on alleged representations of defendant company where there was evidence that employees of company verbally stated that their feed mixture would cause two-pound weight gain per day on calves belonging to livestock owner; however, there was insufficient evidence to support finding that it was this breach of warranty and not combination of number of other

factors which proximately caused calves' failure to gain weight as expected. *Heil v. Standard Chem. Mfg. Co.*, 301 Minn. 315, 223 N.W.2d 37 (1974).

Statement by seller of cow herd that cows were "bred to calve by June 1" by which buyers were induced to purchase cow herd at price per head equal to established price of cows with calf, coupled with seller's refusal to permit pregnancy test, supported finding that there was express warranty under UCC § 2-313(1) that cows in question would calve on or before date in question. *Brunner v. Jensen*, 215 Kan. 416, 524 P.2d 1175 (1974).

Whether oral assertions by seller of chickens that "the chickens would bloom out" and that buyer "would only get the good ones" constituted express warranties and whether buyer relied upon these assertions were material issues of fact to be determined by trier of fact. *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972).

20. —Farm goods; seed.

Certification tags required by law on bags of seed expressly warrant the contents of the bag to be as stated thereon, within reasonable and recognized tolerances, and are a warranty made by the vendor who causes the certification to be attached. An attempt to modify this express warranty by "unbargained language of disclaimer" at the bottom of the shipping invoice was inconsistent with this express warranty and to that extent was unreasonable. *Walcott & Steele, Inc. v. Carpenter*, 246 Ark. 95, 436 S.W.2d 820 (1969).

21. —Machinery and equipment.

In action to rescind contract for fraud, where (1) buyer purchased baler from seller for \$2,995, based on offer in seller's letter which represented that baler was two years old and was worth \$4,250, and (2) buyer alone signed purchase agreement, court held (1) that purchase agreement did not constitute complete and exclusive statement of terms of contract, (2) that seller's letter offering baler for sale and making certain representations about it, including representations as to its age, was admissible supplementary evidence of consistent additional terms within

meaning of UCC § 2-202(b), and (3) that in absence of any specification in purchase agreement about baler's age or model year, its age as set forth in seller's letter became both a consistent additional term of the purchase agreement and, by operation of law, an express warranty under UCC § 2-313(1)(a) (also holding that warranty disclaimer found inferentially by trial court was inconspicuous and therefore ineffective). *Mill Printing & Lithographing Corp. v. Solid Waste Mgt. Sys.*, 65 A.D.2d 590 (2d Dep't 1978).

Allegations that plaintiff purchased burglar alarm system from defendant, that the system was to remain the property of the defendant, that plaintiff was told that defendant was reliable firm, had an excellent staff, that the system was foolproof, and that the system was a substantial deterrent to burglaries, that plaintiff's premises were burglarized, and that defendant had breached an express warranty and an implied warranty, and had been guilty of gross negligence, breach of fiduciary duty, and intentional tort did not state a claim upon which relief could be granted where it contained no allegations of facts stating in what respect any warranty was breached or that any breach was a proximate cause of the burglary. *Craig v. American Dist. Tel. Co.*, 91 Misc. 2d 1063 (1977).

In action against manufacturer of mixed nuts by purchaser who suffered tooth injury when biting down on unshelled nut, directed verdict in favor of manufacturer was proper since: (1) evidence did not support purchaser's claim of express warranty within meaning of UCC § 2-313(1), where no statement on label indicated that nuts were shelled and where use of clear glass jar revealing only shelled nuts was mere passive marketing tool and not affirmative representation sufficient to give rise to express warranty; and (2) manufacturer did not breach implied warranty of merchantability under UCC § 2-314, since presence of limited quantities of unshelled nuts was not sufficient to render jar of nuts unmerchantable, or unfit for ordinary purposes. *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976).

Seller neither tendered delivery nor delivered concrete forms to buyer pursuant

to UCC §§ 1-201(14), 2-301 and 2-503(1), and seller breached express warranties under UCC § 2-313 that forms were free from encumbrance and that seller would warrant and defend against demands of all other persons, where third party claimed storage lien on forms, refused to allow buyer to take possession, and seller was unsuccessful in securing release from third party of his claimed lien. *Goosic Constr. Co. v. City Nat'l Bank*, 196 Neb. 86, 241 N.W.2d 521 (1976).

In action by purchaser of bulk curing tobacco barn against its manufacturer for breach of express and implied warranties, although some of manufacturer's promises and descriptions constituted mere "sales puffing" or commendations of barn, there was sufficient testimony to support finding that manufacturer made express oral warranties by promise and description that barns were of first-rate quality and that necessary parts and prompt service would be available, if needed, where manufacturer's agent represented: (1) that barn was of first quality materials and workmanship, (2) that it carried blower system which would furnish more air and dry and cure tobacco more efficiently and with less cost, (3) that it operated electronically and had automatic firing system which would automatically advance itself through range of temperatures after being manually set for each range, (4) that barn was the most well constructed, most durable barn on market, (5) that competent men at all times would be on the spot within two hours to correct anything that might go wrong, (6) that there would be plenty of parts available, if needed, and (7) that manufacturer had been constructing, selling, and distributing barns long enough so that all bugs and defects were ironed out. There was sufficient evidence to support finding that manufacturer breached both oral express warranties as to superior craftsmanship and first-rate quality and implied warranty of merchantability where there was evidence that upon delivery of bulk barn, angle iron that held steel floor was loose and sliding, corner boards were loose, causing cracks, doors would not close, roof was buckled, tobacco racks did not fit, and sides of barn buckled inward

when barn was filled with tobacco, notwithstanding evidence that manufacturer sent its servicemen who remedied defects to satisfaction of purchaser, with exception of doors and caving in of sides. *Bell v. Harrington Mfg. Co.*, 265 S.C. 468, 219 S.E.2d 906 (1975).

Evidence that motors did not conform to the requirements of "squirrel cage" motors is irrelevant where there is nothing in the contract which describes the motors as of the "squirrel cage" variety. *Marble Card Elec. Corp. v. Maxwell Dynamometer Co.*, 10 Chest. Co. 145 (Pa. 1961).

22. —Machinery and equipment; cleaning equipment.

Express warranty under UCC 2-313 was created by information sheet for automatic car washing equipment which stated that pivoted safety hood, by covering opening in floor, "eliminates all possibility of persons stepping into an open pit." *Hensley v. Sherman Car Wash Equip. Co.*, 33 Colo. App. 279, 520 P.2d 146 (1974).

An oral statement by the seller that certain coin-operated dry cleaning machines purchased by the buyer would last at least 10 years without a major breakdown is an express warranty under this section. *Earp v. Hunt*, 238 Ark. 936, 386 S.W.2d 492 (1965).

23. —Machinery and equipment; construction equipment.

In action by owner of heavy-duty construction equipment for damage to equipment's engines that resulted from use of defective antifreeze that owner purchased to winterize such engines, where evidence showed that antifreeze purchased contained chloride, that chloride could corrode internal-combustion engines because it was a salt-water solution, that equipment owner had purchased the antifreeze from defendant retailer, that retailer had previously purchased it from a wholesale supplier (against whom retailer filed third-party action), and that the wholesale supplier had originally purchased it from manufacturer (against whom supplier filed fourth-party action), (1) retailer was liable to equipment owner, under UCC §§ 2-313(1)(a), 2-314(1), and 2-315, for breach of express warranty that anti-

freeze was suitable for use in engines of owner's construction equipment and for breach of implied warranties of merchantability of such antifreeze and fitness thereof for particular purpose; (2) wholesale supplier was liable, under theory of breach of implied warranty of merchantability of antifreeze under UCC § 2-314(1), to retailer for same damages for which retailer was liable to equipment owner; and (3) manufacturer was liable to wholesale supplier on theory of strict liability in tort. *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977).

Where it was clear, under facts of case, that unless seller had agreed to build a crane as good or better than an otherwise available crane, and fit for the needs and purposes of the buyer, there would not have been a sale, the evidence in the record substantiates the trial judge's finding of a breach of express warranty under UCC § 2-313. *Uganski v. Little Giant Crane & Shovel, Inc.*, 35 Mich. App. 88, 192 N.W.2d 580 (1971).

24. —Machinery and equipment; presses.

In action for breach of warranty in sale of defective printing press, where sale transaction was complicated by existence of security agreement signed by buyer which contained disclaimer of all express and implied warranties other than those set forth in security agreement, and where there was testimony that seller had told buyer that if buyer would sign security agreement, seller would "make the press print," seller's statement was promise that formed part of bargain of sale and created express warranty within meaning of UCC § 2-313(1)(a) (also holding that testimony that seller had made such warranty was not barred by UCC § 2-202, and that words in security agreement which limited such warranty were inoperative under UCC § 2-316(1)). *Drier v. Perfection, Inc.*, 259 N.W.2d 496 (S.D. 1977).

In products liability action for personal injuries by punch press operator against manufacturer of punch press and others, plaintiff had viable theory of breach of express warranty, even under strict interpretation of UCC § 2-313, where press

was advertised to be fail-safe, where plaintiff's employer ordered press with fool-proof control, but where even by testimony of manufacturer's own officers, press was neither fail-safe nor fool-proof, if those words had separate meaning. *Wells v. Web Mach. Co.*, 20 Ill. App. 3d 545, 315 N.E.2d 301 (1st Dist. 1974).

25. —Machinery and equipment; tanks and pipes.

In action for breach of express and implied warranties in sale of bellows-expansion joints purchased for use in buyer's steam utility system, (1) seller's recommendation in letter to buyer that joints be made of Monel metal, rather than stainless steel, did not amount to implied warranty of fitness of joints for particular purpose under UCC § 2-315, since buyer did not inform seller that buyer was relying on seller to select metal that would satisfy buyer's need for an extremely anticorrosive substance; (2) buyer did not establish breach of implied warranty of merchantability of joints under UCC § 2-314(1), since joints furnished by seller met all quality standards prescribed by UCC § 2-314(2); (3) statement in seller's letter that seller would guarantee "operation of the application as well as the recommended expansion joints" if joints were installed according to seller's recommendations was not express warranty (see UCC § 2-313(1)(a)) that each joint would work, but was only guarantee that seller's application scheme for placement of joints would adequately absorb expansion and contraction of buyer's steam pipes; and (4) purchase-order warranty that joints would comply with all specifications and would be free of defects in workmanship and materials was not breached, since buyer (a) did not furnish any specifications as to required service longevity of joints or degree of their resistance to corrosion, and (b) alleged design defects of joints, with regard to seller's failure to anneal joints, liner design of joints, and thickness of bellows walls of joints, were not shown to have caused failure of joints after their installation in buyer's utility system. *Wisconsin Elec. Power Co. v. Zallea Bros.*, 443 F. Supp. 946 (E.D. Wis. 1978), *aff'd*, 606 F.2d 697 (7th Cir. Wis. 1979).

In action by water corporation's contractor (buyer) against seller of filter tanks, failure of distributor heads of filter tanks did not constitute breach of implied warranty of merchantability under UCC § 2-314, breach of warranty of fitness for particular purpose under UCC § 2-315, or breach of any express warranty under UCC § 2-313, where distributor heads failed under excessive water pressure in water system due to defect in water corporation's plans and specifications, contractor bought tanks in reliance upon contract specifications without reliance upon any warranty, affirmation or representation by seller as to merchantability or fitness for intended use, and seller's statement to buyer that tanks "should" be able to remove iron and manganese from water did not amount to affirmation of fact affecting bargain between contractor and seller. *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 684, 222 S.E.2d 709 (1976).

26. —Motor vehicles and equipment.

Defendant's advertisement that the car he sold to plaintiff was in "very good condition" and his statements at the time of sale that the car had not been in a collision, when in fact the car had previously been "totaled" in an accident and then rebuilt by defendant at his body and fender shop, and that he was selling the car for a friend who had left the country in order to divert plaintiff's suspicion concerning possible trouble with the car, constitute express warranties which may be enforced against both merchants and nonmerchants (Uniform Commercial Code, § 2-313) and which may exist, despite the absence of the words "guarantee or warranty", as long as there is an affirmation of fact which is made a part of the basis of the bargain; in addition, defendant's active concealment and failure to disclose the fact that the car had been in an accident constitute fraud especially since defendant used his skill to restore the exterior of the car to lull to rest any suspicion as to the existence of the facts concealed; accordingly, since plaintiff properly revoked his acceptance (Uniform Commercial Code, § 2-608) one month after purchase, having first tried on his own to have the car repaired, he is entitled to the cost of the car less the amount

realized from the subsequent sale. *McGregor v. Dimou*, 101 Misc. 2d 756 (1979).

In action by buyer of new Chevrolet Corvette under UCC § 2-313(1) for breach of express warranty, where evidence showed (1) that after car's delivery from selling dealer, both fan belts broke, causing engine to overheat severely, (2) that after car had been repaired by second dealer, engine again overheated because of oil loss caused by second dealer's improper repairs, (3) that third dealer unsuccessfully performed additional repairs, and (4) that buyer was never charged for any repair work, since such work was treated by both dealers and also defendant manufacturer as being covered by manufacturer's express warranty, court held (1) that evidence clearly showed that car was defective, (2) that since manufacturer undertook to perform all repairs without charge, all of the car's defects came under manufacturer's express warranty, (3) that such warranty was clearly breached under rule that unsuccessful efforts to remedy defects found to exist in a product renders seller-warrantor liable therefor, and (4) that since only warranty involved was that of manufacturer, and since both dealers had been expressly authorized to perform warranty repair work at manufacturer's expense and as manufacturer's agents, dealers were not liable to buyer (remanding cause for determination of manufacturer's liability to buyer). *Kure v. Chevrolet Motor Div.*, 581 P.2d 603 (Wyo. 1978).

Where buyer of used three-wheel motorcycle, which had defective weld on rear axle that gave way on date buyer bought vehicle, claimed that statements made by seller's employee (as to whom no deposition was contained in record on appeal) constituted express warranty of dependability and safety of such motorcycle under UCC § 2-313(1)(a), and where seller testified that he himself did not make any representations concerning vehicle's safety and relied on an "as-is" disclaimer that was prominently featured in bill of sale signed by buyer to negate any inference of an express warranty, it could not be fairly said that as a matter of law no express warranty was created, and re-

viewing court would therefore reverse summary judgment on such issue in favor of defendant seller. *Knipp v. Weinbaum*, 351 So. 2d 1081 (Fla. App. 1977), cert. denied, 357 So. 2d 188 (Fla. 1978).

In action by buyers of automobile tires against seller and manufacturer for personal injuries allegedly resulting from blowout of tire, language on invoice given to buyers to effect that "the tires identified hereon are guaranteed for 36,000 miles...against all road hazards, including...blowout," constituted express warranty under UCC § 2-313 that tires would not blow out during first 36,000 miles of use. *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 347 A.2d 253 (1975).

In absence of proof that alleged malfunctioning of car was caused by defect in parts or workmanship, and that manufacturer failed to repair or replace parts in accordance with express warranty that car would be free from defects in material or workmanship, plaintiff could not recover on theory of breach of express warranty. *Collum v. Fred Tuch Buick*, 6 Ill. App. 3d 317, 285 N.E.2d 532 (1st Dist. 1972).

27. —Motor vehicles and equipment; trucks.

An express warranty given by the defendant with regard to certain engine parts it sold to the plaintiff and installed in a truck engine applied only to those parts and not to the entire engine into which the parts were installed. *Easley v. Day Motors, Inc.*, 796 So. 2d 236 (Miss. Ct. App. 2001).

Where used truck purchased by buyer could not be used on state highways until state inspection sticker had been affixed to it, seller's promise to affix sticker to truck related to goods sold, was part of basis of bargain, and constituted an express warranty under UCC § 2-313(1)(a) (holding that under Texas Consumer Protection Act, buyer was entitled to triple damages for seller's breach of such warranty). *Allen v. Parsons*, 555 S.W.2d 522 (Tex. Civ. App. 1977), writ dismissed by agreement, (Mar. 8, 1978).

A manufacturer's warranty that each new truck sold by it was free from defects in material and workmanship under normal use and service met the statutory

requirement for an express warranty. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (1965), overruled on other grounds, *Huang v. Garner*, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1st Dist. 1984).

28. Description of goods.

In action to rescind contract for fraud, where (1) buyer purchased baler from seller for \$2,995, based on offer in seller's letter which represented that baler was two years old and was worth \$4,250, and (2) buyer alone signed purchase agreement, court held (1) that purchase agreement did not constitute complete and exclusive statement of terms of contract, (2) that seller's letter offering baler for sale and making certain representations about it, including representations as to its age, was admissible supplementary evidence of consistent additional terms within meaning of UCC § 2-202(b), and (3) that in absence of any specification in purchase agreement about baler's age or model year, its age as set forth in seller's letter became both a consistent additional term of the purchase agreement and, by operation of law, an express warranty under UCC § 2-313(1)(a) (also holding that warranty disclaimer found inferentially by trial court was inconspicuous and therefore ineffective). *Mill Printing & Lithographing Corp. v. Solid Waste Mgt. Sys.*, 65 A.D.2d 590 (2d Dep't 1978).

In action for breach of express warranty in sale of used boat, where buyer claimed that survey of boat, ordered by seller's agent after parties had agreed only on amount of purchase price and down payment for boat, constituted express warranty under UCC § 2-313(1)(b), and that such warranty was breached when boat proved to have extensive dry rot and insect infestation contrary to description in survey that boat was "very sound" and "well suited for its intended purpose," and where seller claimed that survey description of boat was not part of "basis of bargain" within meaning of UCC § 2-313(1)(b) because survey was made after sale had taken place, seller's contention could not be sustained because (1) seller confused "contract" with "bargain," but "bargain" was process that could continue after buyer had accepted seller's offer; (2) at time buyer was informed of survey

report, certain aspects of the contract, such as time of payment and transfer of possession, had not been settled; and (3) although survey description of boat did not induce actual formation of contract, jury could have found that since such description was intended by seller to induce buyer's satisfaction with contract and to lessen his degree of vigilance in inspecting boat prior to accepting it, seller's use of survey description to affirm condition of boat went to essence of the contract. *Autzen v. John C. Taylor Lumber Sales, Inc.*, 280 Or. 783, 572 P.2d 1322 (1977).

Although written contract for sale and purchase of mobile home provided that article was sold "as is" and disclaimed all warranties, either express or implied, and use of descriptions, samples or models as part of contract, seller made express warranties that mobile home would conform to description given by salesman and sample mobile home; and these warranties rested on "dickered" aspects of individual bargain, and went so clearly to essence of bargain that words of disclaimer in purchase agreement were repugnant to basic dickered terms. *Mobile Hous., Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App. 1973).

Even if order for "Club Cab" pickup truck could be considered valid contract in absence of dealer's signature thereon, use of truck booklet by dealer's salesman to describe and illustrate truck and optional equipment created sale by description or sample and gave rise to warranty that goods delivered would conform to sample or description used in negotiations, which was breached by delivery of different pickup truck. *Antonucci v. Stevens Dodge, Inc.*, 73 Misc. 2d 173 (1973).

Since warranties of sample and description are characterized as express warranties, the whole of the goods shall conform to the sample or model and must be in accordance with the obligations under the contract. *Graulich Caterer, Inc. v. Hans Holterbosch, Inc.*, 101 N.J. Super. 61, 243 A.2d 253 (App. Div. 1968).

29. —Advertisement.

Brochure distributed by seller and ultimately received by buyer depicting seller's trailer and stating that trailer had neces-

sary design strength for all types of material hauling and dumping, ideal for droploading, dumping into high hoppers or spreader machines, such statements constitute more than expression of opinion by seller or puffing for which liability cannot be imposed under Mississippi Code Annotated § 75-2-313. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

Recovery under theory of breach of express warranty, § 2-313, was precluded where buyer of trailers failed to prove by preponderance of evidence that statements contained in seller's brochure were relied upon by buyer prior to purchase. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

Express warranties may be made in advertisements, pamphlets, or brochures (holding that brochure of manufacturer of printing press contained express warranty within meaning of UCC § 2-313(1)(a) concerning ability of press to accommodate paper sizes, perform impression speeds, and control inking). *Drier v. Perfection, Inc.*, 259 N.W.2d 496 (S.D. 1977).

In products liability action for personal injuries by punch press operator against manufacturer of punch press and others, plaintiff had viable theory of breach of express warranty even under strict interpretation of UCC § 2-313 where press was advertised to be fail-safe, where plaintiff's employer ordered press with fool-proof control, but where even by testimony of manufacturer's own officers, press was neither fail-safe nor fool-proof, if those words had separate meaning. *Wells v. Web Mach. Co.*, 20 Ill. App. 3d 545, 315 N.E.2d 301 (1st Dist. 1974).

Express warranty must ordinarily be created at time product is purchased, but such warranty can be created by advertisements. *Anthony v. GMC*, 33 Cal. App. 3d 699 (2d Dist. 1973).

30. —Blueprint or specification.

Express warranty under UCC § 2-313(1)(b) need not be by words but can be by conduct, such as by showing blueprint or other description of goods to buyer. Moreover, fraud is not essential ingredient of action for breach of express war-

ranty, and seller need not have had specific intention to make express warranty. It is sufficient, instead, that warranty made formed part of basis of bargain. *Miles v. Kavanaugh*, 350 So. 2d 1090 (Fla. App. 1977).

Where defendant seller contracted with plaintiff buyer to supply sleeve bearings impregnated with specified oil in accord with government specifications for use in manufacture of bomb fuses, but instead supplied bearings coated with non-conforming oil, and where, although bearings coated with non-conforming oil were visibly different from conforming bearings, buyer used non-conforming bearings to manufacture two lots of bomb fuses which were discovered to be defective as result of use of such bearings, under UCC §§ 2-313, 2-314, and 2-315, seller was liable to buyer for breach of its express warranty to supply bearings meeting applicable specifications and its implied warranties of merchantability and fitness for a particular purpose. *General Instrument Corp., F.W. Sickles Div. v. Pennsylvania Pressed Metals, Inc.*, 366 F. Supp. 139 (M.D. Pa. 1973), *aff'd*, 506 F.2d 1051 (3d Cir. Pa. 1974), *aff'd*, 506 F.2d 1052 (3d Cir. Pa. 1974).

31. —Catalog.

In connection with sale of industrial machine where buyer relied on certain representations contained in seller's catalog relating to performance of machine, where purchase order incorporated by reference eight-page document of technical specifications, but where seller's offer included express warranty that product was free from defects in material and workmanship and comprehensive exclusionary provision which stated, in part: "This warranty is in lieu of any other warranty whether expressed or implied other than a warranty of title. There are no warranties of merchantability or fitness," under UCC § 2-316(1), express representations made in sales literature and warranty provisions of seller's offer could be construed consistently since language warranting product to be free from defect in material and workmanship was entirely consistent with promotional literature's description of what machine could do; writings could be construed to mean that sales material

and technical specifications established standard of product's performance when free of defects in material and workmanship and, thus, exclusionary language did not render inoperative seller's express representations in promotional literature it supplied. *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364 (E.D. Mich. 1977).

Where there was evidence that plaintiff had received catalogue, but no evidence that he relied upon catalogue description in purchasing hammer, plaintiff is not entitled to recover for breach of express warranty of UCC § 2-313(1)(b), since he did not show that the catalogue representations of fact describing the hammer were made "part of the basis of the bargain." *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972).

32. Sample or model.

Buyer of polystyrene beads was not entitled to recover damages for breach of express warranty of sale by sample under UCC § 2-313(1)(c), although material supplied by seller contained impurities and failed to produce clear plastic, where breach of warranty by sample was only theory buyer relied on in trial court and only basis of recovery found by trial judge, where buyer's entire claim for damages was related to its "down-time" and extra costs in adapting its machinery and polystyrene beads supplied to meet its needs, but where size and form of material, not its impurity, caused buyer's problems and resulting "down-time" and where material supplied by seller generally conformed in size and shape with beads furnished as sample; there was no breach of warranty by sample with regard to size and shape of material supplied. *Plasco, Inc. v. Free-Flow Packaging Corp.*, 547 F.2d 86 (8th Cir. Mo. 1977).

In action by seller for purchase price of coal, buyer's counterclaim based on seller's alleged breach of express warranty and implied warranties of merchantability and fitness of coal for particular purpose could not be sustained where (1) evidence did not show that seller had created express warranty under UCC § 2-313(1)(c) by showing buyer samples and analyses of coal's quality, but revealed instead that such samples and analyses

were shown to buyer solely for his information; (2) coal delivered by seller was fit for ordinary purpose for which it was used, was burned as fuel by buyer's customers, and thus complied with seller's implied warranty of merchantability under UCC § 2-314(1); (3) implied warranty of fitness of coal for particular purpose did not arise under UCC § 2-315, since buyer did not rely on seller's skill and judgment in furnishing coal suitable for buyer's customers; and (4) even assuming that seller had breached such express and implied warranties as buyer contended, buyer still could not recover on counterclaim because he did not give seller adequate notice of alleged breach, as required by UCC § 2-607(3)(a), and such breach also was not proximate cause of damages buyer allegedly sustained. *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977).

Under UCC § 2-316(3)(b), buyer received no warranty of merchantability on table tops where buyer had opportunity to inspect, test, and examine sample table tops furnished by manufacturer and ordered large quantities of table tops on basis of such samples; even if defect was latent, buyer was experienced in wood industry and, as such, either knew or should have known that wood has tendency to warp because of change in moisture content and that sealing of wood was proper method to treat such distortion. *Michael-Regan Co. v. Lindell*, 527 F.2d 653 (9th Cir. Cal. 1975).

UCC § 2-313(1)(a), pertaining to samples or models giving rise to express warranties, did not apply in action by purchaser of computer equipment alleging that computer equipment manufactured and sold by defendant for use in plaintiff's insurance premium service business did not perform as defendant had represented or warranted it would where all prior negotiations, demonstrations, "conditional" lease, and experiments, culminated in two outright sales whose terms were put into final written expression signed by plaintiff which set out entire agreement between parties and by separate conspicuous paragraph excluded all outside matters, thus conforming to UCC § 2-202 as final written ex-

pression of parties and to UCC § 2-316 as exclusion of matters not specified in final agreements. *Investors Premium Corp. v. Burroughs Corp.*, 389 F. Supp. 39 (D.C.S.C. 1974).

Where distributor of carbon dioxide was interested in purchasing brewer's surplus carbon dioxide, and requested sample of surplus carbon dioxide which was tested and found to be acceptable, and where past deliveries of surplus carbon dioxide aggregating over 700,000 pounds disclosed no deviation from quality of sample nor any objectionable odor which formed basis of present action, sample must be considered as describing values of goods contracted for unless there was clear, convincing and unmistakable denial of such responsibility. *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522 (D.D.C. 1971).

Manufacturer knew that wine buyer relied on and trusted judgment of manufacturer to send red, dry wine corresponding to samples; held, manufacturer's failure to deliver wine in accordance with sample supplied was breach of express warranty. *Regina Grape Prods. Co. v. Supreme Wine Co.*, 357 Mass. 631, 260 N.E.2d 219 (1970).

Purchaser's customer refused to accept substituted model; there was evidence from which it could be found that there was express warranty that model supplied would be identical to model requested; on investigation differences between models were discovered; purchaser suffered loss by customer's refusal; held, directing verdict in favor of seller on purchaser's counterclaim for damages was reversible error. *Helson's Premiums & Gifts, Inc. v. Duncan*, 9 N.C. App. 653, 177 S.E.2d 428 (1970).

Since warranties of sample and description are characterized as express warranties, the whole of the goods shall conform to the sample or model and must be in accordance with the obligations under the contract. *Graulich Caterer, Inc. v. Hans Holterbosch, Inc.*, 101 N.J. Super. 61, 243 A.2d 253 (App. Div. 1968).

Where the seller, prior to the sale of a number of storm windows, submitted a sample to the buyer, there was not only an express warranty that the windows would

conform to the sample but an implied warranty that they were fit for the purpose intended (holding that where there was some doubt about the sufficiency of the windows to keep out the wind and rain, it was for the jury to determine whether they were fit for the purpose intended). *Loomis Bros. Corp. v. Queen*, 17 Pa. D. & C.2d 482 (1958).

Where a seller of gray iron castings submitted a series of samples to the buyer, after which suggested changes were made and each sample approved, there was a warranty under subsection (1) (c) of this section that the castings sold to the buyer under the contract would be the same as the sample. *John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co.*, 19 F.R.D. 379 (M.D. Pa. 1956), *aff'd*, 239 F.2d 815 (3d Cir. Pa. 1956).

33. —Description or affirmation distinguished.

Small piece of molded acrylic plastic which was given to buyer of boats by seller-manufacturer to illustrate materials and methods used in construction of boats, did not create "sale by sample" under UCC § 2-313(1)(c), but piece of plastic and representations made in regard thereto could be found to constitute express warranty under UCC § 2-313(1)(a) or (b). *Pacific Marine Schwabacher, Inc. v. HydrosSwift Corp.*, 525 P.2d 615 (Utah 1974).

34. —Fabric or garments.

Buyer was entitled to damages under UCC § 2-714(2), and to incidental damages under UCC § 2-714(3) and § 2-715(1), for seller's breach of express and implied warranties of fitness for particular purpose, and also express warranty by sample attaching to wrap coats purchased by buyer, where (1) samples of such coats were made part of basis of bargain and created express warranty under UCC § 2-313(1)(c) that all goods would conform to such samples, (2) seller knew that buyer was relying on seller to furnish goods that would be fit for buyer's particular purpose within meaning of UCC § 2-315, and (3) seller delivered over 3,700 nonconforming coats that were not fit for buyer's resale purposes. *Alafoss v. Premium Corp. of Am., Inc.*, 448 F. Supp. 95 (D. Minn. 1978),

aff'd in part, *rev'd* on other grounds, 599 F.2d 232 (8th Cir. Minn. 1979).

In action arising when hotel refused to pay for specially manufactured carpeting because of excessive shading, there was no breach of express warranty under UCC § 2-313 where carpet conformed precisely to both description of goods contained in purchase order and to sample which had been approved by buyer; neither were implied warranties of merchantability and fitness breached under UCC §§ 2-314 and 2-315 where buyer relied on his own judgment to select goods and manufacturer was not at liberty to alter detailed specifications. *Mohasco Indus., Inc. v. Anderson Halverson Corp.*, 90 Nev. 114, 520 P.2d 234 (1974).

Seller of fabric was liable to buyer for breach of express warranties of merchantability and fitness for particular purpose, notwithstanding seller's invoice contained statement "No refunds after 5 days. Check goods before cutting," where buyer's purchase order stated that fabric was to be used for swimwear and that all "colors, prints and bonding processes must meet swimwear specifications," where buyer's order was based on sample supplied by seller and, although another fabric was substituted for sample fabric, such modification was initiated by seller, where seller's salesman assured buyer that substituted fabric would meet swimwear specifications, and where fabric supplied and subsequently manufactured into swimsuits was defective and failed to meet minimum performance standards for colorfastness: (1) express warranties of merchantability and fitness for particular purpose were established under UCC § 2-313 based on buyer's order form, representations of seller's salesman and samples supplied by seller; and (2) there was no showing that warranties of merchantability and fitness had been excluded or modified under UCC § 2-316. *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973).

35. —Mobile homes.

Purchaser of new mobile home, who purchased from manufacturer through seller after viewing model and who subsequently discovered numerous defects, was entitled to recover from seller for breach of

express warranty under UCC § 2-313 based on seller's assurance that home purchased would conform to model home and repeated promises of seller to make repairs to home. *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976).

Although written contract for sale and purchase of mobile home provided that article was sold "as is" and disclaimed all warranties, either express or implied, and use of descriptions, samples or models as part of contract, seller made express warranties that mobile home would conform to description given by salesman and sample mobile home; and these warranties rested on "dickered" aspects of individual bargain, and went so clearly to essence of bargain that words of disclaimer in purchase agreement were repugnant to basic dickered terms. *Mobile Hous., Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App. 1973).

36. Language as creating warranty.

In sales contract, express warranties based on UCC § 2-313 need not be part of written agreement or bill of sale, but written expressed warranties given in a written agreement or bill of sale in accordance with UCC § 2-313 may be explained or supplemented by oral express warranties in accordance with UCC §§ 2-202 and 2-316, where written agreement was not intended by parties as final expression of their agreement. *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975).

A petition alleging that Zoysia lawn grass was warranted by the seller to survive winter weather, and that the grass subsequently died of the cold, states a cause of action, for the decisive test, in determining whether language used is a mere expression of opinion or a warranty, is whether it purports to state a fact upon which it may fairly be presumed the seller expects the buyer to rely, and upon which the buyer would ordinarily rely, and no particular form of words is necessary to constitute a warranty. *Bell v. Menzies*, 110 Ga. App. 436, 138 S.E.2d 731 (1964).

37. —Statement of value.

In action to rescind contract for fraud, where (1) buyer purchased baler from seller for \$2,995, based on offer in seller's

letter which represented that baler was two years old and was worth \$4,250, and (2) buyer alone signed purchase agreement, court held (1) that purchase agreement did not constitute complete and exclusive statement of terms of contract, (2) that seller's letter offering baler for sale and making certain representations about it, including representations as to its age, was admissible supplementary evidence of consistent additional terms within meaning of UCC § 2-202(b), and (3) that in absence of any specification in purchase agreement about baler's age or model year, its age as set forth in seller's letter became both a consistent additional term of the purchase agreement and, by operation of law, an express warranty under UCC § 2-313(1)(a). *Mill Printing & Lithographing Corp. v. Solid Waste Mgt. Sys.*, 65 A.D.2d 590 (2d Dep't 1978).

Subsection (1)(a) did not govern a case where the seller, after misrepresenting the value of a diamond ring, received it back from the purchaser and thereafter refused either to redeliver the ring or refund the purchaser his purchase price. *Hamilton v. Schwadron*, 82 N.J. Super. 493, 198 A.2d 128 (App. Div. 1964).

38. —Opinion or commendation.

General Business Law § 219-c was enacted at least in part to eliminate question whether art dealer's representations with respect to authorship of particular work were to be considered affirmation of fact, in which event description would create express warranty under Uniform Commercial Code § 2-313, or merely expression of dealer's opinion not giving rise to such warranty. *Dawson v. G. Malina, Inc.*, 463 F. Supp. 461 (S.D.N.Y. 1978).

Seller's words to effect that "The horse is sound" spoken during telephone conversation between buyer and seller constituted opinion or commendation rather than express warranty under UCC § 2-313 where facts that buyer was knowledgeable buyer, having been involved with standardbred horses for some years, and sent agent, an even more knowledgeable horseman, to inspect horse, suggested no special "understanding" between buyer and seller and where conversation between buyer and seller was largely collateral to sale rather than essential part of it.

Furthermore, even if seller's statements constituted express warranties, it did not appear that they were "part of the basis of the bargain", under UCC § 2-313, where agent's opinion was principal, if not only, factor which motivated buyer to purchase horse and conversation with seller played negligible role in buyer's decision. *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977), aff'd, 568 F.2d 770 (3d Cir. Pa. 1978).

In action by buyer of new automobile against seller based on breach of warranty, trial court did not err in dismissing complaint since evidence was sufficient to support conclusion that seller did not violate express warranties contained in warranty book and that seller's commendations regarding auto constituted mere "puffing" rather than express warranties within meaning of UCC § 2-313 where purchaser was sophisticated businessman and experienced negotiator of new car purchases. *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806 (8th Cir. Iowa 1976).

In action by buyer of newly constructed residence against sales agent and seller claiming breach of express warranty, sales agent's statements that water observed in crawl space under house was "probably" left over from construction, that it "should" dry up in a short time, that no more water could get in, and that builder of house "was a good contractor and he built good homes and that they were substantial," were not sufficient to constitute express warranties within UCC § 2-313(2). *Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E.2d 557 (1976).

In action by water corporation's contractor (buyer) against seller of filter tanks, failure of distributor heads of filter tanks did not constitute breach of implied warranty of merchantability under UCC § 2-314, breach of warranty of fitness for particular purpose under UCC § 2-315, or breach of any express warranty under UCC § 2-313, where distributor heads failed under excessive water pressure in water system due to defect in water corporation's plans and specifications, contractor bought tanks in reliance upon contract specifications without reliance upon any warranty, affirmation or representation by seller as to merchantability or

fitness for intended use, and seller's statement to buyer that tanks "should" be able to remove iron and manganese from water did not amount to affirmation of fact affecting bargain between contractor and seller. *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 684, 222 S.E.2d 709 (1976).

In personal injury action against manufacturer and seller of wood shaper, recommendations and suggestions of seller did not constitute express warranty, where language used by seller was not affirmation of fact or promise but rather his personal opinion, seller was not possessed of any special knowledge and did not assert fact of which buyer was ignorant, and vendor and vendee could both see danger of device in operation, that blades cut from underside, and that pressure was required to hold board down and against cutter. *Weiss v. Rockwell Mfg. Co.*, 9 Ill. App. 3d 906, 293 N.E.2d 375 (1st Dist. 1973).

A seller's language that "the trailer was supposed to last a lifetime and be in perfect condition", if used in negotiating a sale, is ordinarily regarded as an expression of opinion in "the puffing of his wares", and does not create an express warranty. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

39. Reliance on warranty.

In breach-of-warranty action for damages by buyer of allegedly defective dump trailers against manufacturer-seller, court held (1) that buyer and its ultimate Mexican customers were "merchants" within meaning of UCC § 2-104(1); (2) that seller was "merchant" within meaning of both UCC § 2-104(1) and § 2-314(1); (3) that telephoned order for 20 additional trailers was not enforceable under statute of frauds in UCC § 2-201(1) because it did not come within exceptions to such statute contained in UCC § 2-201(3); (4) that "specially manufactured goods" exception in UCC § 2-201(3)(a) applies only when seller, rather than buyer, seeks to escape statute-of-frauds defense; (5) that since three trailers purchased under valid written contract were put to improper use by buyer's Mexican customers, rather than being used for their "ordinary purposes," no breach of implied warranty of mer-

chantability under UCC § 2-314(1) and (2)(c) occurred; (6) that use of trailers for improper purposes, rather than for their stated "particular purpose," prevented recovery under implied warranty of fitness in UCC § 2-315; (7) that buyer could not recover for breach of express warranty under UCC § 2-313(1)(a) because it failed to prove that it had relied on statements in manufacturer-seller's brochure either prior to or contemporaneously with making of parties' contract; and (8) that since buyer had no right under UCC § 2-601(a) to reject two unused and undamaged trailers, manufacturer-seller was not required to retake them or to refund their purchase price to buyer. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

This section requires only that the purchaser rely upon the express warranty, and it does not additionally require that he be aware that it was made by the manufacturer of the truck which he purchased, instead of by the dealer, to reach the one who in fact made it. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (1965), overruled on other grounds, *Huang v. Garner*, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1st Dist. 1984).

Buyer of mobile home was entitled to recover from seller for breach of written express warranty made part of basis of bargain under UCC § 2-313, notwithstanding buyer never actually received physical possession of copy of warranty, and notwithstanding buyer neither relied on, nor was even aware of existence of warranty. *Winston Indus., Inc. v. Stuyvesant Ins. Co.*, 55 Ala. App. 525, 317 So. 2d 493 (Civ. App. 1975), cert. denied, 294 Ala. 775, 317 So. 2d 500 (1975).

Purchaser of herbicide was not entitled to recover from manufacturer for breach of express warranty based on herbicide's failure to perform as warranted, where purchaser failed to apply herbicide in accordance with manufacturer's instructions. *Elanco Prods. Co. v. Akin-Tunnell*, 516 S.W.2d 726 (Tex. Civ. App. 1974), writ ref'd n.r.e., (Feb. 26, 1975).

Where there was evidence that mechanic received tool manufacturer's catalog, but no evidence that he relied on catalog description when he purchased

hammer which chipped and injured his eye, mechanic was not entitled to recover for breach of express warranty. *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972).

40. —Knowledgeable buyer.

Finding of trial court that express warranty had not been made under UCC § 2-313 was not against manifest weight of the evidence, even though seller told buyer that trucks were in "good condition" when in fact they needed extensive repairs, where buyer admitted that he had inspected trucks and worked with them prior to purchase and that he knew they needed repairs. *Janssen v. Hook*, 1 Ill. App. 3d 318, 272 N.E.2d 385 (2d Dist. 1971).

Evidence supported finding that seller of tractor and combine had not warranted that equipment was new, where purchasers knew at time of purchase that equipment had been used as demonstrator. *Pearrow v. Huntsman*, 248 Ark. 1146, 455 S.W.2d 128 (1970).

Where the buyer knows that an express warranty of the seller is false there is no "warranty" as the misrepresentation is not in such case a part of the basis for the bargain. *City Mach. & Mfg. Co. v. A. & A. Mach. Corp.*, 4 U.C.C. Rep. Serv. 461 (E.D.N.Y. 1967).

41. —Opportunity to inspect.

In action by buyer of used crane for recovery of purchase price based on breach of express warranty, evidence was not sufficient to establish any express warranty as to crane's capabilities within meaning of UCC § 2-313 where buyer's decision to purchase was based primarily on two inspections by buyer's experts, where no evidence of written or oral representations was shown other than description of crane as "75-ton" crane, and where contract terms contained valid disclaimer of express warranties. *Alan Wood Steel Co. v. Capital Equip. Enters., Inc.*, 39 Ill. App. 3d 48, 349 N.E.2d 627 (1st Dist. 1976).

Finding of trial court that express warranty had not been made under UCC § 2-313 was not against manifest weight of the evidence, even though seller told buyer that trucks were in "good condition"

when in fact they needed extensive repairs, where buyer admitted that he had inspected trucks and worked with them prior to purchase and that he knew they needed repairs. *Janssen v. Hook*, 1 Ill. App. 3d 318, 272 N.E.2d 385 (2d Dist. 1971).

Buyer's reliance on express warranty is not precluded by his inspection of merchandise if facts allegedly constituting breach of warranty are not discovered during inspection. *Capital Equip. Enters., Inc. v. North Pier Term. Co.*, 117 Ill. App. 2d 264, 254 N.E.2d 542 (1st Dist. 1969).

42. —Seller's skill and judgment.

Representation made by reputable brewer of beer to distributor of carbon dioxide that surplus carbon dioxide which distributor was interested in buying from brewer was from time to time used by brewer in manufacture of its own beer was one which distributor was entitled to rely upon as matter of fact. *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522 (D.D.C. 1971).

Where the purchaser never intended to buy anything other than a 7-year-old secondhand automobile, the defendant never purported to sell anything other than such an automobile, the automobile was reasonably fit for the general purpose for which it was sold, and the purchaser did not rely solely upon any special judgment of the defendant, in the complete absence of any special warranties no rescission or recovery could be had of the seller. *Basta v. Riviello*, 66 Lack. Jur. 77 (Pa. 1964).

43. Disclaimers.

Evidence in buyer's suit against manufacturer and seller of farm sprinkler irrigation system for breach of warranties made in connection with sale of system supported trial court's findings (1) that both manufacturer and seller had made and breached express warranties under UCC § 2-313 concerning system's operation and durability; (2) that both defendants had breached implied warranty of merchantability attaching to system under UCC § 2-314(1) and (2)(c); and (3) that both defendants had also breached implied warranty under UCC § 2-315 that system was fit for particular purpose for which buyer had purchased it. More-

over, since such express and implied warranties were made before date on which contract of sale was made, disclaimer of warranties contained in manufacturer's erection manual, which buyer received after entering into contract, did not negate such warranties (noting also that even if buyer had received manufacturer's erection manual before entering into contract, general warranty disclaimer contained in manual would not have destroyed specific express warranties that were made orally by seller and were set forth in writing in manufacturer's advertising brochure). *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977).

In action by buyers of automobile tires against seller and manufacturer for personal injuries allegedly resulting from blowout of tire, clause purporting to limit buyers' remedy solely to replacement tire and purporting to exclude liability for both personal injury and property damage was unconscionable under UCC § 2-719(3), in absence of any evidence to contrary, and was ineffective. *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 347 A.2d 253 (1975).

Evidence of alleged oral warranties or of warranties contained in promotional brochure was properly excluded, where retail instalment contract contained sufficient disclaimer of express warranties and implied warranties other than of merchantability and fitness, and instrument also provided that "there are no promises, terms, conditions, or warranties other than those contained herein." *Pennsylvania Gas Co. v. Secord Bros.*, 73 Misc. 2d 1031 (1973), *aff'd*, 44 A.D.2d 906, 357 N.Y.S.2d 702 (4th Dep't 1974).

Summary judgment was granted to seller for entire amount due in payment for certain air conditioning/heating units which allegedly did not comply with express warranties contained in advertising brochure, where front page of sales contract contained boldface disclaimer "Of Warranties, Express or Implied, or Merchantability or Fitness" not discussed by said contract, and where same page contained large bold print warning buyer to read contract. *Pennsylvania Gas Co. v. Secord Bros.*, 73 Misc. 2d 1031 (1973), *aff'd*, 44 A.D.2d 906, 357 N.Y.S.2d 702 (4th Dep't 1974).

In action against tire manufacturer for breach of express warranty under UCC § 2-313 arising when tire failed and caused car to go out of control, contractual limitation of consequential damages to repair or replacement of tire was *prima facie* unconscionable under UCC § 2-719(3), notwithstanding fact that plaintiff suffered adverse verdict on strict liability theory. *Collins v. Uniroyal, Inc.*, 126 N.J. Super. 401, 315 A.2d 30 (1973), *aff'd*, 64 N.J. 260, 315 A.2d 16 (1974).

A warrantor's statement that its warranty "is expressly in lieu of all other warranties, expressed or implied" is insufficient to operate as a disclaimer of responsibility in damages for breach of warranty when the warrantor repeatedly fails to correct the defect in the vehicle purchased as promised. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (1965), overruled on other grounds, *Huang v. Garner*, 157 Cal. App. 3d 404, 203 Cal. Rptr. 800 (1st Dist. 1984).

44. Time of nonconformity.

Where homeowner brought suit in 1973 based on malfunction of sewer system installed in 1968, and limitation period was thus controlling issue, trial court should have made fact findings as to period of express warranty, whether breach occurred within warranty period, and whether homeowner commenced action within four years of discovering breach as provided in UCC § 2-725. *Daughtry v. Jet Aeration Co.*, 91 Wash. 2d 704, 592 P.2d 631 (1979).

There is no cause of action against an automobile manufacturing company to recover for a vehicle that ceased to operate approximately 23 ½ months after purchase at an odometer reading of 20,879 miles where the express written warranty is limited to repair or replacement of certain parts "after 12,000 miles and during the first twelve months or 50,000 miles of operation, whichever is earliest" and excludes any other warranties, express or implied; the burden is on the purchaser to present the automobile for examination during the warranty period, the parties are free to fix by agreement limitations for actions to be taken within a reasonable time, and the time limitations stated in the warranty are neither unreasonable nor unconscionable. *Broe v. Oneonta Sales Co.*, 100 Misc. 2d 1099 (1978).

No proof of breach of express warranty as to soundness of race horse at time of sale, where X-rays, revealing broken splint bone in horse's leg discovered on day after sale, did not establish date of fracture. *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. N.Y. 1968).

The fact that a race horse, sound at the time of its purchase, was soon afterward discovered to have a bowed tendon, afforded the purchaser no relief on grounds of a breach of an express warranty of soundness, for the condition of the animal subsequent to the time that title passed was immaterial. *Strauss v. West*, 100 R.I. 388, 216 A.2d 366 (1966).

RESEARCH REFERENCES

ALR. What amounts to a "sale by sample" as regards warranties. 12 A.L.R.2d 524.

Question whether oral statements amount to express warranty, as one of fact for jury or of law for court. 67 A.L.R.2d 619.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury. 75 A.L.R.2d 39.

Statements in advertisements as affecting manufacturer's or seller's liability for

injury caused by product sold. 75 A.L.R.2d 112.

Liability of manufacturer or seller for injury caused by animal feed or medicines, crop sprays, fertilizers, insecticides, rodenticides, and similar products. 81 A.L.R.2d 138.

Liability of manufacturer or seller of product sold in container or package for injury caused by container or packaging. 81 A.L.R.2d 229.

Liability of manufacturer or seller of container such as bottle, barrel, drum, tank, etc., or other packaging material for

injury caused thereby. 81 A.L.R.2d 350.

Reasonableness or personal judgment of buyer as test where goods are sold subject to being satisfactory to the buyer. 86 A.L.R.2d 200.

Extent of liability of seller of livestock infected with communicable disease. 87 A.L.R.2d 1317.

Sales: Liability for warranty or representation that article, other than motor vehicle, is new. 36 A.L.R.3d 237.

Statements on container that enclosed toy, game, sports equipment, or the like, is safe as affecting manufacturer's liability for injury caused by product sold. 74 A.L.R.3d 1298.

Products liability: air guns and BB guns. 94 A.L.R.3d 291.

What constitutes "affirmation of fact" giving rise to express warranty under UCC § 2-313(1)(a). 94 A.L.R.3d 729.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment. 97 A.L.R.3d 627.

Products liability: personal injury or death allegedly caused by defect in braking system in motor vehicle. 99 A.L.R.3d 179.

Products liability: manufacturer's or sellers' obligation to supply or recommend available safety accessories in connection with industrial machinery or equipment. 99 A.L.R.3d 693.

Products liability: personal injury or death allegedly caused by defect in steering system in motor vehicle. 100 A.L.R.3d 158.

Products liability: personal injury or death allegedly caused by defect in drive train system in motor vehicle. 100 A.L.R.3d 471.

Products liability: personal injury or death allegedly caused by defect in suspension system in motor vehicle. 100 A.L.R.3d 912.

Products liability: flammable clothing. 1 A.L.R.4th 251.

Products liability: liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment. 1 A.L.R.4th 411.

Products liability: defective heating equipment. 1 A.L.R.4th 748.

Products liability in connection with prosthesis or other product designed to be surgically implanted in patient's body. 1 A.L.R.4th 921.

Products liability: industrial accidents involving conveyor belts or systems. 2 A.L.R.4th 262.

Products liability: diethylstilbestrol (DES). 2 A.L.R.4th 1091.

Liability of manufacturer or seller of snowthrower for injuries to user. 2 A.L.R.4th 1284.

Products liability: farm machinery. 4 A.L.R.4th 13.

Products liability: admissibility of expert or opinion evidence that product is or is not defective, dangerous, or unreasonably dangerous. 4 A.L.R.4th 651.

Products liability: vehicular bumpers. 5 A.L.R.4th 483.

Products liability: personal injury or death allegedly caused by defect in electrical system in motor vehicle. 5 A.L.R.4th 662.

Products liability: swimming pools and accessories. 6 A.L.R.4th 492.

Products liability: clothes dryers. 6 A.L.R.4th 1262.

Products liability: glue and other adhesive products. 7 A.L.R.4th 155.

Products liability: elevators. 7 A.L.R.4th 852.

Products liability: industrial presses. 8 A.L.R.4th 70.

Products liability: sufficiency of proof of injuries resulting from "second collision." 9 A.L.R.4th 494.

Products liability: transformer and other electrical equipment. 10 A.L.R.4th 854.

Allowance of punitive damages in products liability case. 13 A.L.R.4th 52.

Products liability: cranes and other lifting apparatuses. 13 A.L.R.4th 476.

Pre-emption of strict liability in tort by provisions of UCC Article 2. 15 A.L.R.4th 791.

Products liability: firearms, ammunition, and chemical weapons. 15 A.L.R.4th 909.

Products liability: cement and concrete. 15 A.L.R.4th 1186.

Products liability: tire rims and wheels. 16 A.L.R.4th 137.

Products liability: stud guns, staple guns, or parts thereof. 33 A.L.R.4th 1189.

Products liability: household appliances relating to cleaning, washing, personal care, and water supply, quality and disposal. 34 A.L.R.4th 95.

Products liability: medical machinery used in plaintiff's treatment. 34 A.L.R.4th 532.

Products liability: household equipment relating to storage, preparation, cooking, and disposal of food. 35 A.L.R.4th 663.

Products liability: modern status of rule that there is no liability for patent or obvious dangers. 35 A.L.R.4th 861.

Products liability: equipment and devices directly relating to passengers' standing or seating safety in land carriers. 35 A.L.R.4th 1050.

Products liability: home and office furnishings. 36 A.L.R.4th 170.

Products liability: modern cases on explosion or breakage of beverage bottles. 36 A.L.R.4th 419.

Computer sales and leases; breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief. 37 A.L.R.4th 110.

Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability. 41 A.L.R.4th 9.

Products liability: construction materials or insulation containing formaldehyde. 45 A.L.R.4th 751.

Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew. 45 A.L.R.4th 777.

Products liability: perfumes, colognes, or deodorants. 46 A.L.R.4th 1197.

Affirmations or representations made after the sale is closed as basis of warranty under UCC § 2-313(1)(a). 47 A.L.R.4th 200.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action. 47 A.L.R.4th 621.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning athletic, exercise, or recreational equipment. 50 A.L.R.4th 1226.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning agricultural implements and equipment. 60 A.L.R.4th 678.

Products liability: electricity. 60 A.L.R.4th 732.

Products liability: overhead garage doors and openers. 61 A.L.R.4th 94.

Products liability: building and construction lumber. 61 A.L.R.4th 121.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning building components and materials. 61 A.L.R.4th 156.

Strict products liability: recovery for damage to product alone. 72 A.L.R.4th 12.

Products liability: motor vehicle exhaust systems. 72 A.L.R.4th 62.

Products liability: industrial refrigeration equipment. 72 A.L.R.4th 90.

Products liability: tractors. 75 A.L.R.4th 312.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury. 75 A.L.R.4th 443.

Products liability: contributory negligence or assumption of risk as defense in action for strict liability or breach of warranty based on failure to provide safety device for product causing injury. 75 A.L.R.4th 538.

Forum non conveniens in products liability cases. 76 A.L.R.4th 22.

Products liability: bicycles and accessories. 76 A.L.R.4th 117.

Products liability: exercise and related equipment. 76 A.L.R.4th 145.

Products liability: trampolines and similar devices. 76 A.L.R.4th 171.

Products liability: competitive sports equipment. 76 A.L.R.4th 201.

Products liability: skiing equipment. 76 A.L.R.4th 256.

Products liability: general recreational equipment. 77 A.L.R.4th 1121.

Products liability: mechanical amusement rides and devices. 77 A.L.R.4th 1152.

Burden of proving feasibility of alternative safe design in products liability action based on defective design. 78 A.L.R.4th 154.

Products liability: seller's right to indemnity from manufacturer. 79 A.L.R.4th 278.

Products liability: lubricating products and systems. 80 A.L.R.4th 972.

Products liability: all-terrain vehicles (ATV's). 83 A.L.R.4th 70.

Liability of auctioneer under doctrine of strict products liability. 83 A.L.R.4th 1188.

Products liability: hair straighteners and relaxants. 84 A.L.R.4th 1090.

Products liability: cutting or heating torches. 84 A.L.R.4th 1123.

Products liability: Recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect. 50 A.L.R.5th 275.

Products Liability: Ladders. 81 A.L.R.5th 245.

Federal pre-emption of state common-law products liability claims pertaining to motor vehicles. 97 A.L.R. Fed. 853.

Federal pre-emption of state common-law products liability claims pertaining to tobacco products. 97 A.L.R. Fed. 890.

Federal pre-emption of state common-law products liability claims pertaining to drugs, medical devices, and other health-related items. 98 A.L.R. Fed. 124.

Federal pre-emption of state common-law products liability claims pertaining to pesticides. 101 A.L.R. Fed. 887.

Am Jur. 63 Am. Jur. 2d, Products Liability §§ 450 et seq.

67 Am. Jur. 2d, Sales §§ 610, 723 et seq.

67A Am. Jur. 2d, Sales §§ 739 et seq.

6 Am. Jur. Pl & Pr Forms, Sales (Rev), Forms 2:271-2:277. (Express warranties; Sample or model).

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Forms 31 et seq. (breach of warranty as basis of liability).

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Forms 91 et seq. (liability for particular products).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:241-2:260. (Express warranties; Affirmation of fact or promise).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:861 et seq. (Express warranties by affirmation, promise, description, and sample).

2 Am. Jur. Trials, Investigating Particular Civil Actions, §§ 31-37 (products liability claims).

17 Am. Jur. Trials, Drug Products Liability and Malpractice Cases, 1 et seq.

17 Am. Jur. Trials, Power Press Accident Cases §§ 1 et seq.

41 Am. Jur. Trials 161, Motorboat Propeller Injury Accidents.

1 Am. Jur. Proof of Facts, Allergy, Proof Nos. 1, 2 (proofs of allergy or unusual susceptibility).

12 Am. Jur. Proof of Facts, Water Heater Explosions, Proof No. 1 (proof of water heater explosion by testimony of metallurgist).

17 Am. Jur. Proof of Facts 2d, Breach of Warranty as to Effectiveness of Insecticide, §§ 10 et seq. (proof of existence, and breach by manufacturer, of express warranty that insecticide would control particular insect species).

23 Am. Jur. Proof of Facts 2d, Defective Design or Installation of Air Conditioning System, §§ 11 et seq. (proof of defective design, construction, and installation of commercial air conditioning system).

35 Am. Jur. Proof of Facts 2d 255, False Representation as to Quality or Character of Product.

7 Am. Jur. Proof of Facts 3d 1, Injuries from Drugs.

7 Am. Jur. Proof of Facts 3d 225, Defective Design of Golf Cart.

7 Am. Jur. Proof of Facts 3d 305, Products Liability: The "Sophisticated User" Defense.

8 Am. Jur. Proof of Facts 3d 547, Failure to Warn as Proximate Cause of Injury.

8 Am. Jur. Proof of Facts 3d 615, Defective Forklift Trunk.

2 Am Law Prod Liab 3d, Express Warranties § 19:2.

CJS. 77 C.J.S., Sales §§ 242, 251.

Law Reviews. 1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss L. J. 141, March 1983.

§ 75-2-314. Implied warranty; merchantability; usage of trade; sale of specified animals; computer hardware and software.

(1) Except as provided in subsection (5), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as:

(a) Pass without objection in the trade under the contract description; and

(b) In the case of fungible goods, are of fair average quality within the description; and

(c) Are fit for the ordinary purposes for which such goods are used; and

(d) Run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) Are adequately contained, packaged and labeled as the agreement may require; and

(f) Conform to the promises or affirmations of fact made on the container or label if any.

(3) Other implied warranties may arise from course of dealing or usage of trade.

(4) With respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from sickness or disease at the time the sale is consummated, conditioned upon reasonable showing by the seller or his agent that all state and federal regulations pertaining to animal health were complied with.

(5) Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of merchantability or any express limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.

SOURCES: Codes, 1942, § 41A:2-314; Laws, 1966, ch. 316, § 2-314; Laws, 1976, ch. 385, § 1; Laws, 1981, ch. 430, § 1; Laws, 1998, ch. 513, § 1, eff from and after July 1, 1998.

Editor's Note — The preamble to Chapter 385, Laws of 1976, provides as follows:

"Whereas, the Mississippi Legislature passed the Uniform Commercial Code with amendments at the 1966 Regular Session of the Legislature, effective as of March 31, 1968, being Chapter 316, General Laws of 1966; and

"Whereas, one of the amendments to the Uniform Act deleted Section 2-316 and amended Section 2-314 for the express purpose of precluding disclaimers and the limitation of remedies for breach of an implied warranty; and

"Whereas, it now appears that there is confusion as to the legislative intent because of the amendment to the Uniform Act that deleted Section 2-316 and amended Section 2-314(1) and (3) by deleting "(Section 2-316)" and the Uniform Act, as amended, and

now codified in Sections 75-2-314 and 75-2-315, Mississippi Code of 1972, is interpreted by some segments of the judiciary to permit disclaimers and limitations of implied warranties; and

"Whereas, it was the intent of the Legislature by deleting Section 2-316 of the Uniform Act and amending Section 2-314 of the Uniform Act and Section 2-315 of the Uniform Act to prohibit the exclusion or modification of implied warranties of merchantability or fitness for a particular purpose;

"Now, therefore, in order to eliminate any ambiguity in the above sections of the Mississippi Code of 1972, and to conform said sections to express the true legislative intent,

Be it enacted by the legislature of the State of Mississippi:"

Cross References — Varying effect of code provisions by agreement, see § 75-1-102.

General principles of law and equity as supplementing code provisions, see § 75-1-103.

Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

Course of dealing or usage of trade, see § 75-1-205.

Modification, rescission, and waiver, see § 75-2-209.

Agreement to shift or divide risk or burden, see § 75-2-303.

Creation of express warranties, see § 75-2-313.

Implied warranty of fitness for particular purpose, see § 75-2-315.

Construction of warranties, see § 75-2-317.

Prohibition against limitation of remedies depriving buyer of remedy to which he may be entitled for breach of implied warranty of merchantability, see § 75-2-719.

JUDICIAL DECISIONS

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A. In General.

1. Generally.

Action for breach of implied warranty of merchantability against manufacturer, as seller, may be maintained by buyer because manufacturer qualified as seller under UCC § 2-103(1)(d) as person who sells or contracts to sell goods, although motor home in question had not been purchased directly from manufacturer. *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663 (Miss. 1987).

Implied warranty of merchantability applies to sale of both new and used goods so long as seller is merchant with respect to goods of that kind because UCC does not distinguish between new and used goods. *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663 (Miss. 1987).

Three warranties recognized by Mississippi law applicable to a chicken feeder system purchased by defendants from plaintiff on an open account are express warranties, implied warranty of merchantability, and implied warranty of fitness for particular purpose. *McLaurin v. Smith's Poultry & Farm Supply, Inc.*, 499 So. 2d 1361 (Miss. 1986).

In breach-of-warranty action by buyer against manufacturer of defective heat pump that was installed by defendant's dealer in plaintiff's new house, court held (1) that case involved breach of binding compromise settlement between plaintiff and defendant; (2) that defendant's attempt in its limited express warranty to limit its liability respecting any implied warranties was invalid under both Mississippi statute abolishing privity requirement between buyer and manufacturer and also Mississippi UCC § 75-2-719(4);

(3) that defendant was "seller" within meaning of Mississippi privity statute; (4) that because of defendant's breach of implied warranty of merchantability that attached to heat pump under Mississippi UCC § 75-2-314(1) and (2)(c), plaintiff was entitled to recover (a) damages under Mississippi UCC § 75-2-714(2) for difference between actual value of heat pump at time plaintiff accepted it and its value in absence of defendant's breach of warranty, and (b) consequential damages under Mississippi UCC § 75-2-715(2)(a) for additional expenses incurred in purchasing one wood heater and two kerosene heaters; and (5) that case did not justify award of punitive damages for defendant's breach. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

Mississippi Code § 75-2-314 by analogy suggests, with respect to a 2 party copier-equipment lease, that the lessor warranted the merchantability of the copier, i.e., that it was fit for the ordinary purpose of making multiple copies of documents. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Language in a copier-equipment lease disclaiming implied warranties of fitness for purpose and merchantability is rendered inoperative by Mississippi Code § 11-7-18. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Warranties of merchantability and fitness for use are implied by sections 2-314 and 2-315 of the Uniform Commercial Code unless excluded or modified pursuant to section 2-316 of the Uniform Commercial Code; where the exact exclusionary words of subdivision (2) of section 2-316 of the Uniform Commercial Code are not used, the exclusion may still be accomplished by language which clearly indicates that no implied warranty is made (Uniform Commercial Code, § 2-316, subd [3], par [a]), by a course of dealing or course of performance or usage of trade (Uniform Commercial Code, § 2-316, subd [3], par [c]), or where the buyer has refused to examine the goods under circumstances where the defect complained of would have been revealed through such inspection. *Basic Adhesives, Inc. v. Robert Matzkin Co.*, 101 Misc. 2d 283 (1979), *aff'd as modified*.

UCC § 2-314 was drawn from developing case law and is designed to permit further and more expansive interpretation whenever this is necessary. *O'Dell v. Custom Bldrs. Corp.*, 560 S.W.2d 862 (Mo. 1978).

Term "merchantable" in UCC § 2-314(1) and (2) does not mean "perfect." *Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp.*, 62 A.D.2d 982 (2d Dep't 1978).

In suit by gasket manufacturer for damages for defective materials furnished by defendant supplier, where (1) supplier's acceptance of manufacturer's purchase order was expressly conditioned on manufacturer's assent to new terms contained in supplier's acceptance, (2) manufacturer did not assent to such terms, and (3) both parties nevertheless performed what they believed to be their contractual obligations, as evidenced by the shipping and acceptance of the goods, conduct of parties was sufficient under UCC § 2-207(3) to establish a contract, and the terms of such contract were those on which writings of parties agreed, as supplemented by provisions of UCC § 2-314 dealing with implied warranty of merchantability. *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 380 N.E.2d 571 (1978).

Implied warranties of merchantability and fitness for particular purpose arise in every contract of sale under UCC § 2-314(1) and § 2-315, unless such warranties are properly excluded under UCC § 2-316. *Lease Fin., Inc. v. Burger*, 40 Colo. App. 107, 575 P.2d 857 (1977).

In New Hampshire, statutory implied warranties provided by Uniform Commercial Code are deemed to afford complete remedy, and no common-law cause of action in contract based on implied warranty is recognized. *Brescia v. Great Rd. Realty Trust*, 117 N.H. 154, 373 A.2d 1310 (1977).

In action against seller of house for damages arising out of defective construction: (1) by analogy to UCC § 2-314(1), seller of house who was in business of selling houses and who caused house to be built expressly for resale, made implied warranty against structural defects; and (2) by analogy to UCC § 2-715(1), mea-

sure of damages for breach of implied warranty of structural defects was reasonable cost of repairs. *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975).

The liability arising under the strict tort doctrine is distinct from the liability warranty arising under the Code. *Rosenau v. City of New Brunswick*, 51 N.J. 130, 238 A.2d 169 (1968).

The implied warranties of merchantability and of fitness for a particular purpose are designed to protect the buyer of goods from bearing the burden of loss where merchandise, though not violating a promise expressly guaranteed, does not conform to the normal commercial standards or meeting the buyer's particular purpose, a condition upon which he had the right to rely. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

Express and implied warranties rest upon sales and the existence of a buyer-seller relationship, insofar as the UCC deals with the subject. *Cheshire v. Southampton Hosp. Ass'n*, 53 Misc. 2d 355 (1967).

The UCC does not change the already established law of Pennsylvania as to the buyer's right to rescind and recover the purchase price where there has been a breach of an implied warranty of merchantability or fitness. *Sarnecki v. Al Johns Pontiac*, 56 Luz. Legal Reg. Rep. 293 (Pa. 1966).

The description of "merchantable" set forth in subsec (2)(c) of this section is the same as that term was understood prior to adoption of the UCC. *Johnson v. Fore River Motors, Inc.*, 26 Mass. App. Dec. 184 (1963).

The instant section is derived from § 15 of the Uniform Sales Act. *Bafle v. Remchow & Ford Motor Co.*, 58 Schuyl. L. Rec. 108 (Pa. 1962).

2. Disclaimer or exclusion.

Implied warranty of merchantability may not be waived or disclaimed in Mississippi as result of §§ 11-7-18 and 75-2-719(4). *Beck Enters., Inc. v. Hester*, 512 So. 2d 672 (Miss. 1987).

Heat pump manufacturer's attempt in its express limited warranty to limit its liability as to any implied warranty was

invalid. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

In action by plaintiff to recover for breach of agreement termed a "lease," under which defendant agreed to lease business machines from plaintiff for 60-month term, with title to pass to defendant at end of term, implied warranties of merchantability and fitness under UCC §§ 2-314 and 2-315 were held applicable to transaction whether deemed lease or bailment agreement; however, since both front and back page of lease agreement contained statement in bold capitalized lettering, "LESSOR MAKES NO EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS WITH RESPECT TO SUCH LEASED PROPERTY AND HEREBY DISCLAIMS THE SAME," which appeared not more than two inches above signature of officer who signed lease on behalf of defendant, disclaimer was sufficiently conspicuous, as defined in UCC § 1-201(10), and was properly worded so as to effectively exclude such warranties under UCC § 2-316. *Quality Acceptance Corp. v. Million & Albers, Inc.*, 367 F. Supp. 771 (D. Wyo. 1973).

Exclusion of implied warranty of merchantability under instant section must be made in accordance with § 2-316(2). *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967).

B. Scope of Warranty.

3. In general; nature of seller's liability.

An implied warranty of merchantability with regard to certain engine parts sold by the defendant to the plaintiff and installed in a truck engine applied only to those parts and not to the entire engine into which the parts were installed. *Easley v. Day Motors, Inc.*, 796 So. 2d 236 (Miss. Ct. App. 2001).

Implied warranty of merchantability under § 75-2-314 applies to used goods as well as new goods. *Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith*, 523 So. 2d 324 (Miss. 1988).

Since UCC does not distinguish between new and used goods, implied warranty of merchantability applies to sale of

used motor vehicle. *Beck Enters., Inc. v. Hester*, 512 So. 2d 672 (Miss. 1987).

Implied warranty of merchantability applies to sale of both new and used goods so long as seller is merchant with respect to goods of that kind because UCC does not distinguish between new and used goods. *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663 (Miss. 1987).

Action for breach of implied warranty of merchantability against manufacturer, as seller, may be maintained by buyer because manufacturer qualified as seller under UCC § 2-103(1)(d) as person who sells or contracts to sell goods, although motor home in question had not been purchased directly from manufacturer. *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663 (Miss. 1987).

In an action by the purchaser of a new automobile against the manufacturer and the seller thereof, liability would extend to the manufacturer through its expressed warranty of merchantability, the same as liability extended to the seller through § 75-2-314. *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024 (Miss. 1982).

Pursuant to the legislative policy of the State to protect purchasers of used vehicles from being sold defective vehicles, defendant used car dealer is liable for property damage sustained by plaintiff as the result of an accident caused by a defective steering mechanism, traceable to the manufacturer of the car, under section 417 of the Vehicle and Traffic Law which requires retail sellers of used vehicles to expressly warrant in writing that the vehicle "is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery", and, it is therefore not necessary to determine whether defendant is also liable under the theories of strict liability in tort or implied warranty of merchantability. *Maure v. Fordham Motor Sales, Inc.*, 98 Misc. 2d 979 (1979).

The implied warranties under the Uniform Commercial Code apply to the sale of used goods. *Natale v. Martin Volkswagen, Inc.*, 92 Misc. 2d 1046 (1978).

Retail book dealer was not liable under UCC § 2-314 to purchaser of cookbook for

injuries and damages caused by improper instructions or lack of adequate warnings as to poisonous ingredients used in recipe; absent allegations that bookseller knew there was reason to warn public as to contents of book, implied warranty in respect to sale of books by merchant who regularly sells them is limited to warranty of physical properties of such books and does not extend to material communicated by book's author or publisher. *Cardozo v. True*, 342 So. 2d 1053 (Fla. App. 1977), cert. denied, 353 So. 2d 674 (Fla. 1977).

In actions for breach of warranty under UCC § 2-314(1) and § 2-315 to recover damages for injuries resulting from the use of a product, there is generally no liability on the part of the seller if the buyer was unusually susceptible to injury from the product. A manufacturer cannot be required, under a theory of breach of implied warranty, to insure against the susceptibility of a particular individual to the manufacturer's product. The manufacturer's duty is to guard against probabilities, not possibilities. *Chambers v. G.D. Searle & Co.*, 441 F. Supp. 377 (D. Md. 1975), aff'd, 567 F.2d 269 (4th Cir. Md. 1977).

UCC § 2-314 was inapplicable to tort action alleging breach of implied warranty. *Williams v. Detroit Edison Co.*, 63 Mich. App. 559, 234 N.W.2d 702 (1975).

Breach of implied warranty of fitness for particular purpose requires only that seller be made aware of buyer's need, that seller recommend products, and that buyer purchaser product as recommended. *Robinson v. Williamsen Idaho Equip. Co.*, 94 Idaho 819, 498 P.2d 1292 (1972).

Lack of skill or foresight on the part of the seller in discovering the product's flaw was never meant to bar recovery under this section. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

Although the seller is unable to discover the defect in goods sold or cure the damage if it could be ascertained, he cannot avoid the consequences imposed by this section upon the seller of commercially inferior goods. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

The entire purpose behind the implied warranty sections of the UCC is to hold

the seller responsible when inferior goods are passed along to the unsuspecting buyer, and the evidence required is not that the defects could or should have been uncovered by the seller but only that the goods upon delivery were not of a merchantable quality or fit for their particular purpose; and if the requisite proofs are established the only exculpatory relief afforded is a showing that the implied warranties were modified or excluded by specific language under § 2-316. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

The mere fact that shoes were slippery when wet and caused the plaintiff to fall on a laundromat floor does not establish that there was any defect as warranty liability does not require that goods be made accident-proof nor impose on the manufacturer the duty of warning of obvious dangers. *Fanning v. LeMay*, 38 Ill. 2d 209, 230 N.E.2d 182 (1967).

4. Services distinguished.

UCC § 2-314(1), dealing with implied warranty of merchantability, and § 2-315, dealing with implied warranty of fitness for particular purpose, were inapplicable to action against truck-maintenance company for its failure to maintain properly brakes on truck that struck plaintiff's decedent, since such sections relate to a seller of goods. *Lee v. C & P Serv. Corp.*, 363 So. 2d 586 (Fla. App. 1978), cert. denied, 372 So. 2d 469 (Fla. 1979).

Where complaint showed that furnishing of allegedly unsafe drug to decedent was incidental feature of professional services rendered by defendant physicians, no sale of such drug occurred within meaning of Uniform Commercial Code that could give rise to cause of action for breach of any express or implied warranties under UCC § 2-313(1), § 2-314(1), and § 2-315. *Osborn v. Kelley*, 61 A.D.2d 367 (3d Dep't 1978).

In suit by buyer of modular home against seller for breach of warranty, wherein seller filed third-party complaint against testing laboratory, which had allowed its seal of "approval for use and occupancy" to be placed on home, for breach of implied warranties allegedly arising from seal's placement, implied warranties created by UCC § 2-314(1)

and § 2-315 were inapplicable because (1) UCC § 2-314(1) and § 2-315 apply only to transactions in goods, and (2) in present case, any implied warranty of testing laboratory would concern quality of its inspection services, rather than quality of goods inspected. *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Implied warranties do not attach to the performance of a service. *Craig v. American Dist. Tel. Co.*, 91 Misc. 2d 1063 (1977).

Bridge design plans were not "goods" as defined in UCC § 2-105(1), and, thus, implied warranty provisions of Uniform Commercial Code §§ 2-314 and 2-315, did not apply to cause of action based on defect in plans. *Department of Transp. v. Bethlehem Steel Corp.*, 28 Pa. Commw. 214, 368 A.2d 888 (1977).

Insofar as applicability of implied warranty provisions of Uniform Commercial Code to sale of product under hybrid sales-service contract is concerned, if service aspect of such contract is predominant and transfer of personal property is merely incidental feature of transaction, exacting warranty standards in Uniform Commercial Code for imposing liability without proof of fault will not be imported from law of sales to render liable those who perform trade or professional services, such as building services under construction contract. Those who hire experts for predominant purpose of rendering services and who rely on their special skills cannot expect infallibility. Therefore, unless the parties have contractually bound themselves to a higher standard of performance, reasonable care and competence owed generally by practitioners in the particular trade or profession define the limits of an injured party's justifiable demands (also stating that since express warranty provisions of UCC § 2-313(1)(a) apply only to contracts for sale of goods, that section would be no more applicable to contract for rendition of services than the code's implied warranty provisions). *Milau Assocs. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 368 N.E.2d 1247 (1977).

Implied warranty of merchantability and fitness under UCC § 2-314 did not apply to contract for investigating services and report pertaining to prospective insurance agent, since report based upon

pre-employment investigation did not constitute "goods" under UCC. *Strong v. Retail Credit Co.*, 38 Colo. App. 125, 552 P.2d 1025 (1976).

In action against supplier of concrete used in allegedly defective floors, defendant's third party complaint for indemnity against installing contractor, alleging that contractor warranted fitness and merchantability of materials, did not state a cause of action because the warranties created by UCC §§ 2-314 and 2-315 only have significance if made by a seller. *ICI Am., Inc. v. Martin-Marietta Corp.*, 368 F. Supp. 1148 (D. Del. 1974).

A complaint which alleges the breach of an express or implied warranty of fitness arising as a consequence of the breaking of an intramedullary pin, warranted as properly manufactured and free of defects, which was surgically inserted in the plaintiff, stated a cause of action; for it might be possible for the plaintiff to prove a sale of the pin as opposed to an overall contract for hospital and medical services. *Cheshire v. Southampton Hosp. Ass'n*, 53 Misc. 2d 355 (1967).

Warranties are limited to the sales of goods, and no warranty attaches to the performance of a service. *Aegis Prods., Inc. v. Arriflex Corp. of Am.*, 25 A.D.2d 639 (1st Dep't 1966).

5. —Installation of goods or fixtures.

Where vinyl liner of swimming pool developed wrinkle, seller agreed to reseal liner but failed to do so and hole developed which resulted in total destruction of pool, seller breached implied warranties under UCC §§ 2-314 and 2-315 through his failure to install pool in workmanlike manner using suitable materials. *Riffe v. Black*, 548 S.W.2d 175 (Ky. Ct. App. 1977).

Contract for installation and maintenance by defendant of burglar alarm system on plaintiff's premises, which provided that equipment installed should remain property of defendant, did not constitute sale of equipment so as to be basis of cause of action for breach of either express warranty under UCC § 2-313(1) or implied warranties under UCC § 2-314(1) and UCC § 2-315. *Craig v. American Dist. Tel. Co.*, 91 Misc. 2d 1063 (1977).

Where plumbing and heating subcontractor selected, purchased and installed

floor furnace in plaintiff's home, and where it was claimed that installation of furnace was faulty, installation of furnace by subcontractor was covered by implied warranties of UCC §§ 2-314 and 2-315. *O'Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826 (Minn. 1977).

Implied warranty of UCC § 2-314 applied to goods being installed by electrical contractor where contractor contracted with owner of apartment building to install electrical wiring. *Insurance Co. of N. Am. v. Radiant Elec. Co.*, 55 Mich. App. 410, 222 N.W.2d 323 (1974).

An oral agreement between property owners and a handyman whereby the handyman agreed to purchase a heating unit for owners and install it in the owners' building did not create between the parties a relationship of buyer and seller, so as to entitle the owners to a recovery against the handyman on the ground of a breach of implied warranty of merchantability and of fitness for the purpose. *Victor v. Barzaleski*, 19 Pa. D. & C.2d 698 (1959).

6. —Beauty treatments.

Beauty salon patron stated cause of action against operator of beauty salon for breach of implied warranties of fitness and merchantability under UCC where patron alleged that she was injured as result of application of defective hair product during course of permanent wave given by employee of beauty salon. *Ellibee v. Dye*, 64 Pa. D. & C.2d 158 (1973).

Despite hybrid sale-and-service nature of permanent wave treatment, New Jersey Supreme Court has allowed patron's suit against beautician for breach of fitness warranty under Code Sales Article. *Newmark v. Gimbel's, Inc.*, 54 N.J. 585, 258 A.2d 697 (1969).

There is no "sale" to a beauty parlor customer of materials used in giving her treatments, for the materials used in the performance of such services are patently incidental to the treatment itself and do not constitute a purchase of an article by the customer. *Epstein v. Giannattasio*, 25 Conn. Supp. 109, 197 A.2d 342 (1963).

7. —Blood transfusions.

Under Tennessee addition to UCC § 2-316, implied warranties of merchantabil-

ity and fitness were not applicable to transfusions of blood. *Sawyer v. Methodist Hosp.*, 522 F.2d 1102 (6th Cir. Tenn. 1975).

Furnishing of blood to patient by blood banks and hospital was adjunct to services performed by hospital in endeavor to restore patient's health and thus was not "sale" giving rise to any warranty of fitness or merchantable quality; consequently, actions for breach of warranty against blood banks and hospital were not maintainable. *Jennings v. Roosevelt Hosp.*, 83 Misc. 2d 1 (1975).

Even if transfer of donor blood by non-commercial supplier to hospital for service fee was sale under UCC §§ 2-314 and 2-315, so as to give rise to implied warranty, supplier was not liable to hospital patient who contracted serum hepatitis, since there were no methods available at time in question by which hepatitis virus could effectively be excluded from blood or presence of virus determined and, therefore, blood, to extent it may have contained hepatitis virus, was unavoidably unsafe and for that reason was not unreasonably dangerous and did not fail to be fit within terms of warranties provided for in UCC §§ 2-314 and 2-315. *McMichael v. American Red Cross*, 532 S.W.2d 7 (Ky. 1975).

Although implied warranty contained in UCC § 2-314 imposes responsibility on seller for injuries caused by bad product, regardless of seller's fault, suppliers of blood for human transfusions are exempted from such liability. *Steinik v. Doctors Hosp.*, 82 Misc. 2d 97 (1975).

Hospital which furnished defective blood for transfusion to patient who contracted serum hepatitis as a result thereof did not make a "sale" to patient, and thus hospital was not liable under doctrine of strict liability or theory of breach of warranty. *St. Luke's Hosp. v. Schmaltz*, 188 Colo. 353, 534 P.2d 781 (1975).

Alabama Code § 2-314(4) is clear legislative expression that activity of "procuring, furnishing, donating, processing, distributing, or using human whole blood, plasma, blood products, etc." is to be service by every person participating therein and not sale. *State v. Community Blood & Plasma Serv., Inc.*, 48 Ala. App. 658, 267 So. 2d 176 (Civ. App. 1972).

8. Bailments distinguished.

In action by tire store employees against truck manufacturer, manufacture of truck wheel and rim, and truck dealer, for injuries received while they were changing tires on truck: (1) employees failed to establish breach of warranty against dealer since there was no sale when dealer delivered truck to plaintiffs' employer for purpose of having tires changed; (2) plaintiffs also failed to state cause of action for breach of warranty against truck manufacturer or manufacturer of wheel and rim since there was no privity between plaintiffs and manufacturers. *Favors v. Firestone Tire & Rubber Co.*, 309 So. 2d 69 (Fla. App. 1975).

9. Leases distinguished; statute applicable.

In action for breach of implied warranty of merchantability allegedly attaching under Oklahoma UCC § 2-314(1) and (2)(c) to oil-drilling pipe rented by plaintiff from defendant, (1) federal district court would assume without deciding, in absence of decision by Oklahoma Supreme Court, that Oklahoma UCC § 2-314(1) and (2)(c) applied to rental transaction in suit, and (2) plaintiff failed to prove by preponderance of the evidence that defendant had breached its alleged warranty, since plaintiff did not prove that joint of drill pipe which broke during drilling operation was not fit for purpose for which it was used. *Dyco Petro. Corp. v. Rucker Co.*, 443 F. Supp. 685 (E.D. Okla. 1977).

UCC § 2-314, implied warranty of merchantability, and UCC § 2-315, implied warranty of fitness for particular purpose, would be extended to lease transaction under which equipment company leased three motor scraper units to construction company since same considerations which give rise to creation of implied warranties in sales transaction were present: lessor was merchant specializing in sale and leasing of heavy construction equipment and lessee claimed it relied on lessor's expertise; lessor placed product into stream of commerce and sought to reap economic benefits from lease of product; and, finally, lessor was in better position to control antecedent factors which affect condition of product. Furthermore, UCC § 2-316, which allows seller to disclaim

implied warranties and provides specific means for such disclaimer, would be extended to lease in question by analogy. *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 541 P.2d 1184 (1975).

10. —Statute inapplicable.

The provisions for implied warranties in contracts for the sale of goods set forth in §§ 75-2-314(1) and 75-2-315 are not applicable to 3-party lease transactions where the evidence clearly shows that the lessor is an independent financing lessor, not the functional equivalent of a seller or an agent thereof. *David Nutt & Assocs. v. First Continental Leasing Corp.*, 599 So. 2d 576 (Miss. 1992).

In lessor's action to recover balance due under automobile lease, lessee who claimed benefits of implied warranty of merchantability under UCC 2-314 and implied warranty of fitness for particular purpose under UCC § 2-315 could not escape liability by contending that its duty to make payments was conditioned on vehicle's remaining merchantable and repairable and that lessor had breached implied warranties relied on, since assuming that such warranties applied to transaction, neither warranty encompassed commitment that leased vehicle would remain serviceable during the term of lease. *A-Leet Leasing Corp. v. Kingshead Corp.*, 150 N.J. Super. 384, 375 A.2d 1208 (App. Div. 1977), certification denied, 75 N.J. 528, 384 A.2d 508 (1977).

Contract was lease arrangement and was not covered by Uniform Commercial Code provisions relating to warranties where one party agreed to lease certain hens, known as "Parent Stock," and eggs therefrom, known as "Hatching Eggs," to other party for purpose of producing offspring, where contract provided that first party retained title to "Parent Stock" and "Hatching Eggs" and other party was precluded from selling or otherwise disposing of same without express written consent of first party, and where contract additionally provided for termination by either party on written notice at least 30 days in advance. *DeKalb Agresearch, Inc. v. Abbott*, 391 F. Supp. 152 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1162 (5th Cir. Ala. 1975).

Guarantors of lease of truck crane could not assert defense of breach of warranty

in action on guarantee. *Hurst v. Stith Equip. Co.*, 133 Ga. App. 374, 210 S.E.2d 851 (1974).

11. "Merchant with respect to goods of that kind".

A seller of cattle who had been in the cattle business for 20 years, owned approximately 2,000 head of cattle, and annually sold about 1,000 head, and who operated a feed lot operation, feeding and fattening cattle for sale to meat packing plants for slaughter, was an experienced cattle man and a knowledgeable seller, who dealt with goods (cattle) of a kind, and had expertise peculiar to cattle transactions; thus his cattle operation was of sufficient size, extent, and duration that he was a "merchant dealing in goods of that kind" within the meaning of former § 75-2-314, and an implied warranty of merchantability arose from his sale of cattle to plaintiff buyer, notwithstanding the fact that he sold only what he raised, that he had no special knowledge or skill peculiar to selling cattle through a live-stock sale, rather than a stock yard, and that raising cattle was only one of his businesses. *Vince v. Broome*, 443 So. 2d 23 (Miss. 1983).

Although seller was unfamiliar with "hoedads" (i.e., forestry tool used for planting seedling trees) and had not previously manufactured hoedad collars, seller did hold itself out, by operating foundry, as having skill in "practice" of casting iron and presumably in selection of materials to be used in manufacturing castings; inasmuch as transaction involved selection of type of metal appropriate for hoedad collars, seller was merchant within meaning of UCC § 2-104. Likewise, for purposes of UCC § 2-314, seller was merchant "with respect to goods of that kind," i.e., castings, seller having in past assisted buyer in choosing particular type of metals to fulfil various tasks in its manufacture of castings. Furthermore, since ordinary purpose of custom-made castings depended on their designated use, since seller knew that castings were to join handle and blade in tree-planting impact tools which occasionally would strike rock but since castings were not fit for this purpose, warranty of merchantability was

breached. *Valley Iron & Steel Co. v. Thorin*, 278 Or. 103, 562 P.2d 1212 (1977).

Uniform Commercial Code provides two implied warranties: (1) implied warranty of general merchantability contained in UCC § 2-314, which is applicable if seller is merchant with respect to goods of that kind, and (2) implied warranty of fitness for particular purpose contained in UCC § 2-315, which is applicable if seller has reason to know any particular purpose for which goods are required and buyer is relying on seller's skill or judgment to select or to furnish suitable goods. These warranties are imposed by law on basis of public policy and arise by operation of law because of relationship between parties, nature of transaction, and surrounding circumstances. *Brescia v. Great Rd. Realty Trust*, 117 N.H. 154, 373 A.2d 1310 (1977).

Sale of repossessed boat by bank did not give rise to implied warranty of merchantability under UCC § 2-314 where there was no evidence that bank was "merchant" within meaning of UCC § 2-104(1), there being no evidence that bank dealt in kind of goods involved in transaction—boats—or that it held itself as having knowledge or skill peculiar to such goods, but rather record indicated sale of boat was no more than isolated transaction by bank; nor did sale give rise to implied warranty of fitness for particular purpose within UCC § 2-315, although buyer told bank officer he "was thinking about buying a boat to put into charter service" where there was no evidence that buyer relied upon bank's skill or judgment, or that bank possessed such skill or judgment, that boat was fit for particular purpose of charter service use. *Donald v. City Nat'l Bank*, 295 Ala. 320, 329 So. 2d 92 (1976).

Mechanical contracting firm that accepted order to supply custom cooling equipment which would conform to specifications supplied by buyer and that guaranteed its work for period of one year against defects was (1) "seller" as defined in UCC § 2-103(1)(d), and (2) "a merchant with respect to goods of that kind," i.e., with respect to cooling system, as provided in UCC § 2-314(1). *Frantz, Inc. v. Blue Grass Hams, Inc.*, 520 S.W.2d 313 (Ky. 1974).

Since seller of used airplane was not merchant as defined in Code § 2-104, there could be no implied warranties attributed to him in sale of airplane. *Downs v. Shouse*, 18 Ariz. App. 225, 501 P.2d 401 (1972).

Auctioneer who sells different kinds of goods on an ongoing basis under circumstances that imply a likelihood of repetition with regard to the goods in question is a "merchant with respect to goods of that kind." *Regan Purchase & Sales Corp. v. Primavera*, 68 Misc. 2d 858 (1972).

Implied warranty of merchantability of chickens arose by operation of law from sole fact that seller was regular merchant with respect to sale of chickens and knew particular purpose for which buyer intended to use chickens, production of eggs. *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972).

Since the evidence is uncontradicted that the article sold, even though a used or second-hand article, was sold by a seller who is "a merchant with respect to goods of that kind" an implied warranty of merchantability attaches to the sale under UCC § 2-314, unless excluded or modified by UCC § 2-316. *Georgia Timberlands, Inc. v. Southern Airways Co.*, 125 Ga. App. 404, 188 S.E.2d 108 (1972).

In breach of warranty action by distributor of carbon dioxide against brewer which sold its surplus carbon dioxide to distributor, evidence supported brewer's contention that it was not merchant with respect to carbon dioxide, although sale involved more than 700,000 pounds of carbon dioxide. *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522 (D.D.C. 1971).

12. —Isolated sales.

Since defendant, a body and fender specialist, was not, nor did he represent himself to be in the business of selling cars when he sold an allegedly defective car to plaintiff, he is not a merchant and, thus, no warranty of merchantability is applicable (Uniform Commercial Code, § 2-314); a person making an isolated sale of goods is not a merchant within the meaning of the code and the fact that defendant had repaired and sold a few other cars

does not render him a used car salesman. *McGregor v. Dimou*, 101 Misc. 2d 756 (1979).

Sale of used multi-rip saw did not come within terms of UCC § 2-314 where seller was engaged in sawmill business, not business of selling sawmill equipment, and sale was isolated transaction; furthermore, UCC § 2-315 did not apply to transaction where uncontroverted facts established that buyer had decided to purchase particular brand of saw purchased from seller prior to his initial contact with seller, thus mitigating any reliance upon seller's skill and knowledge. *Siemen v. Alden*, 34 Ill. App. 3d 961, 341 N.E.2d 713 (2d Dist. 1975).

In action arising out of automobile accident which was allegedly caused by latent defect in recapped tire, driver of automobile was entitled to protection under UCC § 2-318 despite lack of privity of contract where she was member of purchaser's family; nor did lack of privity bar relief sought by innocent third party bystander; cause of action for breach of implied warranty of fitness for particular purpose under UCC § 2-315 was not stated where tires were purchased for general use upon ordinary highways; but cause of action for breach of implied warranty of merchantability under UCC § 2-314 was stated where sale of recapped tires by service station operator was not isolated sale and retailer qualified as merchant with respect to goods sold. *McHugh v. Carlton*, 369 F. Supp. 1271 (D.C.S.C. 1974).

13. —Custom-made goods.

In action arising when hotel refused to pay for specially manufactured carpeting because of excessive shading, there was no breach of express warranty under UCC § 2-313 where carpet conformed precisely to both description of goods contained in purchase order and to sample which had been approved by buyer; neither were implied warranties of merchantability and fitness breached under UCC §§ 2-314 and 2-315 where buyer relied on his own judgment to select goods and manufacturer was not at liberty to alter detailed specifications. *Mohasco Indus., Inc. v. Anderson Halverson Corp.*, 90 Nev. 114, 520 P.2d 234 (1974).

14. —Reliance on seller's skill and judgment.

"Reliance" is not an element of the warranty of merchantability under UCC § 2-314(1) and (2)(c). *Matulunas v. Baker*, 569 S.W.2d 791 (Mo. Ct. App. 1978).

Packinghouse waste processing plant was constructed subject to implied warranty of merchantability under UCC § 2-314 and to implied warranty of fitness for particular purpose under UCC § 2-315, where seller knew particular purpose for which processing plant was required, buyer relied on seller's skill and judgment to furnish suitable plant, and these warranties were not excluded pursuant to UCC § 2-316. *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F. Supp. 1069 (D. Neb. 1976).

Upon evidence that a marine engine sold by defendant distributor to plaintiff boat owner gave off excessive quantities of heavy black smoke when running, and that defendant was unable to cure the defect after persistent efforts, and where it could have been found that the defendant knew of plaintiff's purpose in buying the engine and that plaintiff relied on defendant to guide him in its selection, a finding was warranted that there were breaches both of the warranty of merchantability and of the warranty of fitness for a particular purpose under §§ 2-314 and 2-315. *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967).

A petition alleging that Zoysia lawn grass was warranted by the seller to survive winter weather, and that the grass subsequently died of the cold, states a cause of action, for the decisive test, in determining whether language used is a mere expression of opinion or a warranty, is whether it purports to state a fact upon which it may fairly be presumed the seller expects the buyer to rely, and upon which the buyer would ordinarily rely, and no particular form of words is necessary to constitute a warranty. *Bell v. Menzies*, 110 Ga. App. 436, 138 S.E.2d 731 (1964).

15. Food and drink.

In in rem action in admiralty involving counterclaims by seller and buyer arising from breaches of contract to sell flour, (1) seller breached implied warranty of merchantability created by UCC § 2-314(1)

and (2)(c), and also federal adulterated-food statute, as to one cargo of flour which was infested with insects when it arrived at warehouse prior to being loaded on ship, (2) buyer had right under UCC § 2-601(a) to reject all of such cargo and therefore was not liable for its purchase price or any consequential damages, (3) seller also breached implied warranty of merchantability with respect to two other cargoes of flour, and since buyer had paid for such flour and had ultimately accepted it, buyer was entitled to damages under UCC § 2-606(1)(a), (4) buyer was not barred from claiming damages for such nonconforming cargoes by failure to give notice of nonconformity by registered mail, since buyer's warning to seller of buyer's dissatisfaction with cargoes constituted adequate notice under UCC § 2-607(3)(a), and (5) under UCC § 2-714(2), although there was no evidence as to value of such cargoes at time and place of their acceptance (*Mobile, Alabama*), buyer was entitled to damages for difference between prices for good and infested flour in Bolivia, South America, plus damages for expenses incurred because of flour's infestation, since buyer had accepted such flour after it had been loaded on ships that transported it to Bolivia and had had no reasonable opportunity to inspect it before it was loaded. *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 449 F. Supp. 84 (S.D. Ala. 1976), rev'd on other grounds, 629 F.2d 338 (5th Cir. Ala. 1980), reh'g denied, 651 F.2d 779 (5th Cir. Ala. 1981).

Manufacturer, seller or supplier of products for human consumption or intimate bodily use may become liable on basis of implied warranty for injurious result stemming therefrom when it should have been foreseen, in exercise of reasonable care and foresight, that such results would be sustained by appreciable number of persons using products. *Robbins v. Alberto-Culver Co.*, 210 Kan. 147, 499 P.2d 1080 (1972).

Where evidence made it clear that cattle food contained stilbestrol, and that the food had not been purchased for beef cattle, the tainted food constituted a clear breach of the implied warranty of merchantability and of the warranty of fitness for a particular purpose. *Kassab v. Cen-*

tral Soya, 432 Pa. 217, 246 A.2d 848 (1968).

The implied warranty of fitness of food for human consumption may be regarded as absolute. *Scanlon v. Food Crafts, Inc.*, 2 Conn. Cir. Ct. 3, 193 A.2d 610 (1963).

Whether a person is a restaurant keeper has no effect upon the existence of the implied warranty for fitness for human consumption that arises from a sale of food by him. *Scanlon v. Food Crafts, Inc.*, 2 Conn. Cir. Ct. 3, 193 A.2d 610 (1963).

All food to be consumed on or off the premises where it is prepared carries an implied warranty of merchantability. *Wernick v. Bob Ware's Food Shops, Inc.*, 27 Mass. App. Dec. 19 (1963).

In *Sofman v. Denham Food Service, Inc.* (1962) 37 NJ 304, 181 A.2d 168, 1 UCCRS 93, the court noted that under the Code which had been adopted but which was not yet in effect a cafeteria selling food makes an implied warranty of its fitness to a purchaser. *Sofman v. Denham Food Serv., Inc.*, 37 N.J. 304, 181 A.2d 168 (1962).

16. —When sale occurs.

In action by customer against self-service food store on theory of breach of warranty under UCC § 2-314, for injuries sustained when soft drink bottle exploded while customer was placing it on check-out counter, directed verdict in favor of store was erroneous where evidence established that store placed goods on shelves with specified price mark and customer removed bottle with intent to pay for it; such acts constituted a contract to sell within UCC § 2-106(1), giving rise to warranty protection, even though customer had not yet paid for goods and title had not yet passed. *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976).

In action by supermarket customer for injuries sustained when one or more bottles of Coca Cola exploded prior to being placed in shopping cart, retailer breached implied warranty of merchantability by relinquishing physical control of defective bottle to consumer, but evidence was not sufficient to establish breach of warranty by manufacturer. *Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318

A.2d 874 (1974), *aff'd*, 273 Md. 592, 332 A.2d 1, 78 A.L.R.3d 682 (1975).

Delivery of article, not payment therefor, is determinative of when and whether sale of food or drink from self-service stores has taken place, so that where buyer took drinks into his possession with intent to pay for them, delay in making payment at cashier's counter did not delay point at which sale was made or to be made. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

17. —Nature of defect.

Buyer who sustained permanent hand injury from breaking of wine glass while drinking wine purchased in defendant's restaurant had cause of action for breach of implied warranty of merchantability created by UCC § 2-314(1) and (2), since drink sold in such case included not only the wine but also its container, and both were required to be fit for ordinary purposes for which they are used. *Shaffer v. Victoria Station, Inc.*, 91 Wash. 2d 295, 588 P.2d 233 (1978).

Distributor of bananas was not liable for wrongful death of grocery store produce manager, who was bitten by banana spider while handling produce delivered to store by distributor, on theory of breach of implied warranty under UCC § 2-314, although spider may have been transported in banana container, where spider was not in bananas when it bit decedent and where there was nothing wrong with bananas which were edible and salable. *Anderson v. Associated Grocers, Inc.*, 11 Wash. App. 774, 525 P.2d 284 (1974).

Trial court erroneously assumed that food is necessarily "fit for ordinary purposes" if not deleterious; if apple sauce is inedible because of taste and smell it is not fit for ordinary purposes for which it is to be used; no biological or laboratory proof should be required as part of plaintiff's case. *Martel v. Duffy-Mott Corp.*, 15 Mich. App. 67, 166 N.W.2d 541 (1968).

The presence of a fish bone in a bowl of New England style fish chowder served to the plaintiff in a restaurant, as a result of which the fish bone became lodged in plaintiff's throat while she was eating the chowder, does not constitute a breach of implied warranty under § 2-314(1) and (2)(c) and under § 2-316(3)(b) of the in-

stant chapter because in the light of the traditional methods of preparing such chowders, the occasional presence of bones therein is to be anticipated and it does not impair the fitness or merchantability thereof. *Webster v. Blue Ship Tea Room, Inc.*, 347 Mass. 421, 198 N.E.2d 309 (1964).

The purchaser of a chicken pie could maintain an action based on the breach of an implied warranty of fitness for consumption against the manufacturer to recover for injuries resulting from a chicken bone lodging in purchaser's throat as he was eating the pie. The court pointing out that, because the question had not been raised, it was not called upon to decide whether the manufacturer's implied warranty extended to the instant purchaser, who was apparently a remote consumer and not a purchaser from the manufacturer. *De Graff v. Myers Foods, Inc.*, 19 Pa. D. & C.2d 19, 1 U.C.C. Rep. Serv. 110 (1958).

18. —Inherent hazards.

In action against manufacturer of mixed nuts by purchaser who suffered tooth injury when biting down on unshelled nut, directed verdict in favor of manufacturer was proper since: (1) evidence did not support purchaser's claim of express warranty within meaning of UCC § 2-313(1), where no statement on label indicated that nuts were shelled and where use of clear glass jar revealing only shelled nuts was mere passive marketing tool and not affirmative representation sufficient to give rise to express warranty; and (2) manufacturer did not breach implied warranty of merchantability under UCC § 2-314, since presence of limited quantities of unshelled nuts was not sufficient to render jar of nuts unmerchantable, or unfit for ordinary purposes. *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 226 S.E.2d 534 (1976).

In action by purchaser of ice cream cone against seller for breach of implied warranty of merchantability where plaintiff purchased "cherry pecan" ice cream cone from defendant's retail store, ate portion of ice cream, and broke tooth on cherry pit contained in ice cream, trial court erred in holding that cherry pit was substance natural to such ice cream and that defen-

dant was not liable for injuries resulting from such natural substance; "reasonable expectation" test would be applied to action for breach of implied warranty and if it was found that pit of cherry should be anticipated in cherry pecan ice cream and guarded against by consumer, then ice cream was reasonably fit under implied warranty of merchantability. *Williams v. Braum Ice Cream Stores, Inc.*, 534 P.2d 700 (Okla. Ct. App. 1974).

19. —Beverages.

In action for damages for negligence and breach of warranty, circumstantial evidence sufficient to support reasonable inference that insect was contained in bottle of orange soda when bottle left defendant's bottling plant was sufficient to support jury finding of liability for (1) negligence, and (2) breach of implied warranty of merchantability under UCC § 75-2-314(1) and (2)(c) that soft drink purchased by plaintiff was fit for ordinary consumption. *Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 351 S.E.2d 897 (Ct. App. 1986).

Buyer who sustained permanent hand injury from breaking of wine glass while drinking wine purchased in defendant's restaurant had cause of action for breach of implied warranty of merchantability created by UCC § 2-314(1) and (2), since drink sold in such case included not only the wine but also its container, and both were required to be fit for ordinary purposes for which they are used. *Shaffer v. Victoria Station, Inc.*, 91 Wash. 2d 295, 588 P.2d 233 (1978).

In action by customer against self-service food store on theory of breach of warranty under UCC § 2-314, for injuries sustained when soft drink bottle exploded while customer was placing it on check-out counter, directed verdict in favor of store was erroneous where evidence established that store placed goods on shelves with specified price mark and customer removed bottle with intent to pay for it; such acts constituted a contract to sell within UCC § 2-106(1), giving rise to warranty protection, even though customer had not yet paid for goods and title had not yet passed. *Fender v. Colonial Stores, Inc.*, 138 Ga. App. 31, 225 S.E.2d 691 (1976).

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Delivery of article, not payment therefor, is determinative of when and whether sale of food or drink from self-service stores has taken place, so that where buyer took drinks into his possession with intent to pay for them, delay in making payment at cashier's counter did not delay point at which sale was made or to be made. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

20. —Bread and rolls.

Warranty of fitness for particular purpose held implied in sales of bread eaten by buyer. *Finocchiaro v. Ward Baking Co.*, 104 R.I. 5, 241 A.2d 619 (1968).

There is an implied warranty from the vendor of food that it should not be too hard for human consumption, although it is recognized that hardness is a matter which is distinct from the presence of extraneous or foreign matter and is not necessarily related to the freshness of the food. (vendor of a ready-made roll-sandwich makes an implied warranty that the roll is not too hard for human consumption) *Scanlon v. Food Crafts, Inc.*, 2 Conn. Cir. Ct. 3, 193 A.2d 610 (1963).

It could be found that the presence in a muffin of a date pit which broke the tooth of the purchaser eating it rendered the muffin unfit for consumption and unmerchantable. *Wernick v. Bob Ware's Food Shops, Inc.*, 27 Mass. App. Dec. 19 (1963).

21. —Meat.

Under Illinois UCC § 2-314(1) and (2)(c), implied warranty of merchantability attaching to sale of raw pork means that such pork is wholesome and fit for consumption only after proper cooking at temperature of at least 137° Fahrenheit, which is sufficient to destroy all trichinae (holding that allegation that plaintiff had

contracted trichinosis after consuming "properly cooked" pork was allegation of factual impossibility). *Huebner v. Hunter Packing Co.*, 59 Ill. App. 3d 563, 375 N.E.2d 873, 96 A.L.R.3d 444 (5th Dist. 1978).

Seller of raw pork did not breach implied warranty of merchantability under UCC § 2-314 with respect to buyer who contracted trichinosis after eating pork; ordinary and intended purpose for raw pork is consumption after proper cooking by consumer and, since proper cooking would have killed all trichinae, fact that buyer contracted trichinosis showed by necessary implication that pork was not properly cooked and, thus, buyer failed to show that pork was not fit for its ordinary and intended purpose. *Hollinger v. Shoppers Paradise of New Jersey, Inc.*, 134 N.J. Super. 328, 340 A.2d 687 (1975), *aff'd*, 142 N.J. Super. 356, 361 A.2d 578 (1976).

In enacting this section it was the clear intention of the Georgia legislature to abrogate the previously existing substantive rule that furnishing of food by a restaurant for consumption on the premises was a service and not a sale; and a customer who broke a tooth, on a hard substance in a hamburger could presently maintain an action for breach of implied warranty against the seller. *Ray v. Deas*, 112 Ga. App. 191, 144 S.E.2d 468 (1965).

An implied warranty of fitness arises on the sale by a merchant to a consumer of raw pork but the warranty is only that it is for human consumption if it is properly cooked. *Adams v. Scheib*, 408 Pa. 452, 184 A.2d 700 (1962).

C. Requisites of Merchantability.

22. In general; fair average quality.

Employee who sustained arm injury from "nip point" of conveyor while working at employer's sugar plant and who alleged that plant's conveyor system was not fit, within meaning of UCC § 2-314(2)(c) and § 2-315, for ordinary and particular purposes for which it was to be used, presented claims involving issues of material fact that should have been submitted to jury (stating that implied warranty liability can extend to manufacturer of component parts, provided that defects exist in such parts before they leave manufac-

turer). *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276, 2 A.L.R.4th 245 (1978).

Under UCC § 2-316(3)(b), buyer received no warranty of merchantability on table tops where buyer had opportunity to inspect, test, and examine sample table tops furnished by manufacturer and ordered large quantities of table tops on basis of such samples; even if defect was latent, buyer was experienced in wood industry and, as such, either knew or should have known that wood has tendency to warp because of change in moisture content and that sealing of wood was proper method to treat such distortion. *Michael-Regan Co. v. Lindell*, 527 F.2d 653 (9th Cir. Cal. 1975).

Even if transfer of donor blood by non-commercial supplier to hospital for service fee was sale under UCC §§ 2-314 and 2-315, so as to give rise to implied warranty, supplier was not liable to hospital patient who contracted serum hepatitis, since there were no methods available at time in question by which hepatitis virus could effectively be excluded from blood or presence of virus determined and, therefore, blood, to extent it may have contained hepatitis virus, was unavoidably unsafe and for that reason was not unreasonably dangerous and did not fail to be fit within terms of warranties provided for in UCC §§ 2-314 and 2-315. *McMichael v. American Red Cross*, 532 S.W.2d 7 (Ky. 1975).

Mere fact that lock ring "exploded" from used truck wheel, striking bystander in mouth and injuring her, did not establish that wheel was "unmerchantable" within meaning of UCC § 2-314. *Rix v. Reeves*, 23 Ariz. App. 243, 532 P.2d 185 (1975).

Where defendant seller contracted with plaintiff buyer to supply sleeve bearings impregnated with specified oil in accord with government specifications for use in manufacture of bomb fuses, but instead supplied bearings coated with non-conforming oil, and where, although bearings coated with non-conforming oil were visibly different from conforming bearings, buyer used non-conforming bearings to manufacture two lots of bomb fuses which were discovered to be defective as result of use of such bearings, (1) under UCC §§ 2-313, 2-314, and 2-315, seller was liable to

buyer for breach of its express warranty to supply bearings meeting applicable specifications and its implied warranties of merchantability and fitness for a particular purpose. *General Instrument Corp., F.W. Sickles Div. v. Pennsylvania Pressed Metals, Inc.*, 366 F. Supp. 139 (M.D. Pa. 1973), *aff'd*, 506 F.2d 1051 (3d Cir. Pa. 1974), *aff'd*, 506 F.2d 1052 (3d Cir. Pa. 1974).

Implied warranty of merchantability applies to livestock, and applies to latent diseases in livestock; and fact that buyer's employee inspected sheep prior to delivery would not have precluded implied warranty where vibriosis with which sheep were infected would not have been apparent to even trained veterinarian. *S-Creek Ranch, Inc. v. Monier & Co.*, 509 P.2d 777 (1973).

Implied warranty of merchantability applies equally to both retailer and manufacturer of goods. *Gillispie v. Thomasville Coca-Cola Bottling Co.*, 17 N.C. App. 545, 195 S.E.2d 45 (1973), *cert. denied*, 283 N.C. 393, 196 S.E.2d 275 (1973).

Where prior to using artificial insemination rancher got 95 percent calf crop via natural service, and obtained 70 percent calf crop during first year of artificial insemination, but obtained only 7 percent calf crop during second year using semen from same bull under almost identical conditions, only logical inference was that something was wrong with semen purchased in second year and that express warranties made by breeding service company to rancher were not met, nor were implied warranties of merchantability and fitness met. *Waddell v. American Breeders Serv., Inc.*, 161 Mont. 221, 505 P.2d 417, 61 A.L.R.3d 801 (1973).

There is no express or implied warranty of merchantability or fitness for particular purpose in connection with sale and supply of water by municipality. *Coast Laundry, Inc. v. Lincoln City*, 9 Or. App. 521, 497 P.2d 1224, 54 A.L.R.3d 930 (1972).

Frozen food case seller was not entitled to directed verdict in face of evidence warranting finding of breach of implied warranty of merchantability, even if there was no evidence of seller's negligence. *Belcher v. Hamilton*, 475 S.W.2d 483 (Ky. 1971).

A purchaser of a product under a trade or patent name receives no implied warranty of fitness of use for any particular purpose, but does receive an implied warranty that the goods are of merchantable quality. *Montgomery Ward & Co. v. McKesson & Robbins, Inc.*, 55 Misc. 2d 529 (1967).

The "fair, average quality within the description" provisions of the original section, since the 1959 amendment to the Pennsylvania Uniform Commercial Code, are expressly limited to cases of fungible goods and thus were not applicable to an action predicated on a breach of warranty arising out of the sale of "log chains." *Robert H. Carr & Sons v. Yearsley*, 31 Pa. D. & C.2d 262 (1963).

It is no defense to an action brought for breach of warranty under subd (1) of this section to say that the seller could not expect that a nine-year-old child would handle and open a bottle of beer which exploded, causing injuries. *Harris v. Great Atl. & Pac. Tea Co.*, 23 Mass. App. Dec. 169 (1962).

23. Fitness for ordinary purposes.

Distributor that sold rifle which exploded and injured plaintiff was a seller and therefore subject to suit under strict liability, however distributor had no duty to inspect rifle for latent defects and therefore could not be held liable on negligence theory; distributor impliedly warranted rifle as merchantable by selling it in role of merchant, however, there was no implied warranty of fitness for particular use because rifle was purchased for ordinary use; manufacturer of rifle was not obliged to defend distributor in such action. *Curry v. Sile Distribs.*, 727 F. Supp. 1052 (N.D. Miss. 1990).

Unless the warranty of merchantability is excluded or modified, a merchant impliedly warrants that goods sold are fit for the ordinary purposes for which such goods are used (Uniform Commercial Code, § 2-314, subd [2], par [c]), and where a photocopying machine frequently malfunctioned, the implied warranty of merchantability was breached. *United States Leasing Corp. v. Comerlald Assocs.*, 101 Misc. 2d 773 (1979).

Employee of dry-cleaning plant, who was injured when his clothing caught fire

after being saturated with cleaning solvent and who, with respect to use of such solvent, was covered by warranties of fitness for purpose and merchantability contained in UCC § 2-314, § 2-315, and § 2-318, could not recover from manufacturers and distributors of solvent on theory of strict liability in tort for defective manufacture and failure to warn plaintiff of its flammability since legislature, by adopting Uniform Commercial Code, preempted field of tort liability in direct sale relationships, so as to prevent court from applying strict liability doctrine. *Wilhelm v. Globe Solvent Co.*, 373 A.2d 218 (Del. Super. 1977) but see *Wilhelm v. Globe Solvent Co.*, 411 A.2d 611 (Del. 1979).

Race horse sold to buyer was merchantable within meaning of UCC § 2-314(2), notwithstanding he suffered from tendonitis and intermittent claudication, where tendonitis was merely temporary and of no long term effect and where intermittent claudication did not prevent horse from becoming creditable if unspectacular race horse; after rest and recuperation, horse won three races in 13 starts and, although he did not live up to buyer's hopes for a preferred pacer, he was able to hold his own with other standardbreds, was reasonably fit for ordinary purpose for which race horses are used, and was merchantable. *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977), aff'd, 568 F.2d 770 (3d Cir. Pa. 1978).

Both the common-law warranty of fitness and quality and the statutory codification thereof in UCC § 2-314(1) and (2)(c) require that the product be reasonably fit for the ordinary purposes for which it is used. *Matulunas v. Baker*, 569 S.W.2d 791 (Mo. Ct. App. 1978).

"Ordinary purposes" in UCC § 2-314(2)(c) include both those uses that the manufacturer intended and uses that are reasonably foreseeable. *Back v. Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964 (1978).

Where there is evidence of a defect in goods which renders them unfit for the ordinary purposes for which they are used, the seller may be held liable under the Uniform Commercial Code (see UCC § 2-314(1) and (2)(c)) (involving alleged

breach of implied warranty of merchantability of hybrid seed corn). *Farmers Mut. Exch. Inc. v. Dixon*, 146 Ga. App. 663, 247 S.E.2d 124 (1978).

Under implied warranty of merchantability contained in UCC § 2-314(1) and (2)(c), goods to be merchantable (1) must at least be fit for ordinary purposes for which such goods are used, and (2) no reliance on seller, when relying on this implied warranty, need be shown. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

Tank purchased for storage of liquid fertilizer would not be suitable for such purpose, and would not be merchantable under UCC § 2-314(1) and (2)(c), if it were leaky (action for loss of liquid fertilizer because of leaks in storage tank purchased by plaintiff). *Christensen v. Eastern Neb. Equip. Co.*, 199 Neb. 741, 261 N.W.2d 367 (1978).

Employee who sustained arm injury from "nip point" of conveyor while working at employer's sugar plant and who alleged that plant's conveyor system was not fit, within meaning of UCC § 2-314(2)(c) and § 2-315, for ordinary and particular purposes for which it was to be used, presented claims involving issues of material fact that should have been submitted to jury (stating that implied warranty liability can extend to manufacturer of component parts, provided that defects exist in such parts before they leave manufacturer). *Union Supply Co. v. Pust*, 196 Colo. 162, 583 P.2d 276, 2 A.L.R.4th 245 (1978).

In action by owner of heavy-duty construction equipment for damage to equipment's engines that resulted from use of defective antifreeze that owner purchased to winterize such engines, where evidence showed that antifreeze purchased contained chloride, that chloride could corrode internal-combustion engines because it was a salt-water solution, that equipment owner had purchased the antifreeze from defendant retailer, that retailer had previously purchased it from a wholesale supplier (against whom retailer filed third-party action), and that the wholesale supplier had originally purchased it from manufacturer (against whom supplier filed fourth-party action), (1) retailer was liable to equipment owner, under

UCC §§ 2-313(1)(a), 2-314(1), and 2-315, for breach of express warranty that antifreeze was suitable for use in engines of owner's construction equipment and for breach of implied warranties of merchantability of such antifreeze and fitness thereof for particular purpose; (2) wholesale supplier was liable, under theory of breach of implied warranty of merchantability of antifreeze under UCC § 2-314(1), to retailer for same damages for which retailer was liable to equipment owner; and (3) manufacturer was liable to wholesale supplier on theory of strict liability in tort. *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977).

In action by seller for purchase price of coal, buyer's counterclaim based on seller's alleged breach of express warranty and implied warranties of merchantability and fitness of coal for particular purpose could not be sustained where (1) evidence did not show that seller had created express warranty under UCC § 2-313(1)(c) by showing buyer samples and analyses of coal's quality, but revealed instead that such samples and analyses were shown to buyer solely for his information; (2) coal delivered by seller was fit for ordinary purpose for which it was used, was burned as fuel by buyer's customers, and thus complied with seller's implied warranty of merchantability under UCC § 2-314(1); (3) implied warranty of fitness of coal for particular purpose did not arise under UCC § 2-315, since buyer did not rely on seller's skill and judgment in furnishing coal suitable for buyer's customers; and (4) even assuming that seller had breached such express and implied warranties as buyer contended, buyer still could not recover on counterclaim because he did not give seller adequate notice of alleged breach, as required by UCC § 2-607(3)(a), and such breach also was not proximate cause of damages buyer allegedly sustained. *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977).

In action by automobile body repairman against manufacturer of clamps used on body straightening machine to recover for injuries sustained when one of such clamps broke while repairman was

straightening automobile body, there was sufficient evidence to establish that clamps were not fit for ordinary purposes for which such goods are used under UCC § 2-314 where manufacturer's salesman sold clamps for use with body straightening machine which it had previously sold to repairman's employer, knowing that both machine and clamps were to be used by buyer to straighten "unitized" automobile bodies, and where clamp, which was one of pair, was delivered in box that contained no warning of any kind. *Mattos, Inc. v. Hash*, 279 Md. 371, 368 A.2d 993 (1977).

Seller of raw pork did not breach implied warranty of merchantability under UCC § 2-314 with respect to buyer who contracted trichinosis after eating pork; ordinary and intended purpose for raw pork is consumption after proper cooking by consumer and, since proper cooking would have killed all trichinae, fact that buyer contracted trichinosis showed by necessary implication that pork was not properly cooked and, thus, buyer failed to show that pork was not fit for its ordinary and intended purpose. *Hollinger v. Shoppers Paradise of New Jersey, Inc.*, 134 N.J. Super. 328, 340 A.2d 687 (1975), *aff'd*, 142 N.J. Super. 356, 361 A.2d 578 (1976).

Even if transfer of donor blood by non-commercial supplier to hospital for service fee was sale under UCC §§ 2-314 and 2-315, so as to give rise to implied warranty, supplier was not liable to hospital patient who contracted serum hepatitis, since there were no methods available at time in question by which hepatitis virus could effectively be excluded from blood or presence of virus determined and, therefore, blood, to extent it may have contained hepatitis virus, was unavoidably unsafe and for that reason was not unreasonably dangerous and did not fail to be fit within terms of warranties provided for in UCC §§ 2-314 and 2-315. *McMichael v. American Red Cross*, 532 S.W.2d 7 (Ky. 1975).

In action by buyer of tube mill against seller for breach of warranty: (1) where seller's offer and buyer's acceptance contained conflicting provisions as to warranties, neither provision became part of contract, and UCC implied warranty of

merchantability, § 2-314, was in effect; (2) as to limitation of damages clause in seller's offer, since there was no question that tube mill was grossly defective on delivery, not only did limitation of remedies provision fail of its essential purpose, but its application would be unconscionable; (3) notwithstanding facts that when resale price of machine was coupled with award of damages, buyer would receive more than purchase price of machine, damage award was not improper; (4) warranty of merchantability was breached by seller since tube mill was not fit for ordinary purpose of producing quality salable square tubing. *Bosway Tube & Steel Corp. v. McKay Mach. Co.*, 65 Mich. App. 426, 237 N.W.2d 488 (1975).

Allegations held sufficient to aver breach of implied warranty of merchantability in sale of hair rollers. *Gardner v. Q.H.S., Inc.*, 448 F.2d 238 (4th Cir. S.C. 1971).

The difficulties that plaintiff experienced in using the crane and the many breakdowns including the final breakdown occasioned during the time the crane was in use constituted sufficient evidence that it was not fit for the purposes for which it was used, and the trial judge was correct in finding a breach of the UCC § 2-314(2)(c) implied warranty. *Uganski v. Little Giant Crane & Shovel, Inc.*, 35 Mich. App. 88, 192 N.W.2d 580 (1971).

Leather skins which could be found to have met contract requirements that they be table run and conform to government specifications were "merchantable", regardless of fact that buyer could not use all the skins in the particular manner he wished. *Wakerman Leather Co. v. Irvin B. Foster Sportswear Co.*, 34 A.D.2d 594 (3d Dep't 1970), appeal denied, 26 N.Y.2d 614 (1970).

The fact that a product wears out in the course of normal use does not establish that there was a defect in it. *Indiana Nat'l Bank v. De Laval Separator Co.*, 389 F.2d 674 (7th Cir. Ind. 1968).

Under the Connecticut Act there may be an implied warranty that the goods sold shall be reasonably fit for a particular purpose, or that the goods shall be of merchantable quality, and the existence,

nature and extent of either implied warranty depends on the circumstances of the individual case. *Corneliuson v. Arthur Drug Stores, Inc.*, 153 Conn. 134, 214 A.2d 676 (1965).

The court could not take judicial notice of the ordinary uses of a "log chain" with link, hook and weld, and evidence was required to prove that its use as a cable for towing a truck was among such purposes. *Robert H. Carr & Sons v. Yearsley*, 31 Pa. D. & C.2d 262 (1963).

Whether the ordinary purposes for which a "log chain" with link hook, and weld is used includes its use as a cable for towing a truck is a jury question. *Robert H. Carr & Sons v. Yearsley*, 31 Pa. D. & C.2d 262 (1963).

24. —Drugs and medicine.

In action by cattle ranchers for damages for injuries to, and death of, cattle from particular batch of cattle vaccine manufactured by defendant, trial court's finding that such vaccine was not fit for purpose for which it was to be used, and therefore was unmerchantable within meaning of UCC § 2-314(2)(c), was sustained by evidence which showed that plaintiffs' cattle, and also cattle belonging to other persons, had become ill at approximately the same time and with the same clinical symptoms after being vaccinated with such vaccine, whereas herds that were vaccinated with vaccines that were not part of batch that plaintiffs bought from defendant did not become ill. Furthermore, such finding was not precluded by evidence of defendant which tended to establish that there were other possible causes of sickness of plaintiffs' cattle. *Pearson v. Franklin Lab., Inc.*, 254 N.W.2d 133 (S.D. 1977).

In action against pharmacist and physician to recover damages for stroke allegedly suffered as result of oral contraceptive drug available only by prescription, implied warranties of merchantability under UCC § 2-314 and of fitness under UCC § 2-315 were not applicable to transaction with pharmacist, since pharmacist filled prescription as issued by physician. Furthermore, Physician issuing was not "seller" within meaning of UCC § 2-106(1) by virtue of issuing prescription for oral contraceptive drug and, thus, he was not subject to liability on theory of breach

of implied warranties of merchantability under UCC § 2-314 and of fitness under UCC § 2-315. *Batiste v. American Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (1977), cert. denied, 292 N.C. 466, 233 S.E.2d 921 (1977).

25. —Household chemicals.

Manufacturer of common, household drain cleaner that contained highly caustic concentration of sodium hydroxide, breached its implied warranty of merchantability under UCC § 2-314(2)(c) by marketing product that was inherently and unnecessarily dangerous, and therefore not "fit for the ordinary purposes for which such goods are used." Furthermore, under UCC § 2-318 such warranty inured to benefit of child whose mother was tenant in purchaser's boarding house and who was injured by drain cleaner. *Drayton v. Jiffie Chem. Corp.*, 1 Ohio Op. 3d 325, 395 F. Supp. 1081 (N.D. Ohio 1975), motion denied, 413 F. Supp. 834 (N.D. Ohio 1976), modified, 12 Ohio Op. 3d 135, 591 F.2d 352 (N.D. Ohio 1978).

There is no implied warranty that a child will not be killed by eating roach poison since the roach poison is sold as a poison and need only be fit for the purpose for which it was to be used. *Rumsey v. Freeway Manor Minimax*, 423 S.W.2d 387 (Tex. Civ. App. 1968).

26. —New motor vehicles and related equipment.

Purchaser of automobile battery who is injured when battery exploded could not recover under theory of implied warranty of merchantability from organization which allowed its name to be printed on battery because organization did not sell or contract to sell battery and was therefore not in position to make such warranty; organization was not liable for misrepresentation because no evidence was presented that plaintiff relied on name of organization in purchasing battery. *Harmon v. National Automotive Parts Ass'n*, 720 F. Supp. 79 (N.D. Miss. 1989).

Sufficient evidence had been adduced from which jury could find that tire had been cut before it left manufacturer's plant where: manufacturer had possession of tire longer than anyone else; numerous employees, as well as machinery,

handled it during manufacturing process; it was new tire put on rim less than 3 months following manufacture; manufacturer's employee testified that some force was necessary to make such cut, suggesting it was deliberately made by someone with knife or sharp instrument; there was nothing in record to suggest the cut was made by someone other than manufacturer; and, plaintiff offered expert testimony that tire was defective and that this was type of cut customarily made by tire manufacturers on defective tires which were to be scrapped. *BFGoodrich, Inc. v. Taylor*, 509 So. 2d 895 (Miss. 1987).

In breach-of-warranty action for damages by buyer of allegedly defective dump trailers against manufacturer-seller, court held (1) that buyer and its ultimate Mexican customers were "merchants" within meaning of UCC § 2-104(1); (2) that seller was "merchant" within meaning of both UCC § 2-104(1) and § 2-314(1); (3) that telephoned order for 20 additional trailers was not enforceable under statute of frauds in UCC § 2-201(1) because it did not come within exceptions to such statute contained in UCC § 2-201(3); (4) that "specially manufactured goods" exception in UCC § 2-201(3)(a) applies only when seller, rather than buyer, seeks to escape statute-of-frauds defense; (5) that since three trailers purchased under valid written contract were put to improper use by buyer's Mexican customers, rather than being used for their "ordinary purposes," no breach of implied warranty of merchantability under UCC § 2-314(1) and (2)(c) occurred; (6) that use of trailers for improper purposes, rather than for their stated "particular purpose," prevented recovery under implied warranty of fitness in UCC § 2-315; (7) that buyer could not recover for breach of express warranty under UCC § 2-313(1)(a) because it failed to prove that it had relied on statements in manufacturer-seller's brochure either prior to or contemporaneously with making of parties' contract; and (8) that since buyer had no right under UCC § 2-601(a) to reject two unused and undamaged trailers, manufacturer-seller was not required to retake them or to refund their purchase price to buyer. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

Where buyer, in action for breach of express and implied warranties attaching to sale of new car, attacked defendant manufacturer's 12 months-12,000 mile express warranty limit as unreasonable and unconscionable when applied to latent defect (development of rust) in car, and manufacturer, on motion for summary judgment, relied on expiration of its express warranty and its disclaimer of all implied warranties, court held (1) that since car had been driven for 33 months and 90,000 miles without serious mishap, its rust problem did not render it unmerchantable under UCC § 2-314(2)(c); (2) that although UCC § 2-316(2), providing for disclaimer of implied warranties, is silent as to when disclaimer must be made, court would apply rule adopted in other jurisdictions that disclaimer made after the sale is ineffective; (3) that manufacturer's disclaimer in present case was therefore ineffective because it was given to buyer at time of delivery of car and not at time of execution of sales contract; (4) that manufacturer's 12 months-12,000 mile limitation on its express warranty was not unreasonable; and (5) that such warranty, instead of covering all manufacturing defects in car, covered only those that were discoverable within 12 months or 12,000 miles, and buyer bore risk of repairs beyond that point. *Taterka v. Ford Motor Co.*, 86 Wis. 2d 140, 271 N.W.2d 653 (1978).

Under UCC § 2-314, theory of implied warranty is available in Florida against both manufacturers and merchants, and such theory embraces to some degree "crashworthiness" concept of automobiles. Thus, plaintiff who was injured when his automobile was "rear-ended" and his driver's seat back broke could properly sue vehicle's importer-distributor for breach of implied warranty that vehicle was reasonably fit for its intended use as passenger vehicle and that it was equipped with crashworthy seat backs and devices securing such equipment. *Smith v. Fiat-Roosevelt Motors, Inc.*, 556 F.2d 728 (5th Cir. Fla. 1977).

Corporation that imported automobile for resale impliedly warranted under UCC § 2-314(2)(c) that automobile would be equipped with "crashworthy seat backs."

Smith v. Fiat-Roosevelt Motors, Inc., 556 F.2d 728 (5th Cir. Fla. 1977).

In action by buyer of new Toyota pickup truck against seller for breach of implied warranty, under UCC § 2-314(2)(c), of merchantability and fitness of truck for ordinary purposes for which such a truck is used and breach of implied warranty under UCC § 2-315 of truck's fitness for particular purpose (operation at sustained freeway speeds), (1) directed verdict for seller was error with respect to engine's defective performance during first six months of operation, since vehicle's low mileage at such time and testimony that design defect generally existed in that particular engine model removed inference of causation between design defect and defective performance of plaintiff's engine from realm of speculation; (2) directed verdict for seller was proper with respect to subsequent engine repairs that followed repairs made in first six months of engine's operation, since making of earlier repairs and vehicle's advanced mileage rendered speculative plaintiff's claim that design defect, without proof of its existence in plaintiff's engine or elimination of other causes of engine's defective performance, caused engine's difficulties; and (3) directed verdict for seller was error with respect to defects in vehicle's paint, shift lever, and oil system, since plaintiff sustained burden of proof as to causation on these matters. *Nelson v. Wilkins Dodge, Inc.*, 256 N.W.2d 472 (Minn. 1977).

Both seller and manufacturer of new car with defective tie-rod assembly were liable for injuries sustained by owner's son under breach of implied warranty of merchantability, but seller was not negligent and could not have discovered defect and was entitled to full indemnification from manufacturer. *Langford v. Chrysler Motors Corp.*, 373 F. Supp. 1251 (E.D.N.Y. 1974), aff'd, 513 F.2d 1121 (2d Cir. N.Y. 1975).

In products liability action against, inter alia, manufacturer and dealer of automobile, for purpose of evaluating sufficiency of plaintiff's allegations to effect that manufacturer was liable for "secondary impact" injuries caused by design defects, based on breach of warranty, al-

though breach of both implied and express warranties was alleged, warranties would be treated as one since both warranted automobile as being suitable for its intended purpose, i.e., provision of reasonably safe transportation. *Frericks v. GMC*, 274 Md. 288, 336 A.2d 118 (1975).

Automobile manufacturer was not liable for injury to child which occurred when child, who was riding his bicycle, collided with automobile and impact of collision broke parking light on automobile, causing tendon in child's knee to be severed, although child was within class of persons who might reasonably be expected to be affected by such automobile under UCC § 2-318, where vehicle in question was fit for ordinary purposes for which such vehicle is used under UCC § 2-314; part of car involved was essential item on car, and not mere ornamentation; of necessity lens had to be made of transparent or translucent material and, in general, such materials are fragile; light did not shatter under normal usage, but shattered under impact with metal; and breakage resulted from external force and injury did not occur to user of vehicle. *Nacci v. Volkswagen of Am., Inc.*, 325 A.2d 617 (Del. Super. 1974).

In action against car dealer and manufacturer brought by buyer when engine failed to perform properly, statement by manufacturer warranting car to be free from defects in material and workmanship under normal use and service constituted express warranty under UCC § 2-313 and exclusion of, inter alia, implied warranty of fitness for particular purpose was ineffective where exclusions were not at any time called to buyer's attention and were not sufficiently conspicuous under UCC § 1-201(10); while implied warranty of merchantability under UCC § 2-314 and implied warranty of fitness for particular purpose under UCC § 2-315 may both attend sale of automobile, where neither dealer nor manufacturer knew that buyer intended to use car for occasional drag racing prior to or at time of original sale, no issue was created as to implied warranty of fitness for particular purpose, either in connection with original car purchase or subsequent motor replacement. *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396 (Iowa 1974).

Where automobile purchaser was furnished with certain express warranties, language of which provided that "this warranty is expressly in lieu of all other warranties and representations, expressed or implied" and radio was expressly excluded from the warranty, it was held that implied warranty of suitability for particular purpose for which it was sold applied to radio. *Mintz v. Daimler-Benz of N. Am., Inc.*, 73 Misc. 2d 212 (1973).

Where fender of new car was damaged in transit to dealer, dealer replaced damaged fender with new fender and had it repainted, and car was sold to buyer as new car, dealer had no duty under Uniform Commercial Code to disclose to buyer prior damage to fender and its replacement with new fender; mention of one thing in statute implies exclusion of others not expressed and, since UCC mandated only 2 implied warranties (merchantability, § 2-314, and fitness for particular purpose, § 2-315), there was no implied warranty that part of new motor vehicle had not been replaced with another new part. *Cocco v. Degnan Chevrolet, Inc.*, 64 Pa. D. & C.2d 6 (1973).

Where purchaser of new automobile claimed that from time car was delivered it did not operate in proper manner, that doors did not open and close properly, that various portions of car did not fit properly, that car started to rust within 1 month of delivery, that parts of automobile fell off, and that car was damaged while in transit from manufacturer to seller and was repaired without advising plaintiff of this fact, jury finding that dealer had breached implied warranty of merchantability in that vehicle did not comply with standards of quality which purchaser would ordinarily be entitled to expect when buying new car of same type was not against weight of evidence. *Luther v. Bud-Jack Corp.*, 72 Misc. 2d 924 (1972).

27. —Mobile homes.

Finding that there was no breach of implied warranty of merchantability attaching to mobile home under UCC § 2-314(1) was sustained by evidence that showed that although mobile home had leaking roof, buyer did not complain to seller about roof, but instead informed

seller that financial problems were reason for buyer's failure to make monthly payments on time. *Wickware v. National Mtg. Corp. of Am.*, 570 P.2d 330 (Okla. 1977).

Breach, within meaning of UCC § 2-314(1) and § 2-314(2)(c), of implied warranty of merchantability and fitness of mobile home for ordinary purposes for which home was to be used was established by evidence of buyer which showed that vehicle's doors would not latch, that frame of vehicle was crooked, that vehicle's wiring was incorrectly installed, and that vehicle's plumbing did not function properly (rejecting defense contention that seller does not impliedly warrant against latent defects). *Fredrick v. Dreyer*, 257 N.W.2d 835 (S.D. 1977).

Purchaser of new mobile home, who purchased from manufacturer through seller after viewing model and who subsequently discovered numerous defects, was entitled to recover from seller for breach of express warranty under UCC § 2-313 based on seller's assurance that home purchased would conform to model home and repeated promises of seller to make repairs to home; purchaser was also entitled to recover for breach of implied warranty of merchantability under UCC § 2-314 since home purchased was clearly below average and of poor quality. *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976).

A sale of a residential mobile home made by a mobile home merchant carried with it an implied warranty that the mobile home was fit for residential purposes. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

28. —Used motor vehicles.

Under Mississippi law, as predicted by district court, plaintiff cannot pursue remedy under theory of negligence or strict liability against product manufacturer in which damages that are solely economic are sought. *Lee v. GMC*, 950 F. Supp. 170 (S.D. Miss. 1996).

Buyer of pipes stated claims, under Mississippi law, for breach of implied warranties of merchantability and fitness for particular purpose, by alleging that seller represented to buyer that pipes would be sealed and tested to withstand 15 pounds of pressure per square inch and that pipes

failed to withstand such pressure. *IHP Indus., Inc. v. PermAlert, Esp.*, 947 F. Supp. 257 (S.D. Miss. 1996).

The buyer of a used car could not recover from the dealer who sold him the car for breach of implied warranty of merchantability since the buyer had a duty to afford the dealer a reasonable opportunity to cure the automobile's defects, which the buyer failed to do. *Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith*, 523 So. 2d 324 (Miss. 1988).

Merchantability is different for new and used goods of same type, used goods being expected to require more maintenance and repair; additionally, if their quality conforms to that of similar used goods, they will normally be merchantable. *Beck Enters., Inc. v. Hester*, 512 So. 2d 672 (Miss. 1987).

In an action for damages arising out of an alleged breach of implied and express warranties on a used automobile purchased by the plaintiff, no breach of any implied warranty of merchantability existed as a matter of law where the vehicle had been driven for over two years and 26,649 miles before the plaintiff experienced any difficulty with it; neither was there any breach of an implied warranty of fitness for a particular purpose where the vehicle had been purchased for a very ordinary purpose. *Ford Motor Co. v. Fairley*, 398 So. 2d 216 (Miss. 1981).

Pursuant to the legislative policy of the State to protect purchasers of used vehicles from being sold defective vehicles, defendant used car dealer is liable for property damage sustained by plaintiff as the result of an accident caused by a defective steering mechanism, traceable to the manufacturer of the car, under section 417 of the Vehicle and Traffic Law which requires retail sellers of used vehicles to expressly warrant in writing that the vehicle "is in condition and repair to render, under normal use, satisfactory and adequate service upon the public highway at the time of delivery", and, it is therefore not necessary to determine whether defendant is also liable under the theories of strict liability in tort or implied warranty of merchantability. *Maure v. Fordham Motor Sales, Inc.*, 98 Misc. 2d 979 (1979).

Implied warranty of merchantability under UCC § 2-314(1) applies to sale of used car. *Natale v. Martin Volkswagen, Inc.*, 92 Misc. 2d 1046 (1978).

In action by buyer for breach of warranties attaching to sale of used truck, (1) when defendant dealer sold used truck, represented to have completely rebuilt engine, to plaintiff, appropriate implied warranty of merchantability under UCC § 2-314(1) was created; (2) since plaintiff had relied on defendant's skill and judgment to furnish truck suitable for plaintiff's purposes, implied warranty of fitness for particular purpose arose by operation of law under UCC § 2-315 at time of sale and delivery of truck to plaintiff; and (3) no compelling reason existed to disturb trial court's finding that failure of truck's engine had not resulted from plaintiff's failure to keep engine properly oiled. *Roupp v. Acor*, 253 Pa. Super. 46, 384 A.2d 968 (1978).

In buyer's action for damages for breach of warranty in sale of three-year-old used car, court held (1) that used-car warranty under Illinois Consumer Fraud Act, which applied to cars not more than four years old, was not plaintiff's exclusive remedy simply because such act was enacted after Illinois Uniform Commercial Code; (2) that both Illinois Consumer Fraud Act and Uniform Commercial Code applied to sale of used automobiles, and that used-car warranties under the former act supplemented remedies afforded to consumers under the Uniform Commercial Code; (3) that implied warranty of merchantability under Illinois UCC § 2-314(1) and (2)(c) applied to case; (4) that jury was entitled to believe plaintiff's testimony that defects in her car had substantially impaired its value; (5) that seller had not excluded or modified its implied warranty of merchantability in sales contract because seller had failed to include therein the word "merchantability," as required by Illinois UCC § 2-316(2); (6) that jury believed that plaintiff had properly revoked her acceptance of car; and (7) that trial court by adjusting plaintiff's damages to reflect difference, at time and place of her acceptance of car, between car's value as warranted and its actual worth had applied measure of dam-

ages prescribed by Illinois UCC § 2-714(2) for breach of warranty. *Jackson v. H. Frank Olds, Inc.*, 65 Ill. App. 3d 571, 382 N.E.2d 550 (1st Dist. 1978).

In action by buyer of used car to recover purchase price from seller for seller's breach of express and implied warranties, where engine in vehicle at time of sale and also replacement engine subsequently installed were both defective, so as to cause breach of seller's express engine warranty and also breach of vehicle's implied warranty of merchantability under UCC § 2-314(1) and (2)(c), remedy of recovery of purchase price was available to buyer because (1) language in seller's express warranty did not expressly limit buyer's remedy to repair and replacement of defective parts; (2) even if seller's express warranty could be construed as limiting buyer's remedy to repair and replacement of defective parts, such exclusive remedy failed in its essential purpose within meaning of UCC § 2-719(2); and (3) buyer's remedies were not limited by any exclusion or modification by seller, under UCC § 2-316(2), of vehicle's implied warranty of merchantability. Furthermore, since buyer under UCC § 2-608(2) had sufficiently revoked her acceptance of vehicle, she was entitled to recover its purchase price. *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 2d 99 (1977).

Appropriate implied warranty of merchantability was created by contract for sale of "good" used car which entitled buyers to revoke their obligations under contract when warranties were found to have been breached. *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1st Dist. 1972).

Exterior finish on two year old used car was not, without more, included in any implied warranty of merchantability that might attach to sale of used car. *Tracy v. Vinton Motors, Inc.*, 130 Vt. 512, 296 A.2d 269 (1972).

A warranty of fitness of merchantability may arise in the sale of a used automobile. *Chamberlain v. Bob Matick Chevrolet, Inc.*, 4 Conn. Cir. Ct. 685, 239 A.2d 42, 24 A.L.R.3d 456 (1967).

Where the purchaser never intended to buy anything other than a 7-year-old secondhand automobile, the defendant never

purported to sell anything other than such an automobile, the automobile was reasonably fit for the general purpose for which it was sold, and the purchaser did not rely solely upon any special judgment of the defendant, in the complete absence of any special warranties no rescission or recovery could be had of the seller. *Basta v. Riviello*, 66 Lack. Jur. 77 (Pa. 1964).

29. —Building materials.

In breach of warranty action by developer of subdivision against seller-manufacturer of coating product used on plywood exterior of certain of developer's houses following delamination and checking of surfaces painted with sellers' product, finding that seller neither breached implied warranty of merchantability under UCC § 2-314 nor implied warranty of fitness for particular purpose under UCC § 2-315 was proper where there was evidence that coating material was free from defects and was proper material for use intended, and that delamination and checking occurred as result of combination of improper preparation of plywood surface and incompetent application of coating material. *Shore Line Properties, Inc. v. Deer-O-Paints & Chems., Ltd*, 24 Ariz. App. 331, 538 P.2d 760 (1975).

30. —Fixtures.

No recovery for wrongful death where claim is based on alleged breach of implied warranty of fitness of room heater. *Horne v. Armstrong Prods. Corp.*, 416 F.2d 1329 (5th Cir. Ga. 1969).

31. —Farm fixtures and implements.

A seller of farm machinery breached its new equipment warranty and the implied warranty of merchantability found in § 75-2-314(2)(c) where neither a new grain drill nor a used combine sold to the purchaser were fit for the ordinary purposes for which such goods were to be used; the seller also breached the implied warranty of fitness for a particular purpose found in § 75-2-315 where the evidence established that the purchaser relied upon the skill of the seller's salesman who had explained to the purchaser all that he knew about farming and had assisted the purchaser in selecting the equipment that he would need in his ini-

tial farming operation. A new agricultural equipment warranty which warrants new agricultural equipment to be free of defects in material and workmanship at the time of delivery to the first retail purchaser encompasses the proposition that the equipment will be in "field ready" condition; "field ready" condition simply means that the equipment is ready to be used in the field and is consistent with the warranty that the machinery is free of defects in material and workmanship at the time of delivery. The seller's attempt to avoid any warranty, express or implied, in relation to used equipment sold to the purchaser was prohibited by § 75-2-719(14). *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15 (Miss. 1981).

Evidence in buyer's suit against manufacturer and seller of farm sprinkler irrigation system for breach of warranties made in connection with sale of system supported trial court's findings (1) that both manufacturer and seller had made and breached express warranties under UCC § 2-313 concerning system's operation and durability; (2) that both defendants had breached implied warranty of merchantability attaching to system under UCC § 2-314(1) and (2)(c); and (3) that both defendants had also breached implied warranty under UCC § 2-315 that system was fit for particular purpose for which buyer had purchased it. Moreover, since such express and implied warranties were made before date on which contract of sale was made, disclaimer of warranties contained in manufacturer's erection manual, which buyer received after entering into contract, did not negate such warranties (noting also that even if buyer had received manufacturer's erection manual before entering into contract, general warranty disclaimer contained in manual would not have destroyed specific express warranties that were made orally by seller and were set forth in writing in manufacturer's advertising brochure). *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977).

Even though contract for sale of used tractor to farmer contained complete disclaimer of warranties in accordance with UCC § 2-316, UCC § 2-102 states that Article 2 does not "impair or repeal any

statute regulating sales to consumers, farmers or other specified classes of buyers," and hence disclaimer provision was void since it was in conflict with statute relating to purchase of tractors which made such disclaimers void; once disclaimer provision was voided, UCC § 2-314 injected implied warranty of merchantability into contract for sale of tractor. *Hoffman Motors, Inc. v. Enockson*, 240 N.W.2d 353 (N.D. 1976).

32. —Livestock feed.

In action arising out of sale of livestock feed, implied warranty under UCC §§ 2-314 and 2-315 of fitness for purpose of feeding hogs was inherent in transaction, since inference that seller knew purpose to which feed was being put by buyer, a hog farmer, must follow from their course of dealing for two years. *Utah Coop. Ass'n v. Egbert-Haderlie Hog Farms, Inc.*, 550 P.2d 196 (Utah. 1976).

Evidence was sufficient to support finding that seller breached implied warranty that feed was of merchantable quality and reasonably fit for commercial feeding of dairy cattle, where, inter alia, veterinarian testified that cows often back away from quality of mix which defendant sold plaintiff; although buyer was obligated under UCC § 2-607 to pay for goods accepted at a contract rate, he was not barred thereby from recovering damages resulting from defects in such goods. *Jorritsma v. Farmers' Feed & Supply Co.*, 272 Or. 499, 538 P.2d 61 (1975).

33. Uniform quality and quantity.

In action for breach of express and implied warranties in sale of bellows-expansion joints purchased for use in buyer's steam utility system, (1) seller's recommendation in letter to buyer that joints be made of Monel metal, rather than stainless steel, did not amount to implied warranty of fitness of joints for particular purpose under UCC § 2-315, since buyer did not inform seller that buyer was relying on seller to select metal that would satisfy buyer's need for an extremely anticorrosive substance; (2) buyer did not establish breach of implied warranty of merchantability of joints under UCC § 2-314(1), since joints furnished by seller met all quality standards prescribed by UCC

§ 2-314(2); (3) statement in seller's letter that seller would guarantee "operation of the application as well as the recommended expansion joints" if joints were installed according to seller's recommendations was not express warranty (see UCC § 2-313(1)(a)) that each joint would work, but was only guarantee that seller's application scheme for placement of joints would adequately absorb expansion and contraction of buyer's steam pipes; and (4) purchase-order warranty that joints would comply with all specifications and would be free of defects in workmanship and materials was not breached, since buyer (a) did not furnish any specifications as to required service longevity of joints or degree of their resistance to corrosion, and (b) alleged design defects of joints, with regard to seller's failure to anneal joints, liner design of joints, and thickness of bellows walls of joints, were not shown to have caused failure of joints after their installation in buyer's utility system. *Wisconsin Elec. Power Co. v. Zallea Bros.*, 443 F. Supp. 946 (E.D. Wis. 1978), *aff'd*, 606 F.2d 697 (7th Cir. Wis. 1979).

In action for breach of express and implied warranties in sale of bellows-expansion joints purchased for use in buyer's steam utility system, (1) seller's recommendation in letter to buyer that joints be made of Monel metal, rather than stainless steel, did not amount to implied warranty of fitness of joints for particular purpose under UCC § 2-315, since buyer did not inform seller that buyer was relying on seller to select metal that would satisfy buyer's need for an extremely anticorrosive substance; (2) buyer did not establish breach of implied warranty of merchantability of joints under UCC § 2-314(1), since joints furnished by seller met all quality standards prescribed by UCC § 2-314(2); (3) statement in seller's letter that seller would guarantee "operation of the application as well as the recommended expansion joints" if joints were installed according to seller's recommendations was not express warranty (see UCC § 2-313(1)(a)) that each joint would work, but was only guarantee that seller's application scheme for placement of joints would adequately absorb expansion and

contraction of buyer's steam pipes; and (4) purchase-order warranty that joints would comply with all specifications and would be free of defects in workmanship and materials was not breached, since buyer (a) did not furnish any specifications as to required service longevity of joints or degree of their resistance to corrosion, and (b) alleged design warranty (reversing default judgment for plaintiff and remanding case for new trial). *Dallas Heating Co. v. Pardee*, 561 S.W.2d 16 (Tex. Civ. App. 1977), *writ ref'd n.r.e.*, (Mar. 29, 1978).

In action by buyer against seller of studs to be used in construction of building, evidence was sufficient to sustain trial court's conclusions that: (1) seller breached implied warranty of merchantability under UCC § 2-314 where seller did not furnish buyer building studs which were of "fair average quality" within description or agreed upon sample, majority of studs were much lower in quality than "#2 spruce studs" agreed upon, and studs were not "fit for the ordinary purposes" for which they were furnished, namely the construction of buildings which would meet minimum general construction standards; and (2) seller breached implied warranty of fitness under UCC § 2-315 where seller's salesman knew purpose for which studs were to be used, viewed the building site and surveyed the list of goods to be used in the construction of the development, was experienced lumber dealer and had greater skill and judgment than buyer's representative regarding suitability of types of lumber for specific projects, and where seller's expertise was relied upon by buyer. *Jetero Constr. Co. v. South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. Tenn. 1976).

Cotton merchant made express warranties of quantity by stating on its 3 invoices number of bales of cotton sold thereby; and when merchant sold nonexistent cotton to broker, it breached both express and implied warranties and thereby rendered itself liable to broker for at least amount he paid therefor. *Simon v. Estate of Allen*, 497 S.W.2d 800 (Tex. Civ. App. 1973), *ref. n.r.e.*, *cert. denied*, 419 U.S. 843, 95 S. Ct. 76, 42 L. Ed. 2d 71 (1974).

34. Adequate packaging and labeling.

Code imposes on retailer warranty of merchantability which covers not only product which is object of sale, but adequacy of container and its packaging, including paper carton for carrying bottled soft drink. *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901 (Fla. App. 1973).

The nature of bottled drinks requires a container which is adequate to contain the drink without breaking or exploding when handled with ordinary care, or, stated differently, soft drinks are not merchantable if inadequately contained. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Nature of bottled drinks requires container which is adequate to contain drink without breaking or exploding when handled with ordinary care; and if they are sold in container which is inadequate, seller has breached his implied warranty of merchantability and he is liable for personal injury proximately caused by this breach. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Gift or holiday boxes manufactured for use as containers of individual bottles of whiskey which adequately contained the bottles were fit for the ordinary purposes for which such goods are used, and the fact that the increased dimensions of the packaged bottles over those which were unpackaged made it difficult if not impossible to fit them into purchaser's standard shipping cases without damage was not a breach of implied warranty. *Standard Packaging Corp. v. Continental Distilling Corp.*, 259 F. Supp. 919 (E.D. Pa. 1966), aff'd, 378 F.2d 505 (3d Cir. Pa. 1967).

Manufacturer of cosmetics could maintain an action for damages resulting from leaking aerosol cans in which certain of its products were packaged against can manufacturer on theory of breach of implied warranty of merchantability and fitness, although no privity of contract existed between can manufacturer and the user. *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E.2d 726 (1st Dist. 1966).

35. Conformity to affirmation or statement on label.

Since an implied warranty can be made on a container or label of a product (Uniform Commercial Code, § 2-314, subd [2], par [f]), a valid disclaimer of warranty may also be found on a container or label; a specific written disclaimer prevails over an orally expressed warranty which would, in any event, run afoul of the parol evidence rule. *Basic Adhesives, Inc. v. Robert Matzkin Co.*, 101 Misc. 2d 283 (1979), aff'd as modified.

In action for injuries suffered by plaintiff while using golf training device made by defendants, trial court properly concluded that defendants expressly warranted safety of device and that they were liable for plaintiff's injuries, where plaintiff's evidence indicated that before using device, he read and relied on words "Completely Safe Ball Will Not Hit Player", printed on container, but that when his golf club hit under ball, ball looped over club and hit him on head, and where defendants presented no evidence which could remove their assurance of safety from basis of bargain. Furthermore, trial court properly held for plaintiff on theory of breach of implied warranty of merchantability, where device failed to conform to words on container "Completely Safe Ball Will Not Hit Player", and was not fit for ordinary purposes for which such goods are normally used, and where defendants' attempt to limit scope of their warranties failed to meet requirements of UCC § 2-316 governing disclaimer and modification of warranties. *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 74 A.L.R.3d 1282 (1975).

36. In general.

Buyer who successfully sues for breach of warranty may recover litigation expenses under Magnuson-Moss Warranty Act, 15 USCA § 2301-2312. *Beck Enters., Inc. v. Hester*, 512 So. 2d 672 (Miss. 1987).

In action for breach of implied warranties of merchantability and fitness for particular purpose of trailer that was dangerously unroadworthy, (1) trailer's condition demonstrated that implied warranties under UCC § 2-314(1) and § 2-315 were breached, (2) buyer accepted trailer by

offering to pay balance of contract price on assumption that trailer could be repaired, (3) under UCC § 2-608(1)(a), buyer was entitled to revoke acceptance on discovering structural defects in trailer's welding and design that he could not have known about without aid of an expert, (4) buyer's revocation of acceptance was timely under UCC § 2-608(2), and (5) under UCC § 2-711(1), buyer was not required to prove that damages were inadequate remedy before obtaining right to rescind contract. *McCormick v. Ornstein*, 119 Ariz. 352, 580 P.2d 1206 (Ct. App. 1978).

37. Wrongful death.

Cause of action for wrongful death does not arise on account of breach of implied warranty of fitness under UCC. *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485 (4th Cir. Md. 1973).

38. Measure and elements of damages.

In action against manufacturer of poultry meal for damages resulting from injury to poultry producer's chickens in that chickens fed with feed that included meal manufactured by defendant failed to achieve normal growth, gravamen of cause of action was breach of warranty of sale under UCC §§ 2-313 and 2-314 and damages sought were permissible under and governed by UCC §§ 2-714 and 2-715, even though tortious breach on part of defendants was alleged. *Mid-South Milling Co. v. Loret Farms, Inc.*, 521 S.W.2d 586 (Tenn. 1975).

In action by buyer of tube mill against seller for breach of warranty, notwithstanding facts that when resale price of machine was coupled with award of damages, buyer would receive more than purchase price of machine, damage award was not improper. *Bosway Tube & Steel Corp. v. McKay Mach. Co.*, 65 Mich. App. 426, 237 N.W.2d 488 (1975).

In action for damages for breach of warranty of title, brought by buyer of stolen automobile against seller wherein buyer had undisturbed possession of automobile for period of approximately nine months, value of automobile at time buyer's possession was disturbed so that he lost use of automobile was proper measure

of damages. *Ricklefs v. Clemens*, 216 Kan. 128, 531 P.2d 94, 94 A.L.R.3d 572 (1975).

39. Parties and standing.

Plaintiff, buyer of beef from defendant packing company, was not entitled to recover from packer for breach of implied warranty of merchantability under UCC § 2-314, following buyer's receipt of partially spoiled beef, where plaintiff prosecuted claim against carrier and breached its fiduciary duty under UCC § 2-722 by settling claim against carrier without consulting seller, where plaintiff failed to make sufficient proof of seller's fault in defective shipment, and where, even if seller had been at fault, plaintiff failed to apportion fault between carrier and seller with sufficient certainty to support judgment against seller. *Greisler Bros. v. Packerland Packing Co.*, 392 F. Supp. 206 (E.D. Wis. 1975).

UCC § 2-314, implied warranty of merchantability, and UCC § 2-315, implied warranty of fitness for particular purpose, would be extended to lease transaction under which equipment company leased three motor scraper units to construction company since same considerations which give rise to creation of implied warranties in sales transaction were present: lessor was merchant specializing in sale and leasing of heavy construction equipment and lessee claimed it relied on lessor's expertise; lessor placed product into stream of commerce and sought to reap economic benefits from lease of product; and, finally, lessor was in better position to control antecedent factors which affect condition of product. Furthermore, UCC § 2-316, which allows seller to disclaim implied warranties and provides specific means for such disclaimer, would be extended to lease in question by analogy. *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 541 P.2d 1184 (1975).

This section does not deal with the rights of third persons not parties to the sale who come into possession of the goods and use them in the manner intended by the manufacturer and are thereby injured by reason of the faulty condition of goods latent in character due to improper manufacture or the use of faulty materials. *Lonzrick v. Republic Steel Corp.*, 1 Ohio App. 2d 374, 205 N.E.2d 92 (1965), *aff'd*, 6

Ohio St. 2d 227, 35 Ohio Op. 2d 404, 218 N.E.2d 185 (1966).

Where employee's complaint alleged that safety work shoes "supplied" to him by his employer caused dermatitis, it could not be said in view of the many connotations of the word "supplied" that the employee was, as a matter of fact, excluded from the class of persons to whom the warranties extended under this section applied. *Nederostek v. Endicott-Johnson Shoe Co.*, 415 Pa. 136, 202 A.2d 72 (1964).

The implied warranty afforded by subd (1) of this section applied where the injured party was a member of the buyer's family. *Harris v. Great Atl. & Pac. Tea Co.*, 23 Mass. App. Dec. 169 (1962).

40. Remote manufacturer or seller; privity required.

In an action by a purchaser of an automobile against the car manufacturer and the car dealership, no remedy of revocation would be available to the purchaser against the manufacturer as a "seller" under § 75-2-314, where there was no evidence that the manufacturer either sold or contracted to sell the automobile to the purchaser. *Royal Lincoln-Mercury Sales, Inc. v. Wallace*, 415 So. 2d 1024 (Miss. 1982).

Where the purchaser of an unmerchantable product suffers only loss of profits, his remedy for breach of warranty is against his immediate seller unless he can predicate liability upon some fault on the part of a remote seller. *State ex rel. W. Seed Prod. Corp. v. Campbell*, 250 Or. 262, 442 P.2d 215 (1968), cert. denied, 393 U.S. 1093, 89 S. Ct. 862, 21 L. Ed. 2d 784 (1969), but see, *State ex rel. La Manufacture Francaise Des Pneumatiques Michelin v. Wells*, 294 Or. 296, 657 P.2d 207 (1982).

Corporation that imported automobile for resale impliedly warranted under UCC § 2-314(2)(c) that automobile would be equipped with "crashworthy seat backs." *Smith v. Fiat-Roosevelt Motors, Inc.*, 556 F.2d 728 (5th Cir. Fla. 1977).

No cause of action for breach of express or implied warranty existed, in insurer's action as subrogee against company supplying defective filtration plant equipment to subcontracting company insured

by plaintiff, where (1) no seller-buyer relationship or sale contract existed under UCC § 2-314 and § 2-315 between subcontracting company and defendant supplier and (2) plaintiff insurer was neither "natural person" nor "injured in person" within meaning of UCC § 2-318. *Potsdam Welding & Mach. Co. v. Neptune Microfloc, Inc.*, 57 A.D.2d 993 (3d Dep't 1977).

In action by buyer of four oil tankers against shipbuilder-seller for consequential damages under UCC § 2-714(3) and § 2-715(2) for losses incurred when tankers were inoperative because of cargo-pump and expansion-joint failures, in which shipbuilder filed third-party complaint against manufacturer of defective cargo pumps and manufacturer of pumps filed fourth-party complaint against manufacturer of defective expansion joints, (1) shipbuilder-seller breached express warranty to buyer under UCC § 2-313(1) that tankers would be built to operate efficiently and also implied warranties under UCC § 2-314(1) and § 2-315 of merchantability and fitness of tankers for particular purpose (transportation of aviation fuels); (2) buyer of tankers was entitled only to consequential damages caused by defects in design and was not entitled to damages caused by defects in materials or workmanship; (3) shipbuilder-seller's foreseeable liability to buyer was \$500,000, which was amount of adjusted revenues lost by buyer when two of its tankers were inoperative because of cargo-pump and expansion-joint failures due to defective design; (4) manufacturer of defective cargo pumps breached its express and implied warranties to shipbuilder and was liable, in amount of \$2,000,000, for losses sustained by shipbuilder as result of cargo-pump and expansion-joint failures in tankers sold to buyer (including shipbuilder's liability to buyer for lost revenues during period tankers were inoperative), but was not liable to shipbuilder for cost of installing separate stripping on each tanker; and (5) manufacturer of defective expansion joints, which were used in connection with cargo pumps, breached its express and implied warranties concerning such joints and was liable to manufacturer of pumps

for costs of replacing all defective joints. *Falcon Tankers, Inc. v. Litton Sys.*, 380 A.2d 569 (Del. Super. 1977).

In action by purchaser of rifle against manufacturer's distributor for breach of implied warranty of merchantability and fitness of rifle for ordinary purposes for which it was to be used, (1) distributor was remote seller who could be held liable under Uniform Commercial Code for breach of either express or implied warranty; (2) unlike Uniform Commercial Code, Georgia law required existence of privity of contract before liability could be imposed on distributor or remote seller under theory of express or implied warranty; (3) requirement of privity was complied with because distributor, by written statement accompanying rifle, "fully guaranteed" its use by ultimate consumer, and such express warranty was part of bargain of sale; and (4) since distributor's express warranty contained no limitation on its provisions and also did not exclude any implied warranties attaching to rifle, distributor could be held liable under either UCC § 2-313(1)(a) for breach of express warranty or UCC § 2-314(2)(c) for breach of implied warranty of merchantability and fitness of rifle for ordinary purposes for which it was to be used (holding that distributor failed to discharge its burden of establishing nonexistence of plaintiff's right to recover). *Jones v. Cranman's Sporting Goods*, 142 Ga. App. 838, 237 S.E.2d 402 (1977).

While no implied warranty ordinarily exists under UCC § 2-314 between manufacturer and purchaser of automobile when no privity exists between them, implied warranty of UCC § 2-314 was applicable to personal injury action arising from automobile "jumping in gear," where manufacturer issued written warranty to purchaser through its authorized agent. *Ford Motor Co. v. Lee*, 137 Ga. App. 486, 224 S.E.2d 168 (1976), *aff'd in part, rev'd on other grounds*, 237 Ga. 554, 229 S.E.2d 379 (1976), *conformed to*, 140 Ga. App. 579, 231 S.E.2d 571 (1976).

In action by tire store employees against truck manufacturer, manufacturer of truck wheel and rim, and truck dealer, for injuries received while they were changing tires on truck: (1) employ-

ees failed to establish breach of warranty against dealer since there was no sale when dealer delivered truck to plaintiffs' employer for purpose of having tires changed; (2) plaintiffs also failed to state cause of action for breach of warranty against truck manufacturer or manufacturer of wheel and rim since there was no privity between plaintiffs and manufacturers. *Favors v. Firestone Tire & Rubber Co.*, 309 So. 2d 69 (Fla. App. 1975).

Automobile manufacturer was not liable for injury to child which occurred when child, who was riding his bicycle, collided with automobile and impact of collision broke parking light on automobile, causing tendon in child's knee to be severed, although child was within class of persons who might reasonably be expected to be affected by such automobile under UCC § 2-318, where vehicle in question was fit for ordinary purposes for which such vehicle is used under UCC § 2-314; part of car involved was essential item on car, and not mere ornamentation; of necessity lens had to be made of transparent or translucent material and, in general, such materials are fragile; light did not shatter under normal usage, but shattered under impact with metal; and breakage resulted from external force and injury did not occur to user of vehicle. *Nacci v. Volkswagen of Am., Inc.*, 325 A.2d 617 (Del. Super. 1974).

Code section pertaining to implied warranty of merchantability does not appear to govern rights and duties as between retail buyer and remote seller with whom buyer has no privity of contract. *Schuessler v. Coca-Cola Bottling Co.*, 279 So. 2d 901 (Fla. App. 1973).

Distributor of weed killer was liable in damages to truck gardener purchaser whose crop of squash was substantially destroyed when he applied it under adverse weather conditions on the representation of distributor's agent that the chemical was suitable for immediate use. However the manufacturer was not liable, though the labels on its containers contained no warnings whatsoever as to use under adverse conditions. *Wilson v. E-Z Flo Chem. Co.*, 281 N.C. 506, 189 S.E.2d 221 (1972).

A manufacturer's express or implied warranty of fitness of his product for its

contemplated use running in favor of all its intended uses does not give rise to liability on its part in an action to rescind the contract and for the return of the purchase price paid to a dealer by the ultimate consumer. *Carlson v. Shepard Pontiac, Inc.*, 63 Misc. 2d 994 (1970).

Where the liability of the dealer is predicated upon a breach of warranty of the manufacturer a judgment cannot be entered against the dealer until an adverse judgment is entered against the manufacturer and this is so even though the dealer is in default in the lawsuit. *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967).

41. —Privity not required.

Lack of privity between buyer and manufacturer of motor home is no bar to cause of action arising under UCC § 2-314, because privity requirement was statutorily abolished in Mississippi Code Annotated § 11-7-20; action for breach of implied warranty of merchantability against manufacturer, as seller, may be maintained by buyer because the manufacturer qualified as a seller under UCC § 2-103(1)(d) as a person who sells or contracts to sell goods, although the motor home in question had not been purchased directly from the manufacturer. *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663 (Miss. 1987).

Manufacturer can be held liable, without regard to privity, for purely economic loss that results from his breach of implied warranty of merchantability contained in UCC § 2-314(1) (applying rule to manufacturer of mobile homes which sold mobile home to third person who, in turn, resold it to plaintiff). *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

In suit by person suffering from degenerative osteoarthritis against manufacturer of artificial hip prosthesis for breach of implied warranty of fitness and merchantability contained in UCC § 2-314, where evidence showed that device manufactured by defendant was implanted in plaintiff's hip in September, 1971, that device failed to function properly in May, 1974, and that plaintiff suffered pain as result, judgment for plaintiff under 1973 amendment of Massachusetts version of

UCC § 2-318, which eliminated requirement of privity with respect to third-party beneficiaries of express or implied warranties, was proper because (1) plaintiff's injury occurred after effective date of such amendment; and (2) since amendment's elimination of privity requirement had as its purpose deemphasizing sale transaction and emphasizing harm that may result from defects contained in items in commerce that cause injury to class of persons specified in amendment, fact that defendant's device was sold before enactment of amendment did not bar plaintiff's recovery on ground that amendment would thus be applied retroactively. *Hoffman v. Howmedica, Inc.*, 373 Mass. 32, 364 N.E.2d 1215 (1977).

Where there was no exclusion or modification by manufacturer of any warranties in sale of printing press to distributor-retailer, implied warranty of merchantability was created under South Dakota UCC § 2-314(1) which extended under South Dakota UCC § 2-318 to print-shop operator who bought press from distributor. *Drier v. Perfection, Inc.*, 259 N.W.2d 496 (S.D. 1977).

Manufacturer of defective mobile home could be held liable for breach of implied warranties of merchantability and fitness for particular purpose, under UCC §§ 2-314 and 2-315, without regard to privity of contract between manufacturer and consumer, and this liability embraced not only personal injuries and property damage, but also economic loss. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976).

The implied warranty of fitness imposed by law on a manufacturer may be enforced directly against the manufacturer by a third party user where the manufacturer was aware of the purpose for which the product was to be put, and knew of the user's reliance that the product would be fit for the purpose intended, and it is not necessary that a contractual relationship exist between the user and the manufacturer. *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E.2d 726 (1st Dist. 1966).

42. —Remedies of manufacturer and seller inter se.

Where retailer and wholesaler of child's toy each paid \$10,000 to consumer in

settlement of products liability action, and where retailer made out prima facie case for breach of warranty of merchantability by wholesaler, retailer was entitled to recover from wholesaler as consequential damages amount it was required to pay in settlement. *Kelly v. Hanscom Bros.*, 231 Pa. Super. 357, 331 A.2d 737 (1974).

Implied warranty of merchantability applies equally to both retailer and manufacturer of goods. *Gillispie v. Thomasville Coca-Cola Bottling Co.*, 17 N.C. App. 545, 195 S.E.2d 45 (1973), cert. denied, 283 N.C. 393, 196 S.E.2d 275 (1973).

Where a steel company employee recovered for personal injuries in an action against the manufacturer and the general contractor who installed the alleged defective machine in the steel mill, the jury's verdict necessarily concluded the product was in a defective condition at the time it was sold and all elements necessary to establish a breach of warranty were established. Accordingly, the general contractor was entitled to a judgment over against the manufacturer of the machine, since there was implied a warranty of merchantability in the sales transaction. *Greco v. Bucciconi Eng'g Co.*, 283 F. Supp. 978 (W.D. Pa. 1967), aff'd, 407 F.2d 87 (3d Cir. Pa. 1969).

The fact that some minor repairs were required for the automobile does not establish that there has been a breach of warranty of merchantability where the car was in proper running condition after the making of such repairs. *Johnson v. Fore River Motors, Inc.*, 26 Mass. App. Dec. 184 (1963).

43. Proximate cause.

To recover for the breach of an implied warranty (see UCC §§ 2-314(1) and 2-315, the plaintiff must establish that the defect that caused the damage was present when the product left the defendant's control. *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

In buyer's action for consequential damages resulting from explosion of oil refinery equipment defectively installed by buyer, comparative negligence theory was applied to bar seller from recovering so much of damages as were proximately caused by buyer's failure to heed seller's warning regarding continued unsafe op-

eration of defective unit. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (1978).

In action by buyer against paint manufacturer for damages for breach of warranty in sale of red barn paint, where evidence showed (1) that plaintiff was professional barn painter, (2) that he had not followed defendant's instructions when adding linseed oil to paint purchased, (3) that paint on customers' barns painted by plaintiff had faded within one to four months after its application, (4) that plaintiff had had many complaints, and (5) that defendant had admitted that a "fade problem" existed with respect to paint purchased by plaintiff, which was of "botton-of-the-line" quality, court held, on affirming judgment for plaintiff, (1) that although plaintiff's proof of causation was not direct, jury could still infer from fact that fading of paint was quite uniform that presence or absence of linseed oil had had no effect on paint's fading; (2) that since defendant had admitted that paint had a "fade problem" which was to be expected with that brand of paint, jury could therefore infer that paint was not "good barn paint" and that it violated defendant's express warranty made under UCC § 2-313(1)(a); (3) that jury could also infer that paint was not of merchantable quality in violation of implied warranty of merchantability created by UCC § 2-314(1) and (2)(c); (4) that, moreover, it was not fit for plaintiff's particular purpose in violation of implied warranty of fitness contained in UCC § 2-315; and (5) that trial court correctly instructed jury that it could consider whether plaintiff had complied with defendant's directions in determining whether plaintiff had been negligent, and whether such negligence had been a cause of his consequential damages (declining, since issue was first presented on appeal, to consider whether plaintiff's consequential damages should have reduced by 15 per cent to reflect proportion of fault that jury attributed to plaintiff's negligence, and stating that Minnesota courts had not determined whether comparative-fault principle should be applied in breach-of-warranty actions, although its application seemed equitable and appropriate under UCC § 2-715(2)(b)).

Chatfield v. Sherwin-Williams Co., 266 N.W.2d 171 (Minn. 1978).

In action by operator of hog farm for breach of express and implied warranties attaching under UCC § 2-313(1)(a) and 2-314(1) to corn purchased by plaintiff to feed his hogs, evidence was sufficient to support verdict and judgment in plaintiff's favor where it showed (1) that plaintiff's hogs became ill after eating contaminated corn purchased from defendant, (2) that samples of other corn that plaintiff at that time had also fed to his hogs, which corn was purchased from other sources, proved on analysis to be completely negative for toxins, while samples of corn sold by defendant were positive for toxins, and (3) that plaintiff's hogs had not been sick before eating corn purchased from defendant, but had become sick thereafter. *Tillman & Deal Farm Supply, Inc. v. Deal*, 146 Ga. App. 232, 246 S.E.2d 138 (1978).

The plaintiff in a merchantability lawsuit must prove that the defendant deviated from the standard of merchantability and that this deviation caused the plaintiff's injury, both proximately and in fact. These necessities of proof make the merchantability case a first cousin to a negligence lawsuit. Under UCC § 2-314(1) and (2), a plaintiff must prove the following: (1) that a merchant sold goods, (2) that the goods were not merchantable at the time of sale, (3) that injury and damages to the plaintiff or his property resulted, (4) that such injury and damages were proximately and in fact caused by the defective nature of the goods, and (5) that notice of the injury was given to the seller (action for breach of implied warranty of merchantability to recover damages for destruction of grain bin, which was blown off its foundation by tornadic winds, in which trial court erred in not instructing jury that plaintiff had burden of proving that breach of implied warranty alleged was proximate cause of plaintiff's injury). *Geiger v. Sweeney*, 201 Neb. 175, 266 N.W.2d 895 (1978).

In action by purchaser of stove from defendant seller for damages for destruction of plaintiff's home in fire allegedly caused by defect in stove, directed verdict for defendant was proper where plaintiff failed to introduce evidence from which

jury could have found that destruction of her home had resulted from stove's alleged defect. Moreover, such verdict was proper, regardless of whether plaintiff's action was based on implied warranty of merchantability under UCC § 2-314, an express warranty governed by UCC § 2-313, or tort theory of products liability, since plaintiff under any of these theories was still required to prove that alleged defect in stove caused destruction of home. *Crocker v. Sears, Roebuck & Co.*, 346 So. 2d 921 (Miss. 1977).

Where seller of herbicide by his own testimony relating to his experience, licensing, and training in use of herbicide, established himself as merchant as to goods involved, where evidence, inter alia, proved that herbicide was defective in that wheat crop was not unusually susceptible to damage from herbicide even if unusually strong concentration had been applied, and where seller exercised sole control over herbicide, its mixture with water, and application to crop, seller was liable for implied breach of merchantability under UCC § 2-314 since defective herbicide was efficient cause of damage to buyer's crop; statement on label that buyer assumes all risks and liabilities was not part of bargain of sale where buyer was given no opportunity to see or read label. *Eichenberger v. Wilhelm*, 244 N.W.2d 691 (N.D. 1976).

In action by water corporation's contractor (buyer) against seller of filter tanks, failure of distributor heads of filter tanks did not constitute breach of implied warranty of merchantability under UCC § 2-314, breach of warranty of fitness for particular purpose under UCC § 2-315, or breach of any express warranty under UCC § 2-313, where distributor heads failed under excessive water pressure in water system due to defect in water corporation's plans and specifications, contractor bought tanks in reliance upon contract specifications without reliance upon any warranty, affirmation or representation by seller as to merchantability or fitness for intended use, and seller's statement to buyer that tanks "should" be able to remove iron and manganese from water did not amount to affirmation of fact affecting bargain between contractor and

seller. *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 684, 222 S.E.2d 709 (1976).

In action against manufacturer of oral contraceptive for stroke allegedly caused by using contraceptive, plaintiff was not entitled to proceed on theory of breach of either implied warranty of merchantability (UCC § 2-314(1)) or implied warranty of fitness for particular purpose (UCC § 2-315) where there was no evidence to show that such contraceptive had contained any foreign ingredients or impurities that rendered it inherently dangerous for human consumption, and where evidence revealed that plaintiff was suffering from hypertension when her doctor prescribed the contraceptive. *Chambers v. G.D. Searle & Co.*, 441 F. Supp. 377 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. Md. 1977).

In breach of warranty action by developer of subdivision against seller-manufacturer of coating product used on plywood exterior of certain of developer's houses following delamination and checking of surfaces painted with seller's product, finding that seller neither breached implied warranty of merchantability under UCC § 2-314 nor implied warranty of fitness for particular purpose under UCC § 2-315 was proper where there was evidence that coating material was free from defects and was proper material for use intended, and that delamination and checking occurred as result of combination of improper preparation of plywood surface and incompetent application of coating material. *Shore Line Properties, Inc. v. Deer-O-Paints & Chems., Ltd*, 24 Ariz. App. 331, 538 P.2d 760 (1975).

In action by automobile purchaser against manufacturer and dealer for damages sustained when engine of automobile "burned up," evidence was insufficient to require trial court to submit purchaser's case to jury on theory of breach of implied warranty of merchantability in view of evidence that prior to burning episode purchaser had points and spark plugs replaced by servicemen independent of manufacturer or dealer and in view of testimony of president of dealer corporation that in his opinion damage to engine was caused by improper ignition advance resulting from maladjustment of "timing"

and that installation of points and plug without timing adjustment, as recommended by manufacturer, would cause mishap that occurred; evidence was not sufficient to negate possibility of intermediate act or agency producing engine failure. *Kriedler v. Pontiac Div. of GMC*, 514 S.W.2d 174 (Tex. Civ. App. 1974), *ref. n.r.e.* (Oct. 30, 1974).

Manufacturer, seller or supplier of products for human consumption or intimate bodily use may become liable on basis of implied warranty for injurious result stemming therefrom when it should have been foreseen, in exercise of reasonable care and foresight, that such results would be sustained by appreciable number of persons using products. *Robbins v. Alberto-Culver Co.*, 210 Kan. 147, 499 P.2d 1080 (1972).

Allegations held sufficient to aver breach of implied warranty of merchantability in sale of hair rollers. *Gardner v. Q.H.S., Inc.*, 448 F.2d 238 (4th Cir. S.C. 1971).

When proceeding under Code-imposed implied warranty, plaintiff has burden of proving that injury resulted from unmerchantability or unsuitability of product; mere fact of application of shampoo and permanent wave followed by temporary hair loss is not enough to justify this conclusion. *Elliott v. Lachance*, 109 N.H. 481, 256 A.2d 153 (1969).

44. Pleading.

Complaint which alleged (1) that defendant had manufactured drug complained of (pitocin) and sold it to codefendant hospital, (2) that defendant had impliedly warranted that drug was of merchantable quality and fit for use in certain obstetrical deliveries, (3) that plaintiff had relied on such warranties and on defendant's skill and judgment in purchasing drug, (4) that treating physician had ordered intravenous administration of drug to plaintiff's mother while fetus was in high station, (5) that defendant had breached its warranties of merchantability and fitness of drug for particular purpose by inadequate packaging and labeling, and by failure of drug to conform to defendant's affirmations of fact, and (6) that plaintiff had been proximately injured as a result of such breaches, was sufficient to state

cause of action for breach of warranty under UCC § 2-314(1) and § 2-315 (stating that Uniform Commercial Code intended to create statutory cause of action for breach of implied warranty on behalf of consumers who are injured by product deficiencies, and that such cause of action is in addition to that existing in strict tort liability). *Woodill v. Parke Davis & Co.*, 58 Ill. App. 3d 349, 374 N.E.2d 683 (1st Dist. 1978), *aff'd* and remanded, 79 Ill. 2d 26, 37 Ill. Dec. 304, 402 N.E.2d 194 (1980).

To plead properly cause of action for breach of warranty under Uniform Commercial Code, complaint should at least allege the following: (1) facts respecting sale of the goods; (2) identification of warranty created as being express warranty under UCC § 2-313(1), implied warranty of merchantability under UCC § 2-314(1), or implied warranty of fitness for particular purpose under UCC § 2-315; (3) facts respecting creation of such warranty; (4) facts respecting its breach; (5) giving to seller of notice of breach required by UCC § 2-607(3)(a); and (6) injuries sustained by buyer as result of breach (holding that third-party complaint failed to state cause of action because it did not comply with above list of essential allegations). *Dunham-Bush, Inc. v. Thermo-Air Serv., Inc.*, 351 So. 2d 351 (Fla. App. 1977).

Allegations that plaintiff purchased burglar alarm system from defendant, that the system was to remain the property of the defendant, that plaintiff was told that defendant was reliable firm, had an excellent staff, that the system was foolproof, and that the system was a substantial deterrent to burglaries, that plaintiff's premises were burglarized, and that defendant had breached an express warranty and an implied warranty, and had been guilty of gross negligence, breach of fiduciary duty, and intentional tort did not state a claim upon which relief could be granted where it contained no allegations of facts stating in what respect any warranty was breached or that any breach was a proximate cause of the burglary. *Craig v. American Dist. Tel. Co.*, 91 Misc. 2d 1063 (1977).

Complaint which alleged that architect had breached implied warranty of merchantability that roof of building designed

by architect was of good and merchantable quality (see UCC § 2-314(1)) failed to state cause of action, since architect's contract with plaintiff was for rendition of professional services and did not involve sale of goods. *Queensbury Union Free Sch. Dist. v. Jim Walter Corp.*, 91 Misc. 2d 804 (1977).

Complaint alleging that drug was contraceptive pill, that defendant manufacturer knew that members of the public were purchasing the pill for contraceptive purposes, and that drug "was unsafe and was not reasonably fit for plaintiff's use as contraceptive," adequately stated cause of action for breach of implied warranty of merchantability. *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 512 P.2d 776 (1973).

On a motion for summary judgment an allegation in defendant's affidavit alleging that its sweaters were rendered unsalable because of latent defects in the yarn (for which suit was brought) which caused "variation and color from piece to piece and in the pieces," was sufficient to create a question of fact concerning the merchantability of the yarn. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

In an action to rescind a sales contract on the ground of breach of an express warranty of fitness for purpose, the plaintiff, after the hearing before the chancellor, cannot argue that there was an implied warranty of fitness when no implied warranty was pleaded and the defendant did not have any opportunity to defend against such a claim. *Suppa v. D.A. Wiley, Inc.*, 49 Del. Co. 335 (Pa. 1962).

45. Notice of breach.

In action by purchaser of rifle against seller under UCC § 2-314(2)(c) for breach of implied warranty of merchantability and fitness of rifle for ordinary purposes for which it was to be used, defendant failed to discharge its burden of proof to show that there was no defect in rifle and thus no breach of implied warranty sued on. Furthermore, defendant, who alleged that plaintiff did not give notice of alleged breach of warranty within reasonable time after discovery of breach, as required by UCC § 2-607(3)(a), also did not discharge burden of establishing that reason-

able notice of breach had not been given (stating that fact that rifle exploded while it was being loaded constituted evidence that it was unfit for ordinary purposes for which it was intended). *Jones v. Cranman's Sporting Goods*, 142 Ga. App. 838, 237 S.E.2d 402 (1977).

In *rem* action in admiralty involving counterclaims by seller and buyer arising from breaches of contract to sell flour, (1) seller breached implied warranty of merchantability created by UCC § 2-314(1) and (2)(c), and also federal adulterated-food statute, as to one cargo of flour which was infested with insects when it arrived at warehouse prior to being loaded on ship, (2) buyer had right under UCC § 2-601(a) to reject all of such cargo and therefore was not liable for its purchase price or any consequential damages, (3) seller also breached implied warranty of merchantability with respect to two other cargoes of flour, and since buyer had paid for such flour and had ultimately accepted it, buyer was entitled to damages under UCC § 2-606(1)(a), (4) buyer was not barred from claiming damages for such nonconforming cargoes by failure to give notice of nonconformity by registered mail, since buyer's warning to seller of buyer's dissatisfaction with cargoes constituted adequate notice under UCC § 2-607(3)(a), and (5) under UCC § 2-714(2), although there was no evidence as to value of such cargoes at time and place of their acceptance (*Mobile, Alabama*), buyer was entitled to damages for difference between prices for good and infested flour in Bolivia, South America, plus damages for expenses incurred because of flour's infestation, since buyer had accepted such flour after it had been loaded on ships that transported it to Bolivia and had had no reasonable opportunity to inspect it before it was loaded. *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 449 F. Supp. 84 (S.D. Ala. 1976), *rev'd* on other grounds, 629 F.2d 338 (5th Cir. Ala. 1980), *reh'g* denied, 651 F.2d 779 (5th Cir. Ala. 1981).

46. Evidence and burden of proof.

Evidence was sufficient to establish that the defendant breached the implied warranty of merchantability with regard to the sale of a rebuilt motor vehicle

transmission. *Settlemyres v. Jones*, 736 So. 2d 471 (Miss. Ct. App. 1999).

Where evidence tended to show that galvanized nails were not proper for use in cedar siding and were not ordinarily used for such purpose in the building-trade industry, plaintiff builder of house components, who had used galvanized casing nails purchased from defendant to construct cedar plywood paneling, failed to prove that nails did not comply with defendant's implied warranty of merchantability under UCC § 2-314(1) and (2)(c). *Lindy Homes, Inc. v. Evans Supply Co.*, 357 So. 2d 996 (Ala. Civ. App. 1978).

In action against dealer, who assembled truck and camper unit sold to plaintiffs, for injuries sustained by plaintiffs and their niece when truck's rear tire blew out and caused truck to go out of control, (1) evidence showed that blowout was caused by combination of vehicle overloading and rear tire's underinflation, (2) adequate warnings were not contained in operator's manual furnished with truck by manufacturer, or by "rating plate" affixed by manufacturer to truck's door which listed recommended maximum gross vehicle weight rating, (3) plaintiffs' niece was member of class of persons who under UCC § 2-318 are third-party beneficiaries of express and implied warranties, and (4) since warnings furnished by truck's manufacturer were inadequate to prevent danger of blowout when truck and camper unit were used by ordinary user for purposes for which such goods are ordinarily used, and since a product is unmerchantable if it is sold without a suitable warning, dealer's sale breached warranty of merchantability created by UCC § 2-314(1) and (2)(c). *Sorensen v. Travelers Indem. Co.*, 1978 Adv. Sheets 550 (Mass. App. Div. 1978).

In action for breach of implied warranty of merchantability under UCC § 2-314(1) of container of Ortho Tomato Vegetable Dust insecticide, some of which came into contact with plaintiff's skin during use and caused her to be hospitalized for insecticide poisoning, plaintiff's complaint was properly dismissed at end of her case when she failed to show that such insecticide was not reasonably fit for purposes for which it was ordinarily used (observ-

ing that although plaintiff might have been more successful if she had based her claim on theory of strict products liability, her recourse because of statute-of-limitations reasons was limited to theory of breach of implied warranty). *Finkelstein v. Chevron Chem. Co.*, 60 A.D.2d 640 (2d Dep't 1977), appeal denied, 44 N.Y.2d 641 (1978).

In action by purchaser of stove from defendant seller for damages for destruction of plaintiff's home in fire allegedly caused by defect in stove, directed verdict for defendant was proper where plaintiff failed to introduce evidence from which jury could have found that destruction of her home had resulted from stove's alleged defect. Moreover, such verdict was proper, regardless of whether plaintiff's action was based on implied warranty of merchantability under UCC § 2-314, an express warranty governed by UCC § 2-313, or tort theory of products liability, since plaintiff under any of these theories was still required to prove that alleged defect in stove caused destruction of home. *Crocker v. Sears, Roebuck & Co.*, 346 So. 2d 921 (Miss. 1977).

Failure of plaintiff to meet its burden of showing that contract with defendant electric company, under which defendant was to design, manufacture, and install electrical distribution system in plaintiff's building, involved sale of goods under UCC Art 2 precluded any recovery under UCC § 2-314(1) for defendant's alleged breach of implied warranty of merchantability of equipment installed or any recovery under UCC § 2-315 for defendant's alleged breach of implied warranty of fitness of equipment for particular purpose (observing that not every contract to install electrical system is automatically outside scope of UCC Art 2). *Air Heaters, Inc. v. Johnson Elec., Inc.*, 258 N.W.2d 649, 5 A.L.R.4th 489 (N.D. 1977).

Breach, within meaning of UCC § 2-314(1) and § 2-314(2)(c), of implied warranty of merchantability and fitness of mobile home for ordinary purposes for which home was to be used was established by evidence of buyer which showed that vehicle's doors would not latch, that frame of vehicle was crooked, that vehicle's wiring was incorrectly installed, and

that vehicle's plumbing did not function properly (rejecting defense contention that seller does not impliedly warrant against latent defects). *Fredrick v. Dreyer*, 257 N.W.2d 835 (S.D. 1977).

In action for eye injury following application of false eyelashes by manufacturer's representative, (1) where representative had warned plaintiff of possible irritation if adhesive glue supplied with eyelashes came into contact with skin or eyes, lashes that were applied properly to one eye had caused no injury, and adhesive glue was inadvertently introduced into plaintiff's damaged eye; and (2) where plaintiff's sole theory of action was breach by defendant of implied warranty of fitness of eyelashes for particular purpose under UCC § 2-315 and breach of implied warranty of merchantability under UCC § 2-314, summary judgment for defendant was proper, since (1) plaintiff's testimony that eyelashes, when properly applied to one eye, had caused her no injury contradicted her claim of breach of warranty, and (2) such warranties did not apply to use of defendant's product in other than normal manner. *Caldwell v. Lord & Taylor, Inc.*, 142 Ga. App. 137, 235 S.E.2d 546 (1977).

Employee of construction company, who was injured by collapse of boom of truck crane that construction company had leased from defendant trust company, could not recover damages under UCC § 2-314 for defendant's alleged breach of implied warranty of merchantability of crane where evidence showed (1) that person who was president and sole stockholder of construction company also was sole stockholder, trustee, and beneficiary of defendant trust company, and (2) that trust company did not deal in cranes or any other type of goods, had no employees, and had been formed solely as tax-saving device. Defendant also was not liable to plaintiff under UCC § 2-315 for breach of implied warranty of fitness of crane for particular purpose, since defendant lessor possessed no skill or judgment on which lessee (construction company) had relied; for purposes of Uniform Commercial Code, lessor and lessee of crane constituted single entity in person of sole stockholder of both companies. *Brescia v. Great*

Rd. Realty Trust, 117 N.H. 154, 373 A.2d 1310 (1977).

Under UCC § 2-314, buyer who had purchased pump from seller was entitled to retain replacement motor for pump without paying for it or its installation where seller was merchant engaged in selling such goods, no evidence existed that implied warranty of merchantability under UCC § 2-314 for pump was excluded or modified, and seller by his own testimony showed that pump as originally installed was not merchantable. *Titus v. Polan*, 72 Wis. 2d 23, 240 N.W.2d 420 (1976).

Plaintiff, buyer of beef from defendant packing company, was not entitled to recover from packer for breach of implied warranty of merchantability under UCC § 2-314, following buyer's receipt of partially spoiled beef, where plaintiff prosecuted claim against carrier and breached its fiduciary duty under UCC § 2-722 by settling claim against carrier without consulting seller, where plaintiff failed to make sufficient proof of seller's fault in defective shipment, and where, even if seller had been at fault, plaintiff failed to apportion fault between carrier and seller with sufficient certainty to support judgment against seller. *Greisler Bros. v. Packerland Packing Co.*, 392 F. Supp. 206 (E.D. Wis. 1975).

In breach of warranty action by developer of subdivision against seller-manufacturer of coating product used on plywood exterior of certain developer's houses following delamination and checking of surfaces painted with seller's product, finding that seller neither breached implied warranty of merchantability under UCC § 2-314 nor implied warranty of fitness for particular purpose under UCC § 2-315 was proper where there was evidence that coating material was free from defects and was proper material for use intended, and that delamination and checking occurred as result of combination of improper preparation of plywood surface and incompetent application of coating material. *Shore Line Properties, Inc. v. Deer-O-Paints & Chems., Ltd*, 24 Ariz. App. 331, 538 P.2d 760 (1975).

Knowledge of defect on part of seller is not essential to recovery by buyer for

breach of implied warranties under UCC §§ 2-314 and 2-315. *Brendsel v. Wright*, 301 Minn. 175, 221 N.W.2d 695 (1974).

Purchaser of pumps failed to prove breach of implied warranty of merchantability, even if it was not excluded by express warranty, where purchaser's expert could not say had made no measurements which indicated that pump, bearings, etc. were not within tolerance for necessary and proper use nor that they were not reasonably suited for purposes intended; fact that pumps may have produced "red water", arising from faulty installation or other causes, did not show breach. *Carr v. Jacuzzi Bros.*, 133 Ga. App. 70, 210 S.E.2d 16 (1974).

Genuine issues of material fact arose as to existence and violation of express warranties and as to violation of implied warranties of merchantability and fitness, and as to sufficiency of disclaiming language in receipts to negate either implied or express warranties; therefore, granting of summary judgment was reversible error. *Woodruff v. Clark County Farm Bureau Coop. Ass'n*, 153 Ind. App. 31, 286 N.E.2d 188 (1972).

Where plaintiff was only witness who testified to defects in car and his testimony showed no evidence that he at any time examined car to determine what, if anything was wrong with it, and showed that most serious problem was not caused by defect, but merely by oversight of serviceman who failed to replace oil filter, and plaintiff admitted that he was not qualified to give opinion concerning trouble and that he never had to add water to car even though it appeared to be running hot, plaintiff failed to prove breach of implied warranty of merchantability. *Collum v. Fred Tuch Buick*, 6 Ill. App. 3d 317, 285 N.E.2d 532 (1st Dist. 1972).

It is clear that plaintiff has not met his burden of proof of proving a cause of action under UCC § 2-313 (Express Warranty), UCC § 2-314 (Implied Warranty of Merchantability), and UCC § 2-315 (Implied Warranty of Fitness for a Particular Purpose), where no evidence was submitted by the plaintiff on the existence of such warranties or on any defect in the chemical at issue, and none is apparent

from the testimony. *Toppi v. United States*, 332 F. Supp. 513 (E.D. Pa. 1971).

Contributory negligence of purchaser may be defense to claim of breach of implied warranty of merchantability and fitness, but was not proven where gas purchaser had attempted to reignite pilot light after having been informed of trouble by gas company-seller. *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970).

Contributory negligence is defense to action for breach of warranty under UCC § 2-314. *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970).

When proceeding under Code-imposed implied warranty, plaintiff has burden of proving that injury resulted from unmerchantability or unsuitability of product; mere fact of application of shampoo and permanent wave followed by temporary hair loss is not enough to justify this conclusion. *Elliott v. Lachance*, 109 N.H. 481, 256 A.2d 153 (1969).

The buyer has the burden of proving the existence of the warranty relied on. *Chamberlain v. Bob Matick Chevrolet, Inc.*, 4 Conn. Cir. Ct. 685, 239 A.2d 42, 24 A.L.R.3d 456 (1967).

Evidence that (a) the bulbs were inspected by inspectors for the Dutch and American governments and were found to be sound, and both the plaintiff and the government of Holland go to great lengths to see that nothing is wrong with the bulbs shipped, (b) so many things can happen after delivery that are not under the control of plaintiff that it has the right to limit its warranty, and there is therefore no implied warranty after this moment, and (c) defendants, as well as plaintiff, have been in the business for a long time and know that no shipper of bulbs guarantees flowering results, affected only the weight and credibility of the evidence but not its admissibility. *Q. Vandenberg & Sons v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964).

47. —Breach at time of sale.

Buyer of motor home must establish that defects existed when motor home left control of manufacturer in order to recover, thus assuring that manufacturer will not be held responsible for defects caused by actions of intervening parties,

unrelated to manufacturer, who had access to goods. *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663 (Miss. 1987).

To recover for the breach of an implied warranty (see UCC §§ 2-314(1) and 2-315), the plaintiff must establish that the defect that caused the damage was present when the product left the defendant's control. *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

In suit under UCC § 2-314(1) for breach of implied warranty of merchantability in sale of automobile, buyer had burden of proving that vehicle was defective when it left hands of manufacturer or seller, although such proof could consist of circumstantial evidence. However, although buyer did produce evidence that some of vehicle's lesser defects had existed when he bought vehicle, trial court's finding of unfitness of vehicle at time of sale was not supported by evidence which did not negate possibility that vehicle's main defect (defective steering mechanism) was not in existence when vehicle was purchased, but came into existence after dealer had attempted to repair vehicle's front end. *Ford Motor Co. v. Tidwell*, 563 S.W.2d 831 (Tex. Civ. App. 1978).

In action by fourth-party declaration by manufacturer of propane-fuel canister against manufacturer of value-core unit incorporated in canister for breach of implied warranty of merchantability established by UCC § 2-314, evidence did not sustain plaintiff's contention that valve-core unit, when delivered to plaintiff for incorporation into canister, was not fit for ordinary purposes for which it was used. *Eaton Corp. v. Wright*, 281 Md. 80, 375 A.2d 1122 (1977).

In action by subrogee of buyer of used automobile against manufacturer for breach of implied warranty of merchantability contained in UCC § 2-314(1), plaintiff did not sustain its burden of proof when it failed to establish that defect that caused fire in vehicle's engine existed when vehicle left possession of either defendant distributor or defendant manufacturer. *St. Paul Mercury Ins. Co. v. Jeep Corp.*, 175 Mont. 69, 572 P.2d 204 (1977).

In action by buyer of new automobile against seller based on breach of warranty, trial court did not err in dismissing

complaint since seller did not breach implied warranty of merchantability under UCC § 2-314 where there was no evidence to establish any defective condition existing at the time of the purchase. *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806 (8th Cir. Iowa 1976).

Evidence established that elevators were materially defective at time of delivery and were unfit for ordinary purposes for which they were normally used, and thus that implied warranty of merchantability under UCC § 2-314 was breached, where shortly after elevators were installed many complaints were received concerning erratic operation, elevators frequently did not come to rest flush with floor, elevators would not operate properly at speed specified in contract, and, although elevators were installed with releveing devices, devices had to be disconnected, without which elevators were unsafe. *Curtis v. Murphy Elevator Co.*, 407 F. Supp. 940 (E.D. Tenn. 1976).

In a suit for personal injuries against the seller of a cigarette lighter which caught fire in the plaintiff's hand as he attempted to use it, a judgment for the plaintiff would be reversed, where the plaintiff relied entirely on the theory of a breach of the implied warranty of merchantability, and the evidence disclosed that he had used the lighter approximately 8 months prior to the accident with no difficulty. To recover for breach of an implied warranty of fitness of goods sold, the buyer must prove that the goods were defective at the time of their delivery to him. *Bruns v. Wellesley Hills Mkt., Inc.*, 39 Mass. App. Dec. 160 (1968).

48. —Expert and opinion testimony.

Evidence that printing press did not feed paper properly, that feeder mechanism caused paper jams in press, that it failed to "register" properly (i.e., failed to print one symbol on top of another identical symbol without visible overlap on printed surface), that machine streaked or smeared printed surface, that it was not timed properly, produced crooked printing, was slow in printing and that there were problems with loose or defective parts, was sufficient to establish breach of implied warranty of merchantability un-

der UCC § 2-314(2)(c); fact that defects complained of were apparent immediately after delivery was strong evidence against finding that problems were caused by improper maintenance and there was no requirement that specific defects must be proven by expert testimony. *Burrus v. Ittek Corp.*, 46 Ill. App. 3d 350, 360 N.E.2d 1168 (3d Dist. 1977).

49. —Presumptions and inferences.

In action by buyer against paint manufacturer for damages for breach of warranty in sale of red barn paint, where evidence showed (1) that plaintiff was professional barn painter, (2) that he had not followed defendant's instructions when adding linseed oil to paint purchased, (3) that paint on customers' barns painted by plaintiff had faded within one to four months after its application, (4) that plaintiff had had many complaints, and (5) that defendant had admitted that a "fade problem" existed with respect to paint purchased by plaintiff, which was of "bottom-of-the-line" quality, court held, on affirming judgment for plaintiff, (1) that although plaintiff's proof of causation was not direct, jury could still infer from fact that fading of paint was quite uniform that presence or absence of linseed oil had had no effect on paint's fading; (2) that since defendant had admitted that paint had a "fade problem" which was to be expected with that brand of paint, jury could therefore infer that paint was not "good barn paint" and that it violated defendant's express warranty made under UCC § 2-313(1)(a); (3) that jury could also infer that paint was not of merchantable quality in violation of implied warranty of merchantability created by UCC § 2-314(1) and (2)(c); (4) that, moreover, it was not fit for plaintiff's particular purpose in violation of implied warranty of fitness contained in UCC § 2-315; and (5) that trial court correctly instructed jury that it could consider whether plaintiff had complied with defendant's directions in determining whether plaintiff had been negligent, and whether such negligence had been a cause of his consequential damages (declining, since issue was first presented on appeal, to consider whether plaintiff's consequential damages should have reduced by 15 per cent to reflect proportion

of fault that jury attributed to plaintiff's negligence, and stating that Minnesota courts had not determined whether comparative-fault principle should be applied in breach-of-warranty actions, although its application seemed equitable and appropriate under UCC § 2-715(2)(b)). *Chatfield v. Sherwin-Williams Co.*, 266 N.W.2d 171 (Minn. 1978).

Seller of raw pork did not breach implied warranty of merchantability under UCC § 2-314 with respect to buyer who contracted trichinosis after eating pork; ordinary and intended purpose for raw pork is consumption after proper cooking by consumer and, since proper cooking would have killed all trichinae, fact that buyer contracted trichinosis showed by necessary implication that pork was not properly cooked and, thus, buyer failed to show pork was not fit for its ordinary and intended purpose. *Hollinger v. Shoppers Paradise of New Jersey, Inc.*, 134 N.J. Super. 328, 340 A.2d 687 (1975), *aff'd*, 142 N.J. Super. 356, 361 A.2d 578 (1976).

Where used car as to which no express warranties were made was totally destroyed by fire during normal operation 3 hours following purchase, it could be reasonably inferred that dealer breached implied warranties of merchantability and fitness, notwithstanding purchaser's failure to allege and prove defect. *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975).

In action by egg producer against feed manufacturer for breach of warranties based on claim that feed supplied contained improper nutritional balance, resulting in obesity and "fatty liver syndrome" in producer's laying hens, thereby reducing egg production and requiring producer to purchase eggs in open market in order to supply its various supermarket customers, evidence was sufficient to permit jury to draw inference that manufacturer's feed caused excess obesity, and hence low egg production, in all of producer's flocks where there was competent evidence that flocks fed with manufacturer's feed were obese and suffered from fatty liver syndrome and low egg production, whereas control flock, which was fed on another manufacturer's feed, were normal. *Vermont Food Indus., Inc. v. Ralston*

Purina Co., 514 F.2d 456 (2d Cir. Vt. 1975).

Evidence that new car, driven only 17 miles, plunged out of control due to defective accelerator, was sufficient to submit case to jury on theory of breach of implied warranty. *Williams v. Steuart Motor Co.*, 494 F.2d 1074, 161 U.S. App. D.C. 155 (1974).

50. —Relation back.

In action for damages for breach of implied warranties of fitness and merchantability arising out of sale of diseased cattle, evidence was sufficient to support conclusion that animals were diseased prior to risk of loss passing to buyer, notwithstanding buyer's expert witness, a veterinarian, could not scientifically identify seller's ranch as source of infection, where inference could be drawn from his testimony that infection had to occur prior to shipment of calves from seller's ranch. *Martineau v. Walker*, 97 Idaho 246, 542 P.2d 1165 (1975).

Where bulbs were warranted of flowering capacity at time of shipment, evidence was admissible to show that the failure to flower resulted from a condition which existed at the time of shipment because the bulbs had been grown beyond their capacity before shipment. *Q. Vandenberg & Sons v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964).

51. —Seller's efforts at repair.

A seller's right to cure before the buyer may revoke acceptance is not unlimited; there comes a time when "enough is enough" and a purchaser is entitled to seek revocation notwithstanding the seller's repeated good faith efforts. *Guerdon Indus., Inc. v. Gentry*, 531 So. 2d 1202 (Miss. 1988).

In action by purchaser of bulk curing tobacco barn against its manufacturer for breach of express and implied warranties, barn was covered by implied warranty of merchantability under UCC § 2-314, since manufacturer was merchant with respect to bulk barns, and since there was no evidence of any oral disclaimers or modifications of this implied warranty of merchantability. There was sufficient evidence to support finding that manufacturer breached both oral express warran-

ties as to superior craftsmanship and first-rate quality and implied warranty of merchantability where there was evidence that upon delivery of bulk barn, angle iron that held steel floor was loose and sliding, corner boards were loose, causing cracks, doors would not close, roof was buckled, tobacco racks did not fit, and sides of barn buckled inward when barn was filled with tobacco, notwithstanding evidence that manufacturer sent its servicemen who remedied defects to satisfaction of purchaser, with exception of doors and caving in of sides. *Bell v. Harrington Mfg. Co.*, 265 S.C. 468, 219 S.E.2d 906 (1975).

There is statutory implied warranty of merchantability unless excluded or modified by agreement of parties; evidence that tractor-seller exerted commendable efforts and incurred considerable expense in his efforts to correct defects cannot relieve seller of unconditional obligation imposed by statute, no matter how commendable his efforts. *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521 (1969).

52. Instructions to jury.

In wrongful death action involving warranty count for breach of implied warranty of merchantability attaching under UCC § 2-314(1) and (2)(c) to sale of motor home, which had burst into flames after overturning on highway, instruction which informed jury that if motor home had been used in extraordinary or unusual manner, there would be no warranty liability for any injury caused by such use was erroneous where no evidence had been introduced to show that motor home had been misused (also holding that trial court correctly refused to instruct jury that evidence of defendant manufacturer's conformity with industry manufacturing practices was immaterial to their decision on warranty count). *Back v. Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964 (1978).

In an action by the buyer against the seller of day-old chicks for breach of implied warranties of merchantability and fitness, an instruction that if the jury concludes that chickens had leukosis when delivered to the plaintiff jury should find for the plaintiff and proceed to the question of damages is not erroneous on

the ground that it constitutes a charge of absolute liability. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

53. Defenses.

In action under UCC § 2-314(1) and (2)(c) for breach of implied warranty of merchantability of rebuilt compressor in air-conditioning system, which buyer alleged was not fit for ordinary purpose for which such goods are used, seller's affidavit stating that malfunction in compressor, which was under warranty, was not result of any inherent defect in compressor itself but was caused by malfunction in another part of the such air-conditioning system, could constitute complete defense to buyer's allegations of breach of defects of joints, with regard to seller's failure to anneal joints, liner design of joints, and thickness of bellows walls of joint, were not shown to have caused failure of joints after their installation in buyer's utility system. *Wisconsin Elec. Power Co. v. Zallea Bros.*, 443 F. Supp. 946 (E.D. Wis. 1978), *aff'd*, 606 F.2d 697 (7th Cir. Wis. 1979).

In wrongful death action involving claims based on breach of both express warranties and implied warranty of merchantability attaching to defendant's sale of radial tires to plaintiff and her deceased husband, court held (1) that under UCC § 1-105(1), since significant part of transaction, including sale, service, and use of the tires, had occurred in Florida, plaintiff's cause of action arose in Florida and was guaranteed by Florida Wrongful Death Act, (2) that plaintiffs' theory of recovery was governed by Florida's interpretation of Florida Uniform Commercial Code provisions governing actions for breach of express and implied warranties, and (3) that under Florida law, contributory negligence, assumption of the risk, and misuse were available defenses to action for breach of warranty. *Westerman v. Sears, Roebuck & Co.*, 577 F.2d 873 (5th Cir. Fla. 1978).

In action by buyer of motor home against dealer-seller for breach of implied warranty of merchantability under UCC § 2-314(1), (1) dealer was liable for such breach because it had not disclaimed warranty under UCC § 2-316(2), and (2)

dealer could not avoid its liability by reliance on manufacturer's disclaimer of warranties, which was contained in the sales contract. *Collella v. Beranger Volkswagen, Inc.*, 118 N.H. 365, 386 A.2d 1283 (1978).

In breach of implied warranty action based on UCC §§ 2-314 et seq., defenses of lack of notice, lack of privity, and disclaimer of warranty are available, but in action based on strict liability in tort, such defenses are not available (expressly refraining from deciding whether adoption of Uniform Commercial Code limited court's authority to impose broader concept of liability for injuries caused by defectively manufactured products). *Pearson v. Franklin Lab., Inc.*, 254 N.W.2d 133 (S.D. 1977).

Manufacturer of blow-molded plastic products was "merchant" within meaning of UCC § 2-104(9) with respect to plastic wiglet cases, notwithstanding manufacturer produced variety of plastic goods, and wiglet cases produced by manufacturer were subject to implied warranty of merchantability. However, since allegedly defective handle housing walls were result of specifications supplied by distributor that ordered cases and since distributor, who was informed buyer who designed product in issue and held mechanical and design patents covering similar cases, examined 15 pre-production cases, inspecting handles and handle housing by lifting cases and shaking them, any implied warranty of merchantability with respect to handle housings was precluded. *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017 (D. Conn. 1975).

Test for plaintiff's alleged misuse of galvanized kettle alleged to bar recovery under UCC § 2-314 warranty of merchantability was whether use to which kettle was put was "in accord with practices employed by an appreciable number of galvanizers" and not whether plaintiff took "commonly used precautions". *Brickman-Joy Corp. v. National Annealing Box Co.*, 459 F.2d 133 (2d Cir. Conn. 1972).

It is no defense to an action brought for breach of warranty under subd (1) of this section to say that the seller could not expect that a nine-year-old child would handle and open a bottle of beer which

exploded, causing injuries. *Harris v. Great Atl. & Pac. Tea Co.*, 23 Mass. App. Dec. 169 (1962).

54. —Limitations and laches.

No implied warranties under UCC §§ 2-314 and 2-315 applied to sale of used caterpillar tractor, where (1) buyer had previously owned and used the same tractor; (2) buyer knew much more about tractor's quality and condition than did seller who had been persuaded by buyer to purchase tractor from buyer; (3) buyer subsequently purchased tractor from seller after seller repaired it; and (4) buyer in choosing tractor did not rely on seller's skill or judgment. *Trax, Inc. v. Tidmore*, 331 So. 2d 275 (Ala. 1976).

In absence of express warranty explicitly guaranteeing future performance or quality of brick which was used in construction of home but which deteriorated, homeowner's cause of action for breach of implied warranty under UCC § 2-314 against manufacturer of brick accrued and limitations statute began to run under UCC § 2-725 from time brick was delivered; however, limitations statute was tolled by manufacturer's absence from state notwithstanding that it could have been served under long arm statute. *Beckmire v. Ristokrat Clay Prods. Co.*, 36 Ill. App. 3d 411, 343 N.E.2d 530 (2d Dist. 1976).

55. —Contributory negligence.

Contributory negligence of purchaser may be defense to claim of breach of implied warranty of merchantability and fitness, but was not proven where gas purchaser had attempted to reignite pilot light after having been informed of trouble by gas company-seller. *Murphy v. Petrolane-Wyoming Gas Serv.*, 468 P.2d 969 (Wyo. 1970).

Contributory negligence is defense to action for breach of warranty under UCC § 2-314. *Stephan v. Sears, Roebuck & Co.*, 110 N.H. 248, 266 A.2d 855 (1970).

56. —Failure to follow instructions.

Where a buyer took possession of and later used a container of adhesive which displayed a valid warranty disclaimer on its label followed by the capitalized words "IF THE PURCHASER DOES NOT AC-

CEPT THE GOODS ON THESE TERMS, THEY ARE TO BE RETURNED AT ONCE, UNOPENED", the buyer may not complain that the seller of the adhesive breached express or implied warranties since the buyer's unreasonable failure to examine the adhesive after it was delivered to him and before its use, not only to determine whether it was fit for the use intended, but also to reject and return it if the buyer did not intend to be bound by the disclaimer, constituted the proximate cause of his injuries. *Basic Adhesives, Inc. v. Robert Matzkin Co.*, 101 Misc. 2d 283 (1979), *aff'd* as modified.

In action by buyer of trailer hitch against seller for breach of implied warranty under UCC § 2-314 when trailer hitch broke while plaintiff was towing his trailer, motion for directed verdict should have been granted to defendant seller where plaintiff admitted he did not read instructions furnished with trailer hitch and that he knew tongue weight should be

between 350 and 525 pounds, but stated that he picked up tongue and placed it on ball, and whether breaking of hitch was caused by defect in part, or by improper load distribution or connection was pure speculation and should not have been submitted to jury. *Burbage v. Atlantic Mobilehome Suppliers Corp.*, 21 N.C. App. 615, 205 S.E.2d 622 (1974).

In action by husband and wife against manufacturer of household cleaner to recover damages for injuries sustained by wife, allegedly resulting from use of cleaner to remove wax from floor, evidence that wife did not use dilutions recommended on label but instead used concentrations greatly exceeding those given in directions, manufacturer was not liable for breach of express or implied warranties, if any, where article was not used in normal manner or, as here, according to directions on label. *Evershine Prods., Inc. v. Schmitt*, 130 Ga. App. 34, 202 S.E.2d 228 (1973).

ATTORNEY GENERAL OPINIONS

The Mississippi Department of Information Technology Services deals in computer hardware, software, and computer services and has knowledge or skill peculiar to such transactions and so is clearly a "merchant" within the meaning of the statute. *Litchliter*, May 29, 1998, A.G. Op. #98-0288.

Merchants can limit or disclaim implied warranties in offering computer hardware and computer software to the Mississippi Department of Information Technology

Services (ITS) or other state agencies through ITS; however, ITS can make it a condition of any bid process or request for proposals or other offer to purchase that the computer hardware and software solicited carry the implied warranties of merchantability and fitness for a particular purpose or, indeed, any other standard it deems necessary and advisable. *Litchliter*, May 29, 1998, A.G. Op. #98-0288.

RESEARCH REFERENCES

ALR. Implied warranty of fitness by one serving food. 7 A.L.R.2d 1027.

Right of retailer sued by consumer for breach of implied warranty of wholesomeness or fitness of food or drink, to bring in as a party defendant the wholesaler or manufacturer from whom article was procured. 24 A.L.R.2d 913.

Seller's or manufacturer's liability for injuries as affected by buyer's or user's allergy or unusual susceptibility to injury from article. 26 A.L.R.2d 963.

Liability of bailor of automotive vehicle or machine for personal injury or death due to defects therein. 46 A.L.R.2d 404.

Implied warranty of fitness of livestock. 53 A.L.R.2d 892.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury. 75 A.L.R.2d 39.

Statements in advertisements as affecting manufacturer's or seller's liability for

injury caused by product sold. 75 A.L.R.2d 112.

Manufacturer's or seller's duty to give warning regarding product as affecting his liability for product-caused injury. 76 A.L.R.2d 9.

Manufacturer's or seller's duty as to product design as affecting his liability for product-caused injury. 76 A.L.R.2d 91.

What law governs liability of manufacturer or seller for injury caused by product sold. 76 A.L.R.2d 130.

Liability of manufacturer or seller for injury caused by animal feed or medicines, crop sprays, fertilizers, insecticides, rodenticides, and similar products. 81 A.L.R.2d 138.

Liability of manufacturer or seller of products sold in container or package for injury caused by container or packaging. 81 A.L.R.2d 229.

Liability of manufacturer or seller of container such as bottle, barrel, drum, tank, etc., or other packaging material for injury caused thereby. 81 A.L.R.2d 350.

Extent of liability of seller of livestock infected with communicable disease. 87 A.L.R.2d 1317.

Products liability: liability of successor corporation for injury or damage caused by product issued by predecessor. 66 A.L.R.3d 824.

Statements on container that enclosed toy, game, sports equipment, or the like, is safe as affecting manufacturer's liability for injury caused by product sold. 74 A.L.R.3d 1298.

What constitutes a contract for sale under Uniform Commercial Code § 2-314. 78 A.L.R.3d 696.

Uniform Commercial Code: implied warranty of fitness for particular purpose as including fitness for ordinary use. 83 A.L.R.3d 656.

What constitutes "particular purpose" within meaning of UCC § 2-315 dealing with implied warranty of fitness. 83 A.L.R.3d 669.

What are "merchantable" goods within meaning of UCC § 2-314 dealing with implied warranty of merchantability. 83 A.L.R.3d 694.

Who is "merchant" under UCC § 2-314(1) dealing with implied warranties of merchantability. 91 A.L.R.3d 876.

Products liability: air guns and BB guns. 94 A.L.R.3d 291.

Products liability: toys and games. 95 A.L.R.3d 390.

Farmers as "merchants" within provisions of UCC Article 2, dealing with sales. 95 A.L.R.3d 484.

Products liability: forklift trucks. 95 A.L.R.3d 541.

Products liability: modern cases determining whether product is defectively designed. 96 A.L.R.3d 22.

Products liability: defective vehicular gasoline tanks. 96 A.L.R.3d 265.

Products liability: personal injury or death allegedly caused by defect in aircraft or its parts, supplies, or equipment. 97 A.L.R.3d 627.

Products liability: liability for personal injury or death allegedly caused by defect in motorcycle or its parts, supplies, or equipment. 98 A.L.R.3d 317.

Products liability: personal injury or death allegedly caused by defect in braking system in motor vehicle. 99 A.L.R.3d 179.

Products liability: manufacturer's or sellers' obligation to supply or recommend available safety accessories in connection with industrial machinery or equipment. 99 A.L.R.3d 693.

Products liability: personal injury or death allegedly caused by defect in steering system in motor vehicle. 100 A.L.R.3d 158.

Products liability: personal injury or death allegedly caused by defect in drive train system motor vehicle. 100 A.L.R.3d 471.

Products liability: personal injury or death allegedly caused by defect in suspension system in motor vehicle. 100 A.L.R.3d 912.

Products liability in connection with prosthesis or other product designed to be surgically implanted in patient's body. 1 A.L.R.4th 92.

Products liability: flammable clothing. 1 A.L.R.4th 251.

Products liability: liability of manufacturer or seller for injury or death caused by defect in boat or its parts, supplies, or equipment. 1 A.L.R.4th 411.

Products liability: defective heating equipment. 1 A.L.R.4th 748.

Products liability: industrial accidents involving conveyor belts or systems. 2 A.L.R.4th 262.

Products liability: diethylstilbestrol (DES). 2 A.L.R.4th 1091.

Liability of manufacturer or seller of snowthrower for injuries to user. 2 A.L.R.4th 1284.

Products liability: farm machinery. 4 A.L.R.4th 13.

Products liability: admissibility of expert or opinion evidence that product is or is not defective, dangerous, or unreasonably dangerous. 4 A.L.R.4th 651.

Products liability: vehicular bumpers. 5 A.L.R.4th 483.

Products liability: personal injury or death allegedly caused by defect in electrical system in motor vehicle. 5 A.L.R.4th 662.

Products liability: swimming pools and accessories. 6 A.L.R.4th 492.

Products liability: clothes dryers. 6 A.L.R.4th 1262.

Products liability: elevators. 7 A.L.R.4th 852.

Products liability: industrial presses. 8 A.L.R.4th 70.

Products liability: sufficiency of proof of injuries resulting from "second collision." 9 A.L.R.4th 494.

Products liability: transformer and other electrical equipment. 10 A.L.R.4th 854.

Products liability: ladders. 11 A.L.R.4th 1118.

Allowance of punitive damages in products liability case. 13 A.L.R.4th 52.

Products liability: cranes and other lifting apparatuses. 13 A.L.R.4th 476.

Pre-emption of strict liability in tort by provisions of UCC Article 2. 15 A.L.R.4th 791.

Products liability: firearms, ammunition, and chemical weapons. 15 A.L.R.4th 909.

Products liability: cement and concrete. 15 A.L.R.4th 1186.

Products liability: tire rims and wheels. 16 A.L.R.4th 137.

Products liability: stud guns, staple guns, or parts thereof. 33 A.L.R.4th 1189.

Products liability: household appliances relating to cleaning, washing, personal

care, and water supply, quality and disposal. 34 A.L.R.4th 95.

Products liability: medical machinery used in plaintiff's treatment. 34 A.L.R.4th 532.

Products liability: household equipment relating to storage, preparation, cooking, and disposal of food. 35 A.L.R.4th 663.

Products liability: modern status of rule that there is no liability for patent or obvious dangers. 35 A.L.R.4th 861.

Products liability: equipment and devices directly relating to passengers' standing or seating safety in land carriers. 35 A.L.R.4th 1050.

Products liability: home and office furnishings. 36 A.L.R.4th 170.

Products liability: modern cases on explosion or breakage of beverage bottles. 36 A.L.R.4th 419.

Computer sales and leases; breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief. 37 A.L.R.4th 110.

Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability. 41 A.L.R.4th 9.

Products liability: construction materials or insulation containing formaldehyde. 45 A.L.R.4th 751.

Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew. 45 A.L.R.4th 777.

Products liability: perfumes, colognes, or deodorants. 46 A.L.R.4th 1197.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action. 47 A.L.R.4th 621.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning athletic, exercise, or recreational equipment. 50 A.L.R.4th 1226.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning agricultural implements and equipment. 60 A.L.R.4th 678.

Products liability: electricity. 60 A.L.R.4th 732.

Products liability: overhead garage doors and openers. 61 A.L.R.4th 94.

Products liability: building and construction lumber. 61 A.L.R.4th 121.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning building components and materials. 61 A.L.R.4th 156.

Products liability: what is an "unavoidably unsafe" product. 70 A.L.R.4th 16.

Strict products liability: recovery for damage to product alone. 72 A.L.R.4th 12.

Products liability: motor vehicle exhaust systems. 72 A.L.R.4th 62.

Products liability: industrial refrigeration equipment. 72 A.L.R.4th 90.

Implied warranty coverage for service transactions under state consumer protection and deceptive trade statutes. 72 A.L.R.4th 282.

Products liability: tractors. 75 A.L.R.4th 312.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury. 75 A.L.R.4th 443.

Products liability: contributory negligence or assumption of risk as defense in action for strict liability or breach of warranty based on failure to provide safety device for product causing injury. 75 A.L.R.4th 538.

Forum non conveniens in products liability cases. 76 A.L.R.4th 22.

Products liability: bicycles and accessories. 76 A.L.R.4th 117.

Products liability: exercise and related equipment. 76 A.L.R.4th 145.

Products liability: trampolines and similar devices. 76 A.L.R.4th 171.

Products liability: competitive sports equipment. 76 A.L.R.4th 201.

Products liability: skiing equipment. 76 A.L.R.4th 256.

Products liability: general recreational equipment. 77 A.L.R.4th 1121.

Products liability: mechanical amusement rides and devices. 77 A.L.R.4th 1152.

Burden of proving feasibility of alternative safe design in products liability action based on defective design. 78 A.L.R.4th 154.

Products liability: seller's right to indemnity from manufacturer. 79 A.L.R.4th 278.

Products liability: lubricating products and systems. 80 A.L.R.4th 972.

Products liability: all-terrain vehicles (ATVs). 83 A.L.R.4th 70.

Liability of auctioneer under doctrine of strict products liability. 83 A.L.R.4th 1188.

Products liability: hair straighteners and relaxants. 84 A.L.R.4th 1090.

Products liability: cutting or heating torches. 84 A.L.R.4th 1123.

Products liability of endorser, trade association, certifier, or similar party who expresses approval of product. 1 A.L.R.5th 431.

Liability on implied warranties in sale of used motor vehicle. 47 A.L.R.5th 677.

Products liability: Manufacturer's postsale obligation to modify, repair, or recall product. 47 A.L.R.5th 395.

Products liability: Recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect. 50 A.L.R.5th 275.

Products liability: paints, stains, and similar products. 69 A.L.R.5th 137.

Products liability: Helicopters. 72 A.L.R.5th 299.

Products liability: consumer expectations test. 73 A.L.R.5th 75.

Federal pre-emption of state common-law products liability claims pertaining to motor vehicles. 97 A.L.R. Fed. 853.

Federal pre-emption of state common-law products liability claims pertaining to tobacco products. 97 A.L.R. Fed. 890.

Federal pre-emption of state common-law products liability claims pertaining to drugs, medical devices, and other health-related items. 98 A.L.R. Fed. 124.

Federal pre-emption of state common-law products liability claims pertaining to pesticides. 101 A.L.R. Fed. 887.

Am Jur. 38 Am. Jur. 2d, Guaranty § 10.

63 Am. Jur. 2d, Products Liability §§ 659-662, 704 et seq.

67 Am. Jur. 2d, Sales §§ 281, 282.

67A Am. Jur. 2d, Sales §§ 747, 791 et seq.

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Forms 31 et seq. (breach of warranty as basis of liability).

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Forms 91 et seq. (liability for particular products).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:311. (Instruction to jury; Creation of implied warranty from course of dealing or usage of trade).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:291-2:304. (Implied warranties; merchantability).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:901 et seq. (Implied warranties of merchantability and usage of trade or course of dealing).

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14 Am. Jur. Trials, Liquefied Petroleum (LP) Gas Fires and Explosions §§ 1 et seq.

17 Am. Jur. Trials, Power Press Accident Cases §§ 1 et seq.

41 Am. Jur. Trials 161, Motorboat Propeller Injury Accidents.

1 Am. Jur. Proof of Facts, Allergy, Proof No. 1 (proof of dermatitis resulting from allergy).

1 Am. Jur. Proof of Facts, Allergy, Proof No. 2 (proof of allergy as similar to "normal condition").

4 Am. Jur. Proof of Facts, Drugs, Proof No. 1 (proof of use of drug other than that called for in prescription); Explosions, Proof No. 1 (proof of explosion of beverage bottle).

5 Am. Jur. Proof of Facts, Food, Proof No. 1 (proof of foreign substance in food or beverage as cause of illness or injury); Proof No. 2 (proof of food poisoning).

12 Am. Jur. Proof of Facts, Thalidomide, Proof No. 1 (proof of thalidomide as the cause of birth defects); Proof No. 2 (proof of thalidomide as the cause of polyneuritis).

12 Am. Jur. Proof of Facts, Water Heater Explosions, Proof No. 1 (proof of water heater explosion by testimony of metallurgist).

14 Am. Jur. Proof of Facts, Cosmetics, § 66 (proof of injury caused by shampoo); § 67 (proof of injury caused by aerosol hair spray); § 68 (proof of manufacturer's pretesting and use evaluation of bleach cream); § 69 (proof of sensitivity to ingredient in deodorant); § 70 (proof of incidence and gravity of allergic reaction to deodorant).

14 Am. Jur. Proof of Facts, Electrical Wiring, § 23 (proof of property damage

from faulty installation of wiring); § 24 (proof of injury from contact with high voltage wire); § 25 (proof of shock caused by faulty appliance).

14 Am. Jur. Proof of Facts, Flammability of Fabrics, § 29 (proof of flammability of wearing apparel; breach of implied warranty).

16 Am. Jur. Proof of Facts, Automobile Design Hazards, § 91 (proof of accident caused by negligently designed directional and overturning stability); § 92 (proof of driver injury due to negligently designed steering column and wheel); § 93 (proof of pedestrian injury aggravation due to negligently designed fender ornament).

16 Am. Jur. Proof of Facts, Seat Belt Accidents, § 56 (proof that injuries resulted from improper installation of seat belt); § 57 (proof of defective seat belt); § 58 (proof that seat belt was not being worn at time of accident; injury evaluation).

18 Am. Jur. Proof of Facts, Farm Machinery Accidents, § 76 (proof of overturning of row-crop tractor because of operator's negligence); § 77 (proof of injuries from ungarded tractor power take-off shaft); § 78 (proof of hay baler injuries caused by improper operating instructions); § 79 (proof of improper removal of operator's safety bar from hay bale stacker); § 80 (proof of corn picker injuries caused by failure to provide proper operating instructions and to install necessary safety devices); § 81 (proof of explosion of cast-iron flywheel on ensilage cutter).

6 Am. Jur. Proof of Facts 2d, Failure of Product to Meet Manufacturer's Specifications or Standards, §§ 25 et seq. (proof of failure to meet specifications or standards).

11 Am. Jur. Proof of Facts 2d, Lack of care in selecting independent contractor, §§ 27 et seq. (proof of failure of company official to use due care in selecting and retaining food service contractor).

17 Am. Jur. Proof of Facts 2d, Defective Mobile Home, §§ 12 et seq. (proof that mobile home was defective).

18 Am. Jur. Proof of Facts 2d, Defective Product Design, Role of Human Factors, §§ 8 et seq. (proof of unreasonably dangerous machine design).

23 Am. Jur. Proof of Facts 2d, Defective Design or Installation of Air Conditioning System, §§ 11 et seq. (proof of defective design, construction, and installation of commercial air conditioning system).

26 Am. Jur. Proof of Facts 2d, Sales: Implied Warranty of Merchantability, §§ 29-32 (proof of existence of implied warranty of merchantability); §§ 33-41 (proof of seller's liability for breach of implied warranty of merchantability).

26 Am. Jur. Proof of Facts 2d 1, Sales: Implied Warranty of Merchantability.

35 Am. Jur. Proof of Facts 2d 255, False Representation as to Quality or Character of Product.

35 Am. Jur. Proof of Facts 2d 607, Misrepresentation in Sale of Animal.

7 Am. Jur. Proof of Facts 3d 1, Injuries from Drugs.

7 Am. Jur. Proof of Facts 3d 225, Defective Design of Golf Cart.

7 Am. Jur. Proof of Facts 3d 305, Products Liability: The "Sophisticated User" Defense.

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8 Am. Jur. Proof of Facts 3d 615, Defective Forklift Trunk.

CJS. 77 C.J.S., Sales §§ 238, 252, 253, 263, 266 et seq.

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1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss. L. J. 141, March 1983.

1983 Mississippi Supreme Court Review: Farmer as merchant. 54 Miss. L. J. 113, March, 1984.

1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L. J. 467, August, 1987.

§ 75-2-315. Implied warranty; fitness for particular purpose.

Except as otherwise provided in this section, where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods shall be fit for such purpose. Provided, however, with respect to the sale of cattle, hogs and sheep, there shall be no implied warranty that the cattle, hogs and sheep are free from sickness or disease at the time the same is consummated, conditioned upon reasonable showing by the seller or his agent that all state and federal regulations pertaining to animal health were complied with.

Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of fitness for a particular purpose or any express limitation of remedies for breach of such warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.

SOURCES: Codes, 1942, § 41A:2-315; Laws, 1966, ch. 316, § 2-315; Laws, 1976, ch. 385, § 2; Laws, 1981, ch. 430, § 2; Laws, 1998, ch. 513, § 2, eff from and after July 1, 1998.

Editor's Note — See Editor's Note at § 75-2-314.

Cross References — Varying effect of code provisions by agreement, see § 75-1-102. General principles of law and equity as supplementing code provisions, see § 75-1-103.

Course of dealing or usage of trade, see § 75-1-205.

Modification, rescission, and waiver, see § 75-2-209.

Agreement to shift or divide risk or burden, see § 75-2-303.

Creation of express warranties, see § 75-2-313.

Implied warranty of merchantability, see § 75-2-314.

Construction of warranties, see § 75-2-317.

Prohibition against limitation of remedies depriving buyer of remedy to which he may be entitled for breach of implied warranty of fitness for particular purpose, see § 75-2-719.

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- 76. —Fertilizer and soil conditioners.
- 77. —Pesticides and herbicides.

A. In General.

1. Generally.

An implied warranty of fitness for a particular purpose with regard to certain engine parts sold by the defendant to the plaintiff and installed in a truck engine applied only to those parts and not to the entire engine into which the parts were installed. *Easley v. Day Motors, Inc.*, 796 So. 2d 236 (Miss. Ct. App. 2001).

Three warranties recognized by Mississippi law applicable to a chicken feeder system purchased by defendants from plaintiff on an open account are express warranties, implied warranty of merchantability, and implied warranty of fitness for particular purpose. *McLaurin v. Smith's Poultry & Farm Supply, Inc.*, 499 So. 2d 1361 (Miss. 1986).

Language in a copier-equipment lease disclaiming implied warranties of fitness for purpose and merchantability is rendered inoperative by Mississippi Code § 11-7-18. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Mississippi Code § 75-2-315 by analogy suggests, with respect to a 2 party copier-equipment lease, that the lessor warranted that the copier was fit for the specific purposes communicated to it by the lessee. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Disclaimer of implied warranty of merchantability in sale of used car was ineffective under UCC § 2-316(2) where (1) although disclaimer was conspicuously stamped on car-purchase order, buyer's signature was underneath, instead of on, line provided in disclaimer for such signature (thus tending to support buyer's claim that disclaimer had been stamped on purchase order after buyer signed order), and (2) that part of disclaimer which stated that car was sold "as is" was stamped over other printed material on order form so as to be almost impossible to read. *Natale v. Martin Volkswagen, Inc.*, 92 Misc. 2d 1046 (1978).

The purpose of the implied warranty of fitness for a particular purpose, which is provided by UCC § 2-315, is to protect the buyer from bearing the burden of loss when the goods, although not violating an express warranty, do not meet the buyer's particular purpose. *Controltek, Inc. v. Kwikie Enters., Inc.*, 284 Or. 123, 585 P.2d 670 (1978).

No warranty of fitness for a particular purpose arises under UCC § 2-315 when goods are manufactured in accordance with specifications provided by the buyer. In such case, the buyer does not rely on the seller's skill or judgment (holding that since buyer of electronic control units for operating automatic steps on motor homes had no expertise in electronics and had not given manufacturer any specifications for manufacturing such units, buyer was justified in relying on manufacturer's skill and judgment, and also holding that buyer's inspection and acceptance of units without making any complaint to manufacturer did not constitute waiver under UCC § 2-316(3)(b) of buyer's claim for breach of implied warranty of fitness of units for particular purpose, since design of units was such as to prevent buyer's discovery of any defects therein). *Controltek, Inc. v. Kwikie Enters., Inc.*, 284 Or. 123, 585 P.2d 670 (1978).

Implied warranties of merchantability and fitness for particular purpose arise in every contract of sale under UCC § 2-314(1) and § 2-315, unless such warranties are properly excluded under UCC § 2-316. *Lease Fin., Inc. v. Burger*, 40 Colo. App. 107, 575 P.2d 857 (1977).

Every sale comprehends within it the warranty of fitness for the purpose intended, unless all warranties have been expressly excluded; nevertheless, the parties may supplement the warranty of fitness and call for detailed and objective standards of compliance. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

The entire purpose behind the implied warranty sections of the UCC is to hold the seller responsible when inferior goods are passed along to the unsuspecting buyer, and the evidence required is not that the defects could or should have been uncovered by the seller but only that the goods upon delivery were not of a mer-

chantable quality or fit for their particular purpose; and if the requisite proofs are established the only exculpatory relief afforded is a showing that the implied warranties were modified or excluded by specific language under § 2-316. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

Lack of skill or foresight on the part of the seller in discovering the product's flaw was never meant to bar recovery under this section. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

2. Comparison with other laws.

The fact that a warranty of fitness for a particular purpose does or does not exist has no bearing on any other warranty or theory of product liability. Conversely, the fact that there may be some other basis for liability of the defendant does not preclude the existence of a warranty for a particular purpose. Thus, the fact that there is a warranty of conformity to sample (an express warranty) does not preclude the existence of a warranty for a particular purpose under UCC § 2-315. *Singer Co. v. E.I. du Pont de Nemours & Co.*, 579 F.2d 433 (8th Cir. Mo. 1978).

In New Hampshire, statutory implied warranties provided by Uniform Commercial Code are deemed to afford complete remedy, and no common-law cause of action in contract based on implied warranty is recognized. *Brescia v. Great Rd. Realty Trust*, 117 N.H. 154, 373 A.2d 1310 (1977).

The UCC does not change the already established law of Pennsylvania as to the buyer's right to rescind and recover the purchase price where there has been a breach of an implied warranty of merchantability or fitness. *Sarnecki v. Al Johns Pontiac*, 56 Luz. Legal Reg. Rep. 293 (Pa. 1966).

A former section of the Connecticut Sales Act extended the warranty of fitness of food or drink "to the purchaser and to all persons for whom such food or drink is intended" whereas § 2-315 extends an implied warranty of fitness for a particular purpose, if the seller has reason to know of that purpose, and § 2-318 extends an express or implied warranty to any person in the family or household of the buyer, or who is a guest in his home. Thus, it would

seem that the Uniform Commercial Code represents an expansion of the old law to include any article, and a contraction from "all persons for whom...[it] is intended." *Simpson v. Powered Prods. of Mich., Inc.*, 24 Conn. Supp. 409, 192 A.2d 555 (1963).

The concept of warranty of fitness for a particular purpose is the same under the Code as under the former Uniform Sales Act. *Marble Card Elec. Corp. v. Maxwell Dynamometer Co.*, 10 Chest. Co. 145 (Pa. 1961).

3. Disclaimer or exclusion.

Provision of contract for extermination of pests which limited homeowner's remedy for breach of express warranty to reinspection and refumigation in event of reinfestation, was enforceable under Mississippi law. Facts did not fall within protections afforded by §§ 11-7-18 or 75-2-315.1, and litigation not involve claim for breach of implied warranties. Moreover, even if defendant had attempted to limit implied warranties, plaintiff did not seek remedies based thereon. In addition, contract was one primarily for service, whereas prohibition on limitation of express warranties applies only to manufacturer of consumer goods, thus there was nothing in Mississippi statutes forbidding limitation of remedies for breach of express warranty provided in service contract. *Smith v. Orkin Exterminating Co.*, 791 F. Supp. 1137 (S.D. Miss. 1990), *aff'd*, 943 F.2d 1314 (5th Cir. 1991).

Warranties of merchantability and fitness for use are implied by sections 2-314 and 2-315 of the Uniform Commercial Code unless excluded or modified pursuant to section 2-316 of the Uniform Commercial Code; where the exact exclusionary words of subdivision (2) of section 2-316 of the Uniform Commercial Code are not used, the exclusion may still be accomplished by language which clearly indicates that no implied warranty is made (Uniform Commercial Code, § 2-316, subd [3], par [a]), by a course of dealing or course of performance or usage of trade (Uniform Commercial Code, § 2-316, subd [3], par [c]), or where the buyer has refused to examine the goods under circumstances where the defect complained of would have been revealed through such inspection. Basic Adhesives,

Inc. v. Robert Matzkin Co., 101 Misc. 2d 283 (1979), *aff'd* as modified.

In action by lessor of ice-vending machine against lessee for overdue lease payments, in which lessee cross-complained against machine's seller alleging breach of seller's implied warranty of fitness for a particular purpose, where evidence showed (1) that seller had sold machine to lessor in order to facilitate leasing it to lessee, (2) that both seller and lessor had advised lessee not to accept machine until he was satisfied with its performance, and (3) that both machine's acceptance notice and lease itself expressly declared that lessee understood that lessor made no warranties, express or implied, concerning machine, court held (1) that since lease agreement between lessor and lessee was merely a financing tool whereby lessee acquired use of machine after seller sold it to lessor, lessor thus was lessee's agent in purchasing machine from seller, (2) that as a result, seller's implied warranty of fitness of machine for particular purpose under UCC § 2-315 extended to lessee, (3) that seller breached such warranty when machine proved to be only 80 percent effective when used, (4) that lessee, by signing acceptance notice wherein he acknowledged that machine was operative and had no defects, accepted it under UCC § 2-606(1) in an "as is" condition and thus released seller from its implied warranty, and (5) that lessee's use of machine for 22 months with full knowledge of its limitations was unreasonable and prevented him from revoking his acceptance under UCC § 2-608(2). *World Wide Lease, Inc. v. Grobschmit*, 21 Wash. App. 537, 586 P.2d 889 (1978), review denied, 91 Wash. 2d 1023 (1979).

In action by plaintiff to recover for breach of agreement termed a "lease," under which defendant agreed to lease business machines from plaintiff for 60-month term, with title to pass to defendant at end of term, implied warranties of merchantability and fitness under UCC §§ 2-314 and 2-315 were held applicable to transaction whether it was deemed lease or bailment agreement; however, since both front and back page of lease agreement contained statement in bold capitalized lettering, "LESSOR MAKES

NO EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS WITH RESPECT TO SUCH LEASED PROPERTY AND HEREBY DISCLAIMS THE SAME," which appeared not more than two inches above signature of officer who signed lease on behalf of defendant, disclaimer was sufficiently conspicuous, as defined in UCC § 1-201(10), and was properly worded so as to effectively exclude such warranties under UCC § 2-316. *Quality Acceptance Corp. v. Million & Albers, Inc.*, 367 F. Supp. 771 (D. Wyo. 1973).

Exclusion of implied warranty under instant section that goods be fit for a particular purpose must be made in accordance with § 2-316(2). *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967).

A new car warranty appearing on page 3 of the "owner's booklet" which limited seller's liability to replacement of defective parts, and was expressly stated to be in lieu of all other warranties, was not so conspicuous as to exclude an implied warranty of merchantability or fitness, even though it was printed in type which contrasted slightly with that used in the remainder of the booklet. *Sarnecki v. Al Johns Pontiac*, 56 Luz. Legal Reg. Rep. 293 (Pa. 1966).

B. Scope of Warranty.

4. In general.

Bridge design plans were not "goods" as defined in UCC § 2-105(1), and, thus, implied warranty provisions of Uniform Commercial Code §§ 2-314 and 2-315, did not apply to cause of action based on defect in plans. *Department of Transp. v. Bethlehem Steel Corp.*, 28 Pa. Commw. 214, 368 A.2d 888 (1977).

Uniform Commercial Code provides two implied warranties: (1) implied warranty of general merchantability contained in UCC § 2-314, which is applicable if seller is merchant with respect to goods of that kind, and (2) implied warranty of fitness for particular purpose contained in UCC § 2-315, which is applicable if seller has reason to know any particular purpose for which goods are required and buyer is relying on seller's skill or judgment to select or to furnish suitable goods. These

warranties are imposed by law on basis of public policy and arise by operation of law because of relationship between parties, nature of transaction, and surrounding circumstances. *Brescia v. Great Rd. Realty Trust*, 117 N.H. 154, 373 A.2d 1310 (1977).

Where fender of new car was damaged in transit to dealer, dealer replaced damaged fender with new fender and had it repainted, and car was sold to buyer as new car, dealer had no duty under Uniform Commercial Code to disclose to buyer prior damage to fender and its replacement with new fender; mention of one thing in statute implies exclusion of others not expressed and, since UCC mandated only 2 implied warranties (merchantability, § 2-314, and fitness for particular purpose, § 2-315), there was no implied warranty that part of new motor vehicle had not been replaced with another new part. *Cocco v. Degnan Chevrolet, Inc.*, 64 Pa. D. & C.2d 6 (1973).

Seller's warranty of fitness imposes obligation to indemnify warrantee for losses, including compensation awards and judgments, resulting from breach of warranty. *Gambino v. United Fruit Co.*, 48 F.R.D. 28 (S.D.N.Y. 1968).

The implied warranties of merchantability and of fitness for a particular purpose are designed to protect the buyer of goods from bearing the burden of loss where merchandise, though not violating a promise expressly guaranteed, does not conform to the normal commercial standards or meeting the buyer's particular purpose, a condition upon which he had the right to rely. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

Where an automobile parts supplier with 20 years' experience used a micrometer, trade manuals, and checked the numbers on the main bearing to be replaced in ordering parts for a truck engine, and evidence later disclosed that the jet lubrication system had been replaced at some prior time when the engine was rebuilt by a full pressure system requiring main bearings with grooved walls, there was no breach of an implied warranty of fitness in supplying the main bearings without grooved walls. *Mennella v. Schork*, 49 Misc. 2d 449 (1966).

Assuming that an implied warranty applies to the trustworthiness of a person employed to a person supplying the person for hire, such a warranty would be negated by a time slip containing a notation that agency furnishing the employee could not be responsible for the handling of cash or negotiable securities by employee without agency's prior consent. *Yoffee v. Temporary Help, Inc.*, 60 Lanc. L. Rev. 137 (Pa. 1966).

Under the Connecticut Act there may be an implied warranty that the goods sold shall be reasonably fit for a particular purpose, or that the goods shall be of merchantable quality, and the existence, nature and extent of either implied warranty depends on the circumstances of the individual case. *Corneliuson v. Arthur Drug Stores, Inc.*, 153 Conn. 134, 214 A.2d 676 (1965).

A warranty that flowering bulbs were sound and healthy and had flowering capacity at time of shipment is not inconsistent with an implied warranty of merchantability or fitness for a particular purpose. *Q. Vandenberg & Sons v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964).

No warranty of fitness for a particular purpose arises where the buyer receives the exact goods which he ordered. *Marble Card Elec. Corp. v. Maxwell Dynamometer Co.*, 10 Chest. Co. 145 (Pa. 1961).

5. Knowledge or discovery of defect.

Knowledge of defect on part of seller is not essential to recovery by buyer for breach of implied warranties under UCC §§ 2-314 and 2-315. *Brendsel v. Wright*, 301 Minn. 175, 221 N.W.2d 695 (1974).

Lack of skill or foresight on the part of the seller in discovering the product's flaw was never meant to bar recovery under this section. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

6. What constitutes particular purpose.

Distributor that sold rifle which exploded and injured plaintiff was a seller and therefore subject to suit under strict liability, however distributor had no duty to inspect rifle for latent defects and therefore could not be held liable on negligence theory; distributor impliedly warranted rifle as merchantable by selling it

in role of merchant, however, there was no implied warranty of fitness for particular use because rifle was purchased for ordinary use; manufacturer of rifle was not obliged to defend distributor in such action. *Curry v. Sile Distribs.*, 727 F. Supp. 1052 (N.D. Miss. 1990).

Although primary purpose of Code provision relating to implied warranty of fitness was to protect buyer who purchases goods with intention of using them in "particular" manner, meaning manner in which they would not normally be expected to be used, that section was not limited exclusively to purchases of such nature, but protected also buyer when his particular purpose was general or ordinary purpose. *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711, 83 A.L.R.3d 636 (1973).

7. Extent of defect constituting breach.

Under Mississippi law, as predicted by district court, plaintiff cannot pursue remedy under theory of negligence or strict liability against product manufacturer in which damages that are solely economic are sought. *Lee v. GMC*, 950 F. Supp. 170 (S.D. Miss. 1996).

Where the purchaser bought milk from a supermarket, delivered in a glass jug which served as a container for the milk but was not a part of the sale, in the absence of any proof of a defect either in the jug or its contents, the supermarket owner could not be held liable for injuries sustained by the purchaser of the milk as a consequence of the explosion of the jug. *McKone v. Ralph's Wonder Mkt., Inc.*, 27 Mass. App. Dec. 159 (1963).

8. —Effect of efforts at repair or mitigation.

In action by buyer of new Toyota pickup truck against seller for breach of implied warranty, under UCC § 2-314(2)(c), of merchantability and fitness of truck for ordinary purposes for which such a truck is used and breach of implied warranty under UCC § 2-315 of truck's fitness for particular purpose (operation at sustained freeway speeds), (1) directed verdict for seller was error with respect to engine's defective performance during first six months of operation, since vehi-

cle's low mileage at such time and testimony that design defect generally existed in that particular engine model removed inference of causation between design defect and defective performance of plaintiff's engine from realm of speculation; (2) directed verdict for seller was proper with respect to subsequent engine repairs that followed repairs made in first six months of engine's operation, since making of earlier repairs and vehicle's advanced mileage rendered speculative plaintiff's claim that design defect, without proof of its existence in plaintiff's engine or elimination of other causes of engine's defective performance, caused engine's difficulties; and (3) directed verdict for seller was error with respect to defects in vehicle's paint, shift lever, and oil system, since plaintiff sustained burden of proof as to causation on these matters. *Nelson v. Wilkins Dodge, Inc.*, 256 N.W.2d 472 (Minn. 1977).

Although the seller is unable to discover the defect in goods sold or cure the damage if it could be ascertained, he cannot avoid the consequences imposed by this section upon the seller of commercially inferior goods. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

9. Persons protected.

The legislature has provided for a specific implied warranty, extending from the manufacturer to third party beneficiaries including any natural person who is in the family or household of the buyer or who is a guest in the buyer's home if it is reasonable to expect that such person may use or be affected by the goods and who is injured by breach of warranty. *Finocchiaro v. Ward Baking Co.*, 104 R.I. 5, 241 A.2d 619 (1968).

10. —Employees; workmen.

Employee of dry-cleaning plant, who was injured when his clothing caught fire after being saturated with cleaning solvent and who, with respect to use of such solvent, was covered by warranties of fitness for purpose and merchantability contained in UCC § 2-314, § 2-315, and § 2-318, could not recover from manufacturers and distributors of solvent on theory of strict liability in tort for

defective manufacture and failure to warn plaintiff of its flammability since legislature, by adopting Uniform Commercial Code, preempted field of tort liability in direct sale relationships, so as to prevent court from applying strict liability doctrine. *Wilhelm v. Globe Solvent Co.*, 373 A.2d 218 (Del. Super. 1977) but see *Wilhelm v. Globe Solvent Co.*, 411 A.2d 611 (Del. 1979).

Workmen who suffered injuries when flash fire occurred in oil and gas well which was in process of being abandoned by owner could not invoke UCC provision relating to implied warranty to fitness to recover from defendant which had delivered and pumped some cement down casting, where cement was intended only to stabilize casing, and not to seal off gas, and workmen were not within objects of sale. *Garner v. Halliburton Co.*, 474 F.2d 290 (10th Cir. Okla. 1973).

Defendant's machine exploded spewing oil flames on workman working in close proximity; held, workman was entitled to benefit of any warranty of fitness on machine and entitled to recover for any breach thereof even though there was no contractual privity. *Murray v. Bullard Co.*, 110 N.H. 220, 265 A.2d 309 (1970).

Where employee's complaint alleged that safety work shoes "supplied" to him by his employer caused dermatitis entitling him to recover damages from the shoe manufacturer for breach of warranty, it could not be said in view of the many connotations of the word "supplied" that the employee was, as a matter of fact, excluded from the class of persons to whom the warranties extended under this section applied. *Nederostek v. Endicott-Johnson Shoe Co.*, 415 Pa. 136, 202 A.2d 72 (1964).

11. Services distinguished.

UCC § 2-314(1), dealing with implied warranty of merchantability, and § 2-315, dealing with implied warranty of fitness for particular purpose, were inapplicable to action against truck-maintenance company for its failure to maintain properly brakes on truck that struck plaintiff's decedent, since such sections relate to a seller of goods. *Lee v. C & P Serv. Corp.*, 363 So. 2d 586 (Fla. App. 1978), cert. denied, 372 So. 2d 469 (Fla. 1979).

In suit by buyer of modular home against seller for breach of warranty, wherein seller filed third-party complaint against testing laboratory, which had allowed its seal of "approval for use and occupancy" to be placed on home, for breach of implied warranties allegedly arising from seal's placement, implied warranties created by UCC § 2-314(1) and § 2-315 were inapplicable because (1) UCC § 2-314(1) and § 2-315 apply only to transactions in goods, and (2) in present case, any implied warranty of testing laboratory would concern quality of its inspection services, rather than quality of goods inspected. *Jones v. Clark*, 36 N.C. App. 327, 244 S.E.2d 183 (1978).

Implied warranties do not attach to the performance of a service. *Craig v. American Dist. Tel. Co.*, 91 Misc. 2d 1063 (1977).

12. —Medical services.

Where complaint showed that furnishing of allegedly unsafe drug to decedent was incidental feature of professional services rendered by defendant physicians, no sale of such drug occurred within meaning of Uniform Commercial Code that could give rise to cause of action for breach of any express or implied warranties under UCC § 2-313(1), § 2-314(1), and § 2-315. *Osborn v. Kelley*, 61 A.D.2d 367 (3d Dep't 1978).

Under Tennessee addition to UCC § 2-316, implied warranties of merchantability and fitness were not applicable to transfusions of blood. *Sawyer v. Methodist Hosp.*, 522 F.2d 1102 (6th Cir. Tenn. 1975).

Even if transfer of donor blood by non-commercial supplier to hospital for service fee was sale under UCC §§ 2-314 and 2-315, so as to give rise to implied warranty, supplier was not liable to hospital patient who contracted serum hepatitis, since there were no methods available at time in question by which hepatitis virus could effectively be excluded from blood or presence of virus determined and, therefore, blood, to extent it may have contained hepatitis virus, was unavoidably unsafe and for that reason was not unreasonably dangerous and did not fail to be fit within terms of warranties provided for in UCC §§ 2-314 and 2-315. *McMichael v. American Red Cross*, 532 S.W.2d 7 (Ky. 1975).

13. —Construction.

Fact issue whether contract for construction of glass screen walls concerned a predominantly labor-intensive endeavor precluded summary judgment for glass contractor on building owner's claim for implied warranty of fitness. *Schulman Inv. Co. v. Olin Corp.*, 477 F. Supp. 623 (S.D.N.Y. 1979).

In action by warehouse tenants against general contractor which built warehouse and subcontractor which designed and installed sprinkler system therein for water damage to textiles stored in warehouse as result of bursting of defective pipe that connected building's sprinkler system to city water main, plaintiffs' theory that defendants were liable for breach of implied warranty of fitness of pipe for particular purpose, which warranty allegedly attached under UCC § 2-315 to defective pipe supplied by subcontractor, could not be sustained because transaction entered into by defendants was not primarily for sale of goods, but was predominantly service-oriented and called for workmanlike performance of construction service. *Milau Assocs. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 368 N.E.2d 1247 (1977).

Insofar as applicability of implied warranty provisions of Uniform Commercial Code to sale of product under hybrid sales-service contract is concerned, if service aspect of such contract is predominant and transfer of personal property is merely incidental feature of transaction, exacting warranty standards in Uniform Commercial Code for imposing liability without proof of fault will not be imported from law of sales to render liable those who perform trade or professional services, such as building services under construction contract. Those who hire experts for predominant purpose of rendering services and who rely on their special skills cannot expect infallibility. Therefore, unless the parties have contractually bound themselves to a higher standard of performance, reasonable care and competence owed generally by practitioners in the particular trade or profession define the limits of an injured party's justifiable demands (also stating that since express warranty provisions of UCC § 2-313(1)(a) apply only to contracts for sale of goods,

that section would be no more applicable to contract for rendition of services than the code's implied warranty provisions). *Milau Assocs. v. North Ave. Dev. Corp.*, 42 N.Y.2d 482, 368 N.E.2d 1247 (1977).

In action against supplier of concrete used in allegedly defective floors, defendant's third party complaint for indemnity against installing contractor, alleging that contractor warranted fitness and merchantability of materials, did not state a cause of action because the warranties created by UCC §§ 2-314 and 2-315 only have significance if made by a seller. *ICI Am., Inc. v. Martin-Marietta Corp.*, 368 F. Supp. 1148 (D. Del. 1974).

In cross-petition for breach of implied warranty of fitness for particular purpose under UCC § 2-315 arising when silo built by plaintiff fell during windstorm, court properly submitted issue of implied warranty of fitness for particular purpose to jury where record disclosed that fact issue was created as to breach of warranty. *Madison Silos v. Wassom*, 215 N.W.2d 494 (Iowa 1974).

14. —Installment of goods and fixtures.

Where vinyl liner of swimming pool developed wrinkle, seller agreed to reseal liner but failed to do so and hole developed which resulted in total destruction of pool, seller breached implied warranties under UCC §§ 2-314 and 2-315 through his failure to install pool in workmanlike manner using suitable materials. *Riffe v. Black*, 548 S.W.2d 175 (Ky. Ct. App. 1977).

An oral agreement between property owners and a handyman whereby the handyman agreed to purchase a heating unit for owners and install it in the owners' building did not create between the parties a relationship of buyer and seller, so as to entitle the owners to a recovery against the handyman on the ground of a breach of implied warranty of merchantability and of fitness for the purpose. *Victor v. Barzaleski*, 19 Pa. D. & C.2d 698 (1959).

15. Leases and bailments distinguished; statute applicable.

UCC § 2-314, implied warranty of merchantability, and UCC § 2-315, implied warranty of fitness for particular purpose,

would be extended to lease transaction under which equipment company leased three motor scraper units to construction company since same considerations which give rise to creation of implied warranties in sales transaction were present: lessor was merchant specializing in sale and leasing of heavy construction equipment and lessee claimed it relied on lessor's expertise; lessor placed product into stream of commerce and sought to reap economic benefits from lease of product; and, finally, lessor was in better position to control antecedent factors which affect condition of product. Furthermore, UCC § 2-316, which allows seller to disclaim implied warranties and provides specific means for such disclaimer, would be extended to lease in question by analogy. *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 541 P.2d 1184 (1975).

16. —Statute inapplicable.

The provisions for implied warranties in contracts for the sale of goods set forth in §§ 75-2-314(1) and 75-2-315 are not applicable to 3-party lease transactions where the evidence clearly shows that the lessor is an independent financing lessor, not the functional equivalent of a seller or an agent thereof. *David Nutt & Assocs. v. First Continental Leasing Corp.*, 599 So. 2d 576 (Miss. 1992).

Contract for installation and maintenance by defendant of burglar alarm system on plaintiff's premises, which provided that equipment installed should remain property of defendant, did not constitute sale of equipment so as to be basis of cause of action for breach of either express warranty under UCC § 2-313(1) or implied warranties under UCC § 2-314(1) and UCC § 2-315 (also stating that implied warranties do not attach to performance of a service). *Craig v. American Dist. Tel. Co.*, 91 Misc. 2d 1063 (1977).

Warranty provisions of UCC §§ 2-313 and 2-315 are clearly limited to sales of goods; thus, by enacting UCC, legislature did not preempt field as to bailments and leases, and court was free, notwithstanding UCC, to apply doctrine of strict tort liability to bailment-lease situations. *Martin v. Ryder Truck Rental, Inc.*, 353 A.2d 581 (Del. 1976).

Contract was lease arrangement and was not covered by Uniform Commercial Code provisions relating to warranties where one party agreed to lease certain hens, known as "Parent Stock," and eggs therefrom, known as "Hatching Eggs," to other party for purpose of producing offspring, where contract provided that first party retained title to "Parent Stock" and "Hatching Eggs" and other party was precluded from selling or otherwise disposing of same without express written consent of first party, and where contract additionally provided for termination by either party on written notice at least 30 days in advance. *DeKalb Agresearch, Inc. v. Abbott*, 391 F. Supp. 152 (N.D. Ala. 1974), *aff'd*, 511 F.2d 1162 (5th Cir. Ala. 1975).

C. Reliance on Seller's Skill and Judgment.

17. In general.

Complaint which alleged (1) that defendant had manufactured drug complained of (pitocin) and sold it to codefendant hospital, (2) that defendant had impliedly warranted that drug was of merchantable quality and fit for use in certain obstetrical deliveries, (3) that plaintiff had relied on such warranties and on defendant's skill and judgment in purchasing drug, (4) that treating physician had ordered intravenous administration of drug to plaintiff's mother while fetus was in high station, (5) that defendant had breached its warranties of merchantability and fitness of drug for particular purpose by inadequate packaging and labeling, and by failure of drug to conform to defendant's affirmations of fact, and (6) that plaintiff had been proximately injured as a result of such breaches, was sufficient to state cause of action for breach of warranty under UCC § 2-314(1) and § 2-315 (stating that Uniform Commercial Code intended to create statutory cause of action for breach of implied warranty on behalf of consumers who are injured by product deficiencies, and that such cause of action is in addition to that existing in strict tort liability). *Woodill v. Parke Davis & Co.*, 58 Ill. App. 3d 349, 374 N.E.2d 683 (1st Dist. 1978), *aff'd* and *remanded*, 79 Ill. 2d 26, 37 Ill. Dec. 304, 402 N.E.2d 194 (1980).

In order for a buyer to recover on an implied warranty of fitness for a particular purpose (see UCC § 2-315), three elements are necessary: (1) the seller must have reason to know the buyer's particular purpose; (2) the seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods; and (3) the buyer must rely on the seller's skill or judgment. *World Wide Lease, Inc. v. Grobschmit*, 21 Wash. App. 537, 586 P.2d 889 (1978), review denied, 91 Wash. 2d 1023 (1979).

In action by seller for purchase price of coal, buyer's counterclaim based on seller's alleged breach of express warranty and implied warranties of merchantability and fitness of coal for particular purpose could not be sustained where (1) evidence did not show that seller had created express warranty under UCC § 2-313(1)(c) by showing buyer samples and analyses of coal's quality, but revealed instead that such samples and analyses were shown to buyer solely for his information; (2) coal delivered by seller was fit for ordinary purpose for which it was used, was burned as fuel by buyer's customers, and thus complied with seller's implied warranty of merchantability under UCC § 2-314(1); (3) implied warranty of fitness of coal for particular purpose did not arise under UCC § 2-315, since buyer did not rely on seller's skill and judgment in furnishing coal suitable for buyer's customers; and (4) even assuming that seller had breached such express and implied warranties as buyer contended, buyer still could not recover on counterclaim because he did not give seller adequate notice of alleged breach, as required by UCC § 2-607(3)(a), and such breach also was not proximate cause of damages buyer allegedly sustained. *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977).

Where parents purchased vault for casket of son, relying on funeral home's judgment to furnish suitable goods, and where vault was too small and parents had to return next day for another service and burial, parents were not barred from bringing action for breach of contract; implied warranty of fitness of UCC § 2-315 was neither excluded nor modified in

any way by funeral home and parents would be entitled to incidental and consequential damages resulting from breach pursuant to UCC § 2-715. *Caldwell v. Brown Serv. Funeral Home*, 345 So. 2d 1341 (Ala. 1977).

Employee of construction company, who was injured by collapse of boom of truck crane that construction company had leased from defendant trust company, could not recover damages under UCC § 2-314 for defendant's alleged breach of implied warranty of merchantability of crane where evidence showed (1) that person who was president and sole stockholder of construction company also was sole stockholder, trustee, and beneficiary of defendant trust company, and (2) that trust company did not deal in cranes or any other type of goods, had no employees, and had been formed solely as tax-saving device. Defendant also was not liable to plaintiff under UCC § 2-315 for breach of implied warranty of fitness of crane for particular purpose, since defendant lessor possessed no skill or judgment on which lessee (construction company) had relied; for purposes of Uniform Commercial Code, lessor and lessee of crane constituted single entity in person of sole stockholder of both companies. *Brescia v. Great Rd. Realty Trust*, 117 N.H. 154, 373 A.2d 1310 (1977).

In absence of express provision guaranteeing results of well drilling contract there was no implied warranty on part of driller as to either quantity or quality of water to be obtained; when driller undertook to drill irrigation well, in absence of any express warranty, only implied warranty on his part as to drilling was that he would perform work in workmenlike manner, with such skill as might ordinarily be expected from those who undertake this work; however, when he undertook to equip well, and he as seller at time of contracting for sale of equipment had reason to know particular purpose for which equipment was required and that buyer was relying on his skill or judgment to select and furnish suitable equipment, there was implied warranty that equipment would be fit for such purpose. *Franklin v. Northwest Drilling Co.*, 215 Kan. 304, 524 P.2d 1194 (1974).

Buyer's reliance on seller's skill or judgment must be shown before implied warranty of fitness of purpose can arise. *Klipfel v. Neill*, 30 Colo. App. 428, 494 P.2d 115 (1972).

Where a buyer, being ignorant of the fitness of the article offered by the seller, justifiably relied on the superior skill, information, and judgment of the seller and not on his own knowledge or judgment, he could properly claim an implied warranty of fitness. *Catania v. Brown*, 4 Conn. Cir. Ct. 344, 231 A.2d 668 (1967).

18. Knowledge of particular purpose.

In order for a buyer to recover on an implied warranty of fitness for a particular purpose (see UCC § 2-315), three elements are necessary: (1) the seller must have reason to know the buyer's particular purpose; (2) the seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate goods; and (3) the buyer must rely on the seller's skill or judgment. *World Wide Lease, Inc. v. Grobschmit*, 21 Wash. App. 537, 586 P.2d 889 (1978), review denied, 91 Wash. 2d 1023 (1979).

A warranty of fitness for a particular purpose arises under UCC § 2-315, regardless of the seller's intent, whenever the buyer relies on the seller's skill or judgment to select or furnish suitable goods and the seller, at the time of contracting, has reason to know the buyer's purpose and the fact that he is relying on the seller's skill and judgment. A warranty of fitness for a particular purpose may arise, for example, when a businessman buys goods that must be specially selected, manufactured, and assembled for his business. *Controltek, Inc. v. Kwikkee Enters., Inc.*, 284 Or. 123, 585 P.2d 670 (1978).

Under UCC § 2-315 and Official Comment 1, whether warranty of fitness for particular purpose arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting. Under this section, buyer need not bring home to seller actual knowledge of either particular purpose for which goods are intended or buyer's reliance on seller's skill and judgment if circumstances are such that seller has reason to realize purpose intended or

existence of buyer's reliance. However, the buyer must actually rely on the seller. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

In action under UCC § 2-315 for breach of implied warranty of fitness for particular purpose, buyer must show (1) that seller must have had reason to know buyer's particular purpose, (2) that seller must have had reason to believe buyer was relying on seller's skill and judgment, and (3) that buyer in fact had relied on seller's skill and judgment. *Christensen v. Eastern Neb. Equip. Co.*, 199 Neb. 741, 261 N.W.2d 367 (1978).

Where buyer of castings made known intended purpose and that choice of metal to be used was left to discretion of seller, seller had "reason to know" that buyer was relying on its judgment, and where buyer did so rely, implied warranty of fitness for particular purpose under UCC § 2-315 existed. *Valley Iron & Steel Co. v. Thorin*, 278 Or. 103, 562 P.2d 1212 (1977).

In action by retailer and manufacturer of swing set against manufacturer and supplier of chain used in swing set for breach of implied warranty of fitness under UCC § 2-315, evidence that chain supplier knew that chains would be used in swing sets, that supplier was swing set manufacturer's exclusive supplier of chains, that it sold manufacturer other types of swing equipment, and that swing set manufacturer ordered specified type of chain because of independent laboratory report furnished by chain supplier which indicated that chain was proper, was sufficient to establish that manufacturer was relying on supplier to use its skill and judgment in selecting proper chains. *Gellenbeck v. Sears, Roebuck & Co.*, 59 Mich. App. 339, 229 N.W.2d 443 (1975).

Even though seller's agent knew buyers' "particular purpose" in buying rolls of carpet was for general resale, that purpose was not "particular purpose" within meaning of UCC § 2-315, which requires seller to have reason to know of particular purpose for which goods are required in order to find implied warranty of fitness on part of seller. *Bruce v. Calhoun First Nat'l Bank*, 134 Ga. App. 790, 216 S.E.2d 622, 83 A.L.R.3d 663 (1975).

Where buyer of sheetrock did not inform seller of particular purpose intended for

sheetrock, implied warranty of fitness for particular purpose did not arise. *Tracor, Inc. v. Austin Supply & Drywall Co.*, 484 S.W.2d 446 (Tex. Civ. App. 1972), *ref. n.r.e* (Jan. 31, 1973).

Evidence adequately supported finding that there was breach of UCC § 2-315 warranty of fitness for particular purpose, where seller had reason to know particular purpose for which electrified flooring was required, and where seller had reason to know that buyer was relying on seller's skill and judgment in furnishing a suitable flooring which in collapsed state could be used for flooring and sides of mobile trailer. *Aluminum Co. of Am. v. Electro Flo Corp.*, 451 F.2d 1115 (10th Cir. Utah 1971).

Warranty was created by knowledge of wine manufacturer that wine was to be used by buyer for particular purpose. *Regina Grape Prods. Co. v. Supreme Wine Co.*, 357 Mass. 631, 260 N.E.2d 219 (1970).

A warranty of fitness for a particular purpose arises only if the seller has reason to know of the purpose. *Simpson v. Powered Prods. of Mich., Inc.*, 24 Conn. Supp. 409, 192 A.2d 555 (1963).

19. —Building materials.

In action by homeowner against seller of bricks to recover damages for breach of warranty, (1) implied warranty of fitness for particular purpose attached to sale of bricks under UCC § 2-315, where intended purpose for which they were to be utilized was expressly made known to defendant's salesman, where plaintiff and his brick layer agent relied on judgment of defendant's salesman in selecting suitable brick for stated purposes, and where salesman had reason to know that there was such reliance, (2) warranty was not excluded by usage of trade under UCC § 2-316(3)(c), and (3) since bricks clearly were not fit for use to which they were put and since plaintiff's loss was proximate result thereof, he was clearly entitled to consequential damages under UCC § 2-715(2)(b). *Cohen v. Bratt & Doxey Supply Co.*, 51 A.D.2d 719 (2d Dep't 1976), appeal denied, 39 N.Y.2d 706 (1976).

In action by roofing contractor against supplier of roofing materials to recover damages sustained when contractor was

required to reroof buildings due to defective roofing materials supplied by defendant, supplier gave and breached implied warranty of fitness for particular use under UCC § 2-315 where, *inter alia*, particular use envisioned by contractor was that supplier's materials, when used in built-up roofing system, would produce 20 year bonded roof, where supplier's agents knew of particular use contemplated by contractor, and where materials supplied by defendant were inherently insufficient to produce 20 year bonded roof. *Certain-Teed Prods. Corp. v. Goslee Roofing & Sheet Metal, Inc.*, 26 Md. App. 452, 339 A.2d 302 (1975).

20. —Fixtures or the like.

An implied warranty of fitness for the purpose intended was made in the sale of a furnace, where the seller knew that the particular purpose for which the buyers wanted the furnace was to heat their whole house, and the buyers relied upon the seller's judgment. *Holland Furnace Co. v. Jackson*, 106 Pitts. Legal J. 341 (Pa. 1958).

21. —Farm supplies and fixtures.

In action against feed company for damages to plaintiff's dairy cattle resulting from use of feed additive, evidence that plaintiff relied on defendant's salesman's judgment in selecting feed additive, and that salesman knew particular purpose product was required for supported jury finding of implied warranty of fitness for particular purpose. *Boehm v. Fox*, 473 F.2d 445 (10th Cir. Kan. 1973).

Hog feed was proper subject of implied warranty of fitness for a particular purpose where buyer relied on knowledge, skill and experience of feed manufacturer. *Ralston Purina Co. v. Howell*, 254 So. 2d 911 (Miss. 1971).

22. —Machinery and tools.

An implied warranty of fitness for the purpose intended was made in a sale of gray iron castings to be used in manufacturing sausage stuffing machines, where the seller was fully apprised of the buyer's needs and of the purpose for which the castings were intended. *John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co.*, 19 F.R.D. 379 (M.D. Pa. 1956), *aff'd*, 239 F.2d 815 (3d Cir. Pa. 1956).

23. —Motor vehicles and related equipment.

In action by buyer for breach of warranties attaching to sale of used truck, (1) when defendant dealer sold used truck, represented to have completely rebuilt engine, to plaintiff, an appropriate implied warranty of merchantability under UCC § 2-314(1) was created; (2) since plaintiff had relied on defendant's skill and judgment to furnish truck suitable for plaintiff's purposes, implied warranty of fitness for particular purpose arose by operation of law under UCC § 2-315 at time of sale and delivery of truck to plaintiff; and (3) no compelling reason existed to disturb trial court's finding that failure of truck's engine had not resulted from plaintiff's failure to keep engine properly oiled. *Roupp v. Acor*, 253 Pa. Super. 46, 384 A.2d 968 (1978).

In action against car dealer and manufacturer brought by buyer when engine failed to perform properly, statement by manufacturer warranting car to be free from defects in material and workmanship under normal use and service constituted express warranty under UCC § 2-313 and exclusion of, *inter alia*, implied warranty of fitness for particular purpose was ineffective where exclusions were not at any time called to buyer's attention and were not sufficiently conspicuous under UCC § 1-201(10); while implied warranty of merchantability under UCC § 2-314 and implied warranty of fitness for particular purpose under UCC § 2-315 may both attend sale of automobile, where neither dealer nor manufacturer knew that buyer intended to use car for occasional drag racing prior to or at time of original sale, no issue was created as to implied warranty of fitness for particular purpose, either in connection with original car purchase or subsequent motor replacement. *Jacobson v. Benson Motors, Inc.*, 216 N.W.2d 396 (Iowa 1974).

There was no breach of an implied warranty of fitness for a particular purpose where an automobile parts supplier with 20 years' experience used a micrometer, trade journals, and the identification numbers on the old main bearing in ordering a replacement part for an engine, where it appeared that the part ordered

did not work properly because at some prior time the original jet lubrication system of the engine had been replaced by a full pressure lubrication system which required a main bearing that had grooved walls. *Mennella v. Schork*, 49 Misc. 2d 449 (1966).

24. Course of dealing or custom of trade.

In action arising out of sale of livestock feed, implied warranty under UCC §§ 2-314 and 2-315 of fitness for purpose of feeding hogs was inherent in transaction, since inference that seller knew purpose to which feed was being put by buyer, a hog farmer, must follow from their course of dealing for two years. *Utah Coop. Ass'n v. Egbert-Haderlie Hog Farms, Inc.*, 550 P.2d 196 (Utah. 1976).

In action arising out of sale of bull, seller's answer, which alleged, *inter alia*, that by custom of trade in breeding animals there was no implied warranty of fitness for particular purpose in sale of bull, was sufficient under UCC § 1-205(6) to put buyers on notice of defense of exclusion under UCC § 2-316 of implied warranty of fitness under UCC § 2-315. *Torstenson v. Melcher*, 195 Neb. 764, 241 N.W.2d 103 (1976).

25. Representations and affirmations.

Buyer of pipes stated claims, under Mississippi law, for breach of implied warranties of merchantability and fitness for particular purpose, by alleging that seller represented to buyer that pipes would be sealed and tested to withstand 15 pounds of pressure per square inch and that pipes failed to withstand such pressure. *IHP Indus., Inc. v. PermAlert, Esp.*, 947 F. Supp. 257 (S.D. Miss. 1996).

In action by water corporation's contractor (buyer) against seller of filter tanks, failure of distributor heads of filter tanks did not constitute breach of implied warranty of merchantability under UCC § 2-314, breach of warranty of fitness for particular purpose under UCC § 2-315, or breach of any express warranty under UCC § 2-313, where distributor heads failed under excessive water pressure in water system due to defect in water corporation's plans and specifications, contractor bought tanks in reliance upon con-

tract specifications without reliance upon any warranty, affirmation or representation by seller as to merchantability or fitness for intended use, and seller's statement to buyer that tanks "should" be able to remove iron and manganese from water did not amount to affirmation of fact affecting bargain between contractor and seller. *Hobson Constr. Co. v. Hajoca Corp.*, 28 N.C. App. 684, 222 S.E.2d 709 (1976).

In action by dairy farmer to recover damages from feed manufacturer for loss of milk production and injury to dairy cows allegedly caused by use of feed supplement, evidence was sufficient to establish breach of both express warranty under UCC § 2-313 and implied warranty of fitness under UCC § 2-315 where there was express representation that use of feed supplement would increase milk production and where there was decrease in milk production resulting from wrong instructions about proper way to use feed supplement. However, farmer was not entitled to recover consequential damages under UCC §§ 2-714(3) and 2-715(2): (1) Considering that there were many factors which could affect production of milk, to permit use of difference between total milk production figures for whole of year during which feed supplement was used for approximately 2 months, and total production figures for whole of preceding year, as measure of damages, would constitute rankest form of speculation and conjecture; (2) with respect to damages for decrease in market value of cows affected by feed, it could not reasonably be determined how much of decline in valuation of cattle between date of injury and day on which they were sold was attributable to injury and how much to changes, if any, in market value between those dates. *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

Distributor of weed killer was liable in damages to truck gardener purchaser whose crop of squash was substantially destroyed when he applied it under adverse weather conditions on the representation of distributor's agent that the chemical was suitable for immediate use. However the manufacturer was not liable, though the labels on its containers contained no warnings whatsoever as to use

under adverse conditions. *Wilson v. E-Z Flo Chem. Co.*, 281 N.C. 506, 189 S.E.2d 221 (1972).

A petition alleging that Zoysia lawn grass was warranted by the seller to survive winter weather, and that the grass subsequently died of the cold, states a cause of action, for the decisive test, in determining whether language used is a mere expression of opinion or a warranty, is whether it purports to state a fact upon which it may fairly be presumed the seller expects the buyer to rely, and upon which the buyer would ordinarily rely, and no particular form of words is necessary to constitute a warranty. *Bell v. Menzies*, 110 Ga. App. 436, 138 S.E.2d 731 (1964).

26. —Sample or demonstration.

Buyer was entitled to damages under UCC § 2-714(2), and to incidental damages under UCC § 2-714(3) and § 2-715(1), for seller's breach of express and implied warranties of fitness for particular purpose, and also express warranty by sample attaching to wrap coats purchased by buyer, where (1) samples of such coats were made part of basis of bargain and created express warranty under UCC § 2-313(1)(c) that all goods would conform to such samples, (2) seller knew that buyer was relying on seller to furnish goods that would be fit for buyer's particular purpose within meaning of UCC § 2-315, and (3) seller delivered over 3,700 nonconforming coats that were not fit for buyer's resale purposes. *Alafoss v. Premium Corp. of Am., Inc.*, 448 F. Supp. 95 (D. Minn. 1978), aff'd in part, rev'd on other grounds, 599 F.2d 232 (8th Cir. Minn. 1979).

Evidence of demonstrations and assurances that soil compaction substance would meet customer's needs supported finding that manufacturer of substance and its area dealer made express and implied warranties which were breached by manufacturer and dealer when application of substance to customer's premises proved ineffective. *Larutan Corp. v. Magnolia Homes Mfg. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973).

Where the buyer, at the time of or just prior to contracting for the purchase of a carload of pipe, delivered to the seller a sample of the pipe he desired, and where the seller had reason to know that the

pipe was being used in the manufacture of harrow attachments, and where the buyer was relying on the seller to furnish a pipe suitable for this purpose, seller breached warranty of fitness by furnishing thinner pipe than sample, where thinness rendered pipe unable to withstand external stress. *Northern Plumbing Supply, Inc. v. Gates*, 196 N.W.2d 70 (N.D. 1972).

Where the seller, prior to the sale of a number of storm windows, submitted a sample to the buyer, there was not only an express warranty that the windows would conform to the sample but an implied warranty that they were fit for the purpose intended. *Loomis Bros. Corp. v. Queen*, 17 Pa. D. & C.2d 482, 1 U.C.C. Rep. Serv. 107 (1958) (holding that where there was some doubt about the sufficiency of the windows to keep out the wind and rain, it was for the jury to determine whether they were fit for the purpose intended).

27. Advice and recommendation.

A herbicide retailer, who answered farmers' question as to use of particular herbicide to meet particular needs, was held liable for breach of implied warranty of fitness for particular purpose when crop losses were sustained by farmers due to suggested application of herbicide. *Dobias v. Western Farmers Ass'n*, 6 Wash. App. 194, 491 P.2d 1346 (1971).

Where paint company representatives examined plans and specifications of a construction contract and recommended a particular paint for use by the painting subcontractor, and as the work progressed the paint company became acquainted with the problems encountered and unsatisfactory nature of the paint's performance while continuing to supply paint along with suggestions as to how it might be made to give a satisfactory result; a jury question was presented as to whether the paint company had breached its contract for the sale of paint and a directed verdict for the paint company was reversed and the cause remanded. *Parks v. Glidden Co.*, 433 S.W.2d 445 (Tex. Civ. App. 1968), *ref. n.r.e.* (Jan. 22, 1969).

Upon evidence that a marine engine sold by defendant distributor to plaintiff boat owner gave off excessive quantities or heavy black smoke when running, and

that defendant was unable to cure the defect after persistent efforts, and where it could have been found that the defendant knew of plaintiff's purpose in buying the engine and that plaintiff relied on defendant to guide him in its selection, a finding was warranted that there were breaches both of the warranty of merchantability and of the warranty of fitness for a particular purpose under §§ 2-314 and 2-315. *Hunt v. Perkins Mach. Co.*, 352 Mass. 535, 226 N.E.2d 228 (1967).

An implied warranty of fitness existed as a matter of law where the seller knew purposes for which a helicopter was purchased by the buyer and the seller had itself stimulated and suggested some of the purposes, and it was uncontradicted that the buyer had relied on the seller's skill and judgment, it appearing that buyer's officers had no previous experience or knowledge relating to the operation or performance of helicopters. *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. Minn. 1964).

28. Knowledgeable buyer.

Under Mississippi law, as predicted by district court, plaintiff cannot pursue remedy under theory of negligence or strict liability against product manufacturer in which damages that are solely economic are sought. *Lee v. GMC*, 950 F. Supp. 170 (S.D. Miss. 1996).

No warranty of fitness for a particular purpose arises under UCC § 2-315 when goods are manufactured in accordance with specifications provided by the buyer. In such case, the buyer does not rely on the seller's skill or judgment (holding that since buyer of electronic control units for operating automatic steps on motor homes had no expertise in electronics and had not given manufacturer any specifications for manufacturing such units, buyer was justified in relying on manufacturer's skill and judgment, and also holding that buyer's inspection and acceptance of units without making any complaint to manufacturer did not constitute waiver under UCC § 2-316(3)(b) of buyer's claim for breach of implied warranty of fitness of units for particular purpose, since design of units was such as to prevent buyer's discovery of any defects therein).

Controltek, Inc. v. Kwikkee Enters., Inc., 284 Or. 123, 585 P.2d 670 (1978).

No implied warranties under UCC §§ 2-314 and 2-315 applied to sale of used caterpillar tractor, where (1) buyer had previously owned and used the same tractor; (2) buyer knew much more about tractor's quality and condition than did seller who had been persuaded by buyer to purchase tractor from buyer; (3) buyer subsequently purchased tractor from seller after seller repaired it; and (4) buyer in choosing tractor did not rely on seller's skill or judgment. *Trax, Inc. v. Tidmore*, 331 So. 2d 275 (Ala. 1976).

Seller of concrete pump made no implied warranty of fitness where buyers relied upon their own skill and judgment in selection of pump to be used in construction of tunnel. *Concrete Equip. Co. v. William A. Smith Contracting Co.*, 358 F. Supp. 1137 (E.D. Wis. 1973).

29. —Selection by buyer.

Fact that buyer of oven for baking pizzas acted on advice of buyer's partner in purchasing oven manufactured by defendant, because of partner's success in commercial baking of pizzas with similar oven manufactured by defendant, underscored fact that buyer was relying on defendant, within meaning of UCC § 2-315, to furnish suitable oven for buyer's business. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

There was no implied warranty of fitness for particular purpose in connection with sale of race horse where buyer did not rely on seller's skill or judgment to select or furnish suitable goods but rather buyer relied on his agent to select horse and seller did no more than sell horse that buyer's agent had selected. *Sessa v. Riegle*, 427 F. Supp. 760 (E.D. Pa. 1977), aff'd, 568 F.2d 770 (3d Cir. Pa. 1978).

Sale of used multi-rip saw did not come within terms of UCC § 2-314 where seller was engaged in sawmill business, not business of selling sawmill equipment, and sale was isolated transaction; furthermore, UCC § 2-315 did not apply to transaction where uncontroverted facts established that buyer had decided to purchase particular brand of saw purchased from seller prior to his initial contact with seller, thus mitigating any reliance upon

seller's skill and knowledge. *Siemen v. Alden*, 34 Ill. App. 3d 961, 341 N.E.2d 713 (2d Dist. 1975).

In action to recover for breach of implied warranty of fitness for particular purpose arising from installation and sale by defendant of dump bed on plaintiff's truck, there was sufficient evidence to support finding of non-reliance by plaintiff on skill or judgment of defendant where plaintiff was experienced truck driver, plaintiff had been told by truck salesman five days before he signed defendant's purchase order that he needed bed of 15 to 15 ½ feet for proper functioning on wheelbase of this particular truck, and that 14 foot bed would be too short, where defendant's employee testified that he and defendant talked to plaintiff about length problem and discussed options available, and where defendant specifically stated that he did not recommend putting 14 foot bed on 126 inch cab to axle and that it would not work. *Turnbough v. Schien*, 26 Ill. App. 3d 88, 325 N.E.2d 5 (4th Dist. 1975).

No implied warranty of fitness arose as to specially manufactured machinery, where evidence established no reliance upon seller but rather that buyers relied upon their own judgment and skill in selecting machinery which they concluded would produce their product, and where conspicuous, written contract provision expressly excluded warranty of fitness. *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F. Supp. 449 (E.D. Mich. 1972), aff'd, 509 F.2d 1043 (6th Cir. Mich. 1975).

In action by buyer of cattle which had brucellosis when purchased and could not be used for breeding as buyer planned, finding that there was no implied warranty of fitness for particular purpose was supported by evidence showing that buyer relied on his own judgment in selecting cattle to be purchased and did not inform sellers of his plans for cattle. *Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. N.M. 1972).

30. —Brand name purchases.

The warranty of fitness for a particular purpose is implied in every sale of goods where the seller, at the time of contracting, has reason to know the particular purpose for which the goods are required and where the buyer is relying on the

seller's skill and judgment to select or furnish suitable goods (Uniform Commercial Code, § 2-315); where a photocopying machine was purchased for its trade name and for ordinary office purposes, the warranty for fitness for a particular purpose does not arise. *United States Leasing Corp. v. Comerlald Assocs.*, 101 Misc. 2d 773 (1979).

Implied warranty of fitness for particular purpose does not apply where (1) plaintiff-buyer relied principally upon reputation and advertisements of tractor manufacturer and did not particularly rely upon any judgment of defendant-seller who had recently entered tractor business and had no special skill or knowledge about trailers, and (2) purposes for which tractor was purchased were general and not particular. *Ford Motor Co. v. Taylor*, 60 Tenn. App. 271, 446 S.W.2d 521 (1969).

A purchaser of a product under a trade or patent name receives no implied warranty of fitness of use for any particular purpose, but does receive an implied warranty that the goods are of merchantable quality. *Montgomery Ward & Co. v. McKesson & Robbins, Inc.*, 55 Misc. 2d 529 (1967).

A sale of a specified chattel under its tradename tends to negative an implied warranty of fitness. *McMeekin v. Gimbel Bros.*, 223 F. Supp. 896 (W.D. Pa. 1963).

There was no implied warranty of fitness where a buyer purchased, under its tradename, a rotary-type lawn-mower for the general purpose of cutting grass, and did not rely on the seller's skill and judgment in selecting the mower. *McMeekin v. Gimbel Bros.*, 223 F. Supp. 896 (W.D. Pa. 1963).

31. Conformity to order or specification.

Buyer of pipes stated claims, under Mississippi law, for breach of implied warranties of merchantability and fitness for particular purpose, by alleging that seller represented to buyer that pipes would be sealed and tested to withstand 15 pounds of pressure per square inch and that pipes failed to withstand such pressure. *IHP Indus., Inc. v. PermAlert, Esp.*, 947 F. Supp. 257 (S.D. Miss. 1996).

No warranty of fitness for a particular purpose arises under UCC § 2-315 when goods are manufactured in accordance with specifications provided by the buyer. In such case, the buyer does not rely on the seller's skill or judgment (holding that since buyer of electronic control units for operating automatic steps on motor homes had no expertise in electronics and had not given manufacturer any specifications for manufacturing such units, buyer was justified in relying on manufacturer's skill and judgment, and also holding that buyer's inspection and acceptance of units without making any complaint to manufacturer did not constitute waiver under UCC § 2-316(3)(b) of buyer's claim for breach of implied warranty of fitness of units for particular purpose, since design of units was such as to prevent buyer's discovery of any defects therein). *Controltek, Inc. v. Kwiikee Enters., Inc.*, 284 Or. 123, 585 P.2d 670 (1978).

In action by distributor of wig accessories against plastic manufacturer for breach of warranty arising out of allegedly defective handle housings in plastic wiglet cases manufactured by plastic manufacturer, it could not be said that distributor's knowledge of goods or manufacturing process was so inferior or his reliance on manufacturer's skill so great as to give rise to implied warranty of fitness for particular purpose under UCC § 2-315 where distributor had many years of experience with wig cases and other plastic products of his own design, where distributor was familiar with both blow-molding and injection-molding and chose process by which wiglet case was to be manufactured, and where distributor insisted that wiglet case conform to shape of larger wig case and rejected suggestions made by manufacturer that would have increased strength of handle housing. *Blockhead, Inc. v. Plastic Forming Co.*, 402 F. Supp. 1017 (D. Conn. 1975).

Where specially manufactured floor drain grating was ordered and item as delivered fit description called for by buyer, there was no implied warranty of fitness for particular purpose. *Consolidated Supply Co. v. Babbitt*, 96 Idaho 636, 534 P.2d 466 (1975).

Where defendant seller contracted with plaintiff buyer to supply sleeve bearings

impregnated with specified oil in accord with government specifications for use in manufacture of bomb fuses, but instead supplied bearings coated with non-conforming oil, and where, although bearings coated with non-conforming oil were visibly different from conforming bearings, buyer used non-conforming bearings to manufacture two lots of bomb fuses which were discovered to be defective as result of use of such bearings, under UCC §§ 2-313-2-314, and 2-315, seller was liable to buyer for breach of its express warranty to supply bearings meeting applicable specifications and its implied warranties of merchantability and fitness for a particular purpose. *General Instrument Corp., F.W. Sickles Div. v. Pennsylvania Pressed Metals, Inc.*, 366 F. Supp. 139 (M.D. Pa. 1973), *aff'd*, 506 F.2d 1051 (3d Cir. Pa. 1974), *aff'd*, 506 F.2d 1052 (3d Cir. Pa. 1974).

A seller who has substantially complied with buyer's specifications will not be held to have extended a warranty of fitness for a particular purpose to the buyer, or be held responsible for the consequences of a deficiency in the specifications. *Klipfel v. Neill*, 30 Colo. App. 428, 494 P.2d 115 (1972).

No implied warranty of fitness for purpose arises when the seller manufactures goods following the specifications given by the buyer and acts upon his advice as to design and materials, for in such case it is obvious that the buyer is not relying on any skill or judgment of the seller. *Safe-Carry Paper Prods. Co. v. Concrete Eng'g Co.*, 64 Lack. Jur. 53 (Pa. 1962).

D. Remedies and Procedure.

32. In general.

To recover for the breach of an implied warranty (see UCC §§ 2-314(1) and 2-315), the plaintiff must establish that the defect that caused the damage was present when the product left the defendant's control. *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

In suit for damages to farmers' alfalfa seed crop allegedly caused by sprayers' application of insecticide to control green bugs, where one farmer had been told by sprayer that insecticide had been used with satisfactory results and farmers then

agreed to have defendants spray alfalfa fields, trial court erred in refusing to submit claim of breach of implied warranty under UCC § 2-315 to jury. *Fulwider v. Flynn*, 90 S.D. 527, 243 N.W.2d 170 (1976).

Where used car as to which no express warranties were made was totally destroyed by fire during normal operation 3 hours following purchase, it could be reasonably inferred that dealer breached implied warranties of merchantability and fitness, notwithstanding purchaser's failure to allege and prove defect. *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975).

In action for damages for breach of implied warranties of fitness and merchantability arising out of sale of diseased cattle, evidence was sufficient to support conclusion that animals were diseased prior to risk of loss passing to buyer, notwithstanding buyer's expert witness, a veterinarian, could not scientifically identify seller's ranch as source of infection, where inference could be drawn from his testimony that infection had to occur prior to shipment of calves from seller's ranch. *Martineau v. Walker*, 97 Idaho 246, 542 P.2d 1165 (1975).

33. Rescission.

Contract for sale of mobile trailer, specifically excluding all warranties except those written in the contract, excluded implied warranty of fitness, and buyer of trailer accepted it where he kept trailer and equipment for over two years without giving notice of rejection or desire to rescind contract. *Chrysler Credit Corp. v. Burns*, 527 P.2d 655 (Utah 1974).

34. Damages.

In action for breach of implied warranties of merchantability and fitness for particular purpose of trailer that was dangerously unroadworthy, (1) trailer's condition demonstrated that implied warranties under UCC § 2-314(1) and § 2-315 were breached, (2) buyer accepted trailer by offering to pay balance of contract price on assumption that trailer could be repaired, (3) under UCC § 2-608(1)(a), buyer was entitled to revoke acceptance on discovering structural defects in trailer's welding and design that he could not have known

about without aid of an expert, (4) buyer's revocation of acceptance was timely under UCC § 2-608(2), and (5) under UCC § 2-711(1), buyer was not required to prove that damages were inadequate remedy before obtaining right to rescind contract. *McCormick v. Ornstein*, 119 Ariz. 352, 580 P.2d 1206 (Ct. App. 1978).

Where parents purchased vault for casket of son, relying on funeral home's judgment to furnish suitable goods, and where vault was too small and parents had to return next day for another service and burial, parents were not barred from bringing action for breach of contract; implied warranty of fitness of UCC § 2-315 was neither excluded nor modified in any way by funeral home and parents would be entitled to incidental and consequential damages resulting from breach pursuant to UCC § 2-715. *Caldwell v. Brown Serv. Funeral Home*, 345 So. 2d 1341 (Ala. 1977).

Where buyer of materials for needle point rug discovered that yarn incorporated into background varied in color, seller was liable for breach of express and implied warranties for difference in value of rug as warranted and value as made. *Barrows v. Mazaltov's, Inc.*, 312 Minn. 586, 252 N.W.2d 130 (1977).

In action by dairy farmer to recover damages from feed manufacturer for loss of milk production and injury to dairy cows allegedly caused by use of feed supplement, evidence was sufficient to establish breach of both express warranty under UCC § 2-313 and implied warranty of fitness under UCC § 2-315 where there was express representation that use of feed supplement would increase milk production and where there was decrease in milk production resulting from wrong instructions about proper way to use feed supplement. However, farmer was not entitled to recover consequential damages under UCC §§ 2-714(3) and 2-715(2): (1) Considering that there were many factors which could affect production of milk, to permit use of difference between total milk production figures for whole of year during which feed supplement was used for approximately 2 months, and total production figures for whole of preceding year, as measure of damages, would con-

stitute rankest form of speculation and conjecture; (2) with respect to damages for decrease in market value of cows affected by feed, it could not reasonably be determined how much of decline in valuation of cattle between date of injury and day on which they were sold was attributable to injury and how much to changes, if any, in market value between those dates. *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

35. Notice of breach.

In action by lessor of ice-vending machine against lessee for overdue lease payments, in which lessee cross-complained against machine's seller alleging breach of seller's implied warranty of fitness for a particular purpose, where evidence showed (1) that seller had sold machine to lessor in order to facilitate leasing it to lessee, (2) that both seller and lessor had advised lessee not to accept machine until he was satisfied with its performance, and (3) that both machine's acceptance notice and lease itself expressly declared that lessee understood that lessor made no warranties, express or implied, concerning machine, court held (1) that since lease agreement between lessor and lessee was merely a financing tool whereby lessee acquired use of machine after seller sold it to lessor, lessor thus was lessee's agent in purchasing machine from seller, (2) that as a result, seller's implied warranty of fitness of machine for particular purpose under UCC § 2-315 extended to lessee, (3) that seller breached such warranty when machine proved to be only 80 percent effective when used, (4) that lessee, by signing acceptance notice wherein he acknowledged that machine was operative and had no defects, accepted it under UCC § 2-606(1) in an "as is" condition and thus released seller from its implied warranty, and (5) that lessee's use of machine for 22 months with full knowledge of its limitations was unreasonable and prevented him from revoking his acceptance under UCC § 2-608(2). *World Wide Lease, Inc. v. Grobschmit*, 21 Wash. App. 537, 586 P.2d 889 (1978), review denied, 91 Wash. 2d 1023 (1979).

In action by seller for purchase price of coal, buyer's counterclaim based on seller's alleged breach of express warranty

and implied warranties of merchantability and fitness of coal for particular purpose could not be sustained where (1) evidence did not show that seller had created express warranty under UCC § 2-313(1)(c) by showing buyer samples and analyses of coal's quality, but revealed instead that such samples and analyses were shown to buyer solely for his information; (2) coal delivered by seller was fit for ordinary purpose for which it was used, was burned as fuel by buyer's customers, and thus complied with seller's implied warranty of merchantability under UCC § 2-314(1); (3) implied warranty of fitness of coal for particular purpose did not arise under UCC § 2-315, since buyer did not rely on seller's skill and judgment in furnishing coal suitable for buyer's customers; and (4) even assuming that seller had breached such express and implied warranties as buyer contended, buyer still could not recover on counterclaim because he did not give seller adequate notice of alleged breach, as required by UCC § 2-607(3)(a), and such breach also was not proximate cause of damages buyer allegedly sustained. *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977).

In action by seller of cattle against buyer to recover purchase price of cattle, proffered amendment to seller's answer was insufficient to raise defense of breach of implied warranty of fitness for particular purpose under UCC § 2-315 where buyer failed to plead ultimate facts which would bring sale within provisions of statute, i.e., that cattle were being purchased for particular purpose and that buyer was relying on seller's skill and judgment to select suitable cattle; proffered pleading was also deficient in that it failed to allege that buyer gave seller timely notice of breach as required by UCC § 2-607(3)(a). *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976).

A minor third party beneficiary as to a manufacturer's express and implied warranties injured while a guest in the home of the ultimate purchaser of a bicycle, as a consequence of its defective condition, has a cause of action against the manufacturer and no notice is required to be given the manufacturer by such third party ben-

eficiary. *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 217 A.2d 71 (1965).

36. Parties and standing.

Class action was not maintainable for alleged breach of implied warranty of fitness for particular purpose, since each of necessary elements may be established only by testimony from each purchaser as to what his intended purpose was, whether he relied on defendant's skill and judgment, whether defendant had reason to know of his particular purpose and his reliance. *Metowski v. Traid Corp.*, 28 Cal. App. 3d 332 (3d Dist. 1972).

37. Remote manufacturer or seller; privity required.

No cause of action for breach of express or implied warranty existed, in insurer's action as subrogee against company supplying defective filtration plant equipment to subcontracting company insured by plaintiff, where (1) no seller-buyer relationship or sale contract existed under UCC § 2-314 and § 2-315 between subcontracting company and defendant supplier and (2) plaintiff insurer was neither "natural person" nor "injured in person" within meaning of UCC § 2-318. *Potsdam Welding & Mach. Co. v. Neptune Microfloc, Inc.*, 57 A.D.2d 993 (3d Dep't 1977).

In action by milk case manufacturer against manufacturer of polyethylene used for milk case bottoms, fact that polyethylene manufacturer invoiced plastics to, and received payment from, company that performed actual molding of polyethylene for milk case manufacturer was not conclusive on issue whether there was necessary privity between milk case manufacturer and polyethylene manufacturer to support action for breach of implied warranty of fitness for particular purpose under UCC § 2-315. *Cumberland Corp. v. E.I. DuPont de Nemours & Co.*, 383 F. Supp. 595 (E.D. Tenn. 1973).

For liability to be imposed because of a breach of the warranty of UCC § 2-315, privity must exist between the plaintiff and a defendant charged with the breach. *Walker v. Decora, Inc.*, 225 Tenn. 504, 471 S.W.2d 778 (1971).

In the absence of privity of contract between ultimate buyer and seller, this

section has no application. *Henry v. John W. Eshelman & Sons*, 99 R.I. 518, 209 A.2d 46 (1965).

38. —Privity not required.

In action by lessor of ice-vending machine against lessee for overdue lease payments, in which lessee cross-complained against machine's seller alleging breach of seller's implied warranty of fitness for a particular purpose, where evidence showed (1) that seller had sold machine to lessor in order to facilitate leasing it to lessee, (2) that both seller and lessor had advised lessee not to accept machine until he was satisfied with its performance, and (3) that both machine's acceptance notice and lease itself expressly declared that lessee understood that lessor made no warranties, express or implied, concerning machine, court held (1) that since lease agreement between lessor and lessee was merely a financing tool whereby lessee acquired use of machine after seller sold it to lessor, lessor thus was lessee's agent in purchasing machine from seller, (2) that as a result, seller's implied warranty of fitness of machine for particular purpose under UCC § 2-315 extended to lessee, (3) that seller breached such warranty when machine proved to be only 80 percent effective when used, (4) that lessee, by signing acceptance notice wherein he acknowledged that machine was operative and had no defects, accepted it under UCC § 2-606(1) in an "as is" condition and thus released seller from its implied warranty, and (5) that lessee's use of machine for 22 months with full knowledge of its limitations was unreasonable and prevented him from revoking his acceptance under UCC § 2-608(2). *World Wide Lease, Inc. v. Grobschmit*, 21 Wash. App. 537, 586 P.2d 889 (1978), review denied, 91 Wash. 2d 1023 (1979).

Manufacturer of defective mobile home could be held liable for breach of implied warranties of merchantability and fitness for particular purpose, under UCC §§ 2-314 and 2-315, without regard to privity of contract between manufacturer and consumer, and this liability embraced not only personal injuries and property damage, but also economic loss. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976).

Manufacturer of automobile was liable to purchaser of automobile for personal injuries and property damage sustained in collision caused by failure of automobile's carburetor return spring, notwithstanding purchaser bought vehicle as used automobile from private party; (1) under UCC § 2-315, failure of carburetor return spring constituted breach of implied warranty where automobile had been used for less than one year and was driven approximately 18,000 miles, (2) plaintiff was "buyer" of automobile and manufacturer was "seller" within meaning of § 2-315, and (3) there was no requirement of privity under UCC § 2-315. *Karczewski v. Ford Motor Co.*, 382 F. Supp. 1346 (N.D. Ind. 1974), aff'd, 515 F.2d 511 (7th Cir. Ind. 1975).

In products liability and implied warranty action for supplying feed supplement not suitably and reasonably fit to cause cattle to gain desired weight, privity between cattle feedlot operator and manufacturer of supplement was not required. *Texsun Feedyards, Inc. v. Ralston Purina Co.*, 311 F. Supp. 644 (N.D. Tex. 1970), rev'd on other grounds, 447 F.2d 660 (5th Cir. Tex. 1971).

Under Rhode Island provision of Code § 2-315 extending implied warranty of fitness for particular purpose as to food-stuffs or drinks sold for human consumption in sealed container, from seller to manufacturer or packer of such goods to those described in Code § 2-318 (family, household, guest, etc. of purchaser), privity was abolished as to all injured persons who previously had recourse to immediate seller, including purchaser himself. *Finocchiaro v. Ward Baking Co.*, 104 R.I. 5, 241 A.2d 619 (1968).

The implied warranty of fitness imposed by law on a manufacturer may be enforced directly against the manufacturer by a third party user where the manufacturer was aware of the purpose for which the product was to be put, and knew of the user's reliance that the product would be fit for the purpose intended, and it is not necessary that a contractual relationship exist between the user and the manufacturer. *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E.2d 726 (1st Dist. 1966).

Manufacturer of cosmetics could maintain an action for damages resulting from leaking aerosol cans in which certain of its products were packaged against can manufacturer on theory of breach of implied warranty of merchantability and fitness, although no privity of contract existed between can manufacturer and the user. *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E.2d 726 (1st Dist. 1966).

Plaintiff in a products liability case may proceed in an action of tort based upon the theory of implied warranty, notwithstanding there is no contractual relationship between plaintiff and defendant. *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

The purchaser of a chicken pie could maintain an action based on the breach of an implied warranty of fitness for consumption against the manufacturer to recover for injuries resulting from a chicken bone lodging in purchaser's throat as he was eating the pie. The court pointing out that, because the question had not been raised, it was not called upon to decide whether the manufacturer's implied warranty extended to the instant purchaser, who was apparently a remote consumer and not a purchaser from the manufacturer. *De Graff v. Myers Foods, Inc.*, 19 Pa. D. & C.2d 19, 1 U.C.C. Rep. Serv. 110 (1958).

39. Proximate cause.

In action by buyer against paint manufacturer for damages for breach of warranty in sale of red barn paint, where evidence showed (1) that plaintiff was professional barn painter, (2) that he had not followed defendant's instructions when adding linseed oil to paint purchased, (3) that paint on customers' barns painted by plaintiff had faded within one to four months after its application, (4) that plaintiff had had many complaints, and (5) that defendant had admitted that a "fade problem" existed with respect to paint purchased by plaintiff, which was of "bottom-of-the-line" quality, court held, on affirming judgment for plaintiff, (1) that although plaintiff's proof of causation was not direct, jury could still infer from fact that fading of paint was quite uniform that presence or absence of linseed oil had

had no effect on paint's fading; (2) that since defendant had admitted that paint had a "fade problem" which was to be expected with that brand of paint, jury could therefore infer that paint was not "good barn paint" and that it violated defendant's express warranty made under UCC § 2-313(1)(a); (3) that jury could also infer that paint was not of merchantable quality in violation of implied warranty of merchantability created by UCC § 2-314(1) and (2)(c); (4) that, moreover, it was not fit for plaintiff's particular purpose in violation of implied warranty of fitness contained in UCC § 2-315; and (5) that trial court correctly instructed jury that it could consider whether plaintiff had complied with defendant's directions in determining whether plaintiff had been negligent, and whether such negligence had been a cause of his consequential damages (declining, since issue was first presented on appeal, to consider whether plaintiff's consequential damages should have reduced by 15 per cent to reflect proportion of fault that jury attributed to plaintiff's negligence, and stating that Minnesota courts had not determined whether comparative-fault principle should be applied in breach-of-warranty actions, although its application seemed equitable and appropriate under UCC § 2-715(2)(b)). *Chatfield v. Sherwin-Williams Co.*, 266 N.W.2d 171 (Minn. 1978).

In action by owner of heavy-duty construction equipment for damage to equipment's engines that resulted from use of defective antifreeze that owner purchased to winterize such engines, where evidence showed that antifreeze purchased contained chloride, that chloride could corrode internal-combustion engines because it was a salt-water solution, that equipment owner had purchased the antifreeze from defendant retailer, that retailer had previously purchased it from a wholesale supplier (against whom retailer filed third-party action), and that the wholesale supplier had originally purchased it from manufacturer (against whom supplier filed fourth-party action), (1) retailer was liable to equipment owner, under UCC §§ 2-313(1)(a), 2-314(1), and 2-315, for breach of express warranty that antifreeze was suitable for use in engines of

owner's construction equipment and for breach of implied warranties of merchantability of such antifreeze and fitness thereof for particular purpose; (2) wholesale supplier was liable, under theory of breach of implied warranty of merchantability of antifreeze under UCC § 2-314(1), to retailer for same damages for which retailer was liable to equipment owner; and (3) manufacturer was liable to wholesale supplier on theory of strict liability in tort. *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977).

In an action brought under the UCC § 2-315 warranty, the plaintiff, to establish the right to recover for a breach thereof, need prove only that the food or beverage was purchased in a sealed container and was so contaminated or adulterated as to be unfit for human consumption and, of course, that there was a causal relationship between his consumption of the unfit product and his injury; consequently the defenses ordinarily available in an action brought to recover for injuries resulting from consumption of the contaminated food on the ground of the negligence of the processor or packager, such as contributory negligence or assumption of risk, are not available in an action brought for breach of the statutory warranty set out in UCC § 2-315. *Young v. Coca-Cola Bottling Co.*, 109 R.I. 458, 287 A.2d 345 (1972) but see *Fiske v. MacGregor*, 464 A.2d 719 (R.I. 1983).

When proceeding under Code-imposed implied warranty, plaintiff has burden of proving that injury resulted from unmerchantability or unsuitability of product; mere fact of application of shampoo and permanent wave followed by temporary hair loss is not enough to justify this conclusion. *Elliott v. Lachance*, 109 N.H. 481, 256 A.2d 153 (1969).

40. Pleading.

To plead properly cause of action for breach of warranty under Uniform Commercial Code, complaint should at least allege the following: (1) facts respecting sale of the goods; (2) identification of warranty created as being express warranty under UCC § 2-313(1), implied warranty of merchantability under UCC § 2-314(1), or implied warranty of fitness for particu-

lar purpose under UCC § 2-315; (3) facts respecting creation of such warranty; (4) facts respecting its breach; (5) giving to seller of notice of breach required by UCC § 2-607(3)(a); and (6) injuries sustained by buyer as result of breach (holding that third-party complaint failed to state cause of action because it did not comply with above list of essential allegations). *Dunham-Bush, Inc. v. Thermo-Air Serv., Inc.*, 351 So. 2d 351 (Fla. App. 1977).

Allegations that plaintiff purchased burglar alarm system from defendant, that the system was to remain the property of the defendant, that plaintiff was told that defendant was reliable firm, had an excellent staff, that the system was foolproof, and that the system was a substantial deterrent to burglaries, that plaintiff's premises were burglarized, and that defendant had breached an express warranty and an implied warranty, and had been guilty of gross negligence, breach of fiduciary duty, and intentional tort did not state a claim upon which relief could be granted where it contained no allegations of facts stating in what respect any warranty was breached or that any breach was a proximate cause of the burglary. *Craig v. American Dist. Tel. Co.*, 91 Misc. 2d 1063 (1977).

Beauty salon patron stated cause of action against operators of beauty salon for breach of implied warranties of fitness and merchantability under UCC where patron alleged that she was injured as result of application of defective hair product during course of permanent wave given by employee of beauty salon. *Ellibee v. Dye*, 64 Pa. D. & C.2d 158 (1973).

Petition which alleges that the defendant manufactured certain steel roof joists and impliedly warranted that they were fit for the ordinary purposes for which such steel joists were used, that such joists were defective and not fit for the ordinary purposes for which they were to be used, and as a direct and proximate result of being so defective they collapsed and fell upon plaintiff and injured him while he was working in a place where his presence was reasonably to be anticipated, states a good cause of action in tort based on theory of breach of implied warranty. *Lonzrick v. Republic Steel Corp.*, 6 Ohio St. 2d 227, 218 N.E.2d 185 (1966).

41. Evidence and burden of proof.

To recover for the breach of an implied warranty (see UCC §§ 2-314(1) and 2-315), the plaintiff must establish that the defect that caused the damage was present when the product left the defendant's control. *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

To recover for the breach of an implied warranty of fitness for a particular purpose, the buyer must show by a preponderance of the evidence (1) that the seller at the time of entering into the contract had reason to know the particular purpose for which the goods were required, (2) the buyer's reliance on the skill or judgment of the seller to select suitable goods, and (3) that the goods were unfit for the particular purpose (construing *Miss law*; where seller made no attempt to exclude or modify implied warranty of fitness (UCC § 2-315) of antifreeze for particular purpose for which it was to be used). *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977).

Failure of plaintiff to meet its burden of showing that contract with defendant electric company, under which defendant was to design, manufacture, and install electrical distribution system in plaintiff's building, involved sale of goods under UCC Art 2 precluded any recovery under UCC § 2-314(1) for defendant's alleged breach of implied warranty of merchantability of equipment installed or any recovery under UCC § 2-315 for defendant's alleged breach of implied warranty of fitness of equipment for particular purpose (observing that not every contract to install electrical system is automatically outside scope of UCC Art 2). *Air Heaters, Inc. v. Johnson Elec., Inc.*, 258 N.W.2d 649, 5 A.L.R.4th 489 (N.D. 1977).

It is clear that plaintiff has not met his burden of proof of proving a cause of action under UCC § 2-313 (Express Warranty), UCC § 2-314 (Implied Warranty of Merchantability), and UCC § 2-315 (Implied Warranty of Fitness for a Particular Purpose), where no evidence was submitted by the plaintiff on the existence of such warranties or on any defect in the chemical at issue, and none is apparent from the testimony. *Toppi v. United States*, 332 F. Supp. 513 (E.D. Pa. 1971).

A statutory shift in the burden of proof from the purchaser to the seller in a breach of warranty action does not change the substantive character of the action, but is merely a change in evidentiary procedure. *Lewis v. Food Mach. & Chem. Corp.*, *John Bean Div.*, 245 F. Supp. 195 (W.D. Mich. 1965).

The buyer has the burden of proving by a preponderance of the evidence that there was an implied warranty of fitness for a particular purpose and that such warranty was breached. *Safe-Carry Paper Prods. Co. v. Concrete Eng'g Co.*, 64 Lack. Jur. 53 (Pa. 1962).

The general rule is that the burden is upon the party asserting a breach of warranty to show that the cause of the failure or injury was one for which the warrantor was liable under the warranty. *Whiting Corp. v. Process Eng'g, Inc.*, 273 F.2d 742 (1st Cir. Mass. 1960).

42. —Knowledge of particular purpose.

In action by buyer of new automobile against seller based on breach of warranty, trial court did not err in dismissing complaint since evidence was sufficient to support conclusion that implied warranty of fitness did not arise within meaning of UCC § 2-315 where buyer had cultivated specific interest in automobile purchased at time of initial contact with seller and discussions between buyer and seller were primarily negotiations concerning lowest price, where it was unclear whether seller had reason to know of any particular purpose for buyer's acquisition, and where buyer only indicated that he wanted to purchase a quiet, dependable and comfortable automobile suitable for long distance trips on interstate highways. *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806 (8th Cir. Iowa 1976).

In action by buyer against seller of studs to be used in construction of building, evidence was sufficient to sustain trial court's conclusions that seller breached implied warranty of fitness under UCC § 2-315 where seller's salesman knew purpose for which studs were to be used, viewed the building site and surveyed the list of goods to be used in the construction of the development, was experienced lumber dealer and had greater

skill and judgment than buyer's representative regarding suitability of types of lumber for specific projects, and where seller's expertise was relied upon by buyer. *Jetero Constr. Co. v. South Memphis Lumber Co.*, 531 F.2d 1348 (6th Cir. Tenn. 1976).

43. —Reliance on seller's skill and judgment.

Although buyer informed seller of polystyrene beads of its needs and that it had screw type injection machine into which beads would be fed, in absence of evidence that seller knew more about machine than did buyer and in view of evidence that seller made no representation that bead material would work in buyer's machine and that buyer conducted its own tests from admittedly inadequate sample, there was no proof that buyer relied on any representation by seller that beads would work in its machine and, thus, no implied warranty of fitness for particular purpose under UCC § 2-315. *Plasco, Inc. v. Free-Flow Packaging Corp.*, 547 F.2d 86 (8th Cir. Mo. 1977).

In action by purchaser of soybean holding surge tank against seller for damages resulting from collapse of tank, evidence supported findings that seller breached its implied warranty of fitness for particular purpose where, at time of contracting, seller, through its agents, knew tank was to hold full load of soybeans, and where there was testimony by purchaser's engineers that purchaser relied on seller's skill and judgment in design, erection and fabrication of steel tanks. *Gorbett Bros. Steel Co. v. Anderson, Clayton & Co.*, 533 S.W.2d 413 (Tex. Civ. App. 1976).

Sale of repossessed boat by bank did not give rise to implied warranty of merchantability under UCC § 2-314 where there was no evidence that bank was "merchant" within meaning of UCC § 2-104(1), there being no evidence that bank dealt in kind of goods involved in transaction—boats—or that it held itself as having knowledge or skill peculiar to such goods, but rather record indicated sale of boat was no more than isolated transaction by bank; nor did sale give rise to implied warranty of fitness for particular purpose within UCC § 2-315, although buyer told bank officer he "was thinking about buy-

ing a boat to put into charter service" where there was no evidence that buyer relied upon bank's skill or judgment, or that bank possessed such skill or judgment, that boat was fit for particular purpose of charter service use. *Donald v. City Nat'l Bank*, 295 Ala. 320, 329 So. 2d 92 (1976).

In action by retailer and manufacturer of swing set against manufacturer and supplier of chain used in swing set for breach of implied warranty of fitness under UCC § 2-315, evidence that chain supplier knew that chains would be used in swing sets, that supplier was swing set manufacturer's exclusive supplier of chains, that it sold manufacturer other types of swing equipment, and that swing set manufacturer ordered specified type of chain because of independent laboratory report furnished by chain supplier which indicated that chain was proper, was sufficient to establish that manufacturer was relying on supplier to use its skill and judgment in selecting proper chains. *Gellenbeck v. Sears, Roebuck & Co.*, 59 Mich. App. 339, 229 N.W.2d 443 (1975).

In action by plaintiff against defendant under UCC § 2-315 for damages due to alleged breach of implied warranty of fitness of purpose in supplying and installing sprinklerheads in sprinkler system of plaintiff's building, plaintiff was entitled to directed verdict on uncontradicted evidence that defendant had knowledge of particular purpose for which sprinklerheads were required, that plaintiff relied completely and entirely upon skill and judgment of defendant to select suitable sprinklerheads, and that sprinklerhead malfunctioned within 3 months after installation, although there was no direct evidence as to specific cause of malfunction but overwhelming circumstantial evidence that it was caused by defect within sprinklerhead. *Jones, Inc. v. W.A. Wiedebusch Plumbing & Heating Co.*, 157 W. Va. 257, 201 S.E.2d 248 (1973).

Where a buyer, being ignorant of the fitness of the article offered by the seller, justifiably relied on the superior skill, information, and judgment of the seller and not on his own knowledge or judgment, he could properly claim an implied warranty of fitness. *Catania v. Brown*, 4 Conn. Cir. Ct. 344, 231 A.2d 668 (1967).

44. —Defect as constituting breach.

To recover for the breach of an implied warranty (see UCC §§ 2-314(1) and 2-315), the plaintiff must establish that the defect that caused the damage was present when the product left the defendant's control. *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

In action against manufacturer of oral contraceptive for stroke allegedly caused by using contraceptive, plaintiff was not entitled to proceed on theory of breach of either implied warranty of merchantability (UCC § 2-314(1)) or implied warranty of fitness for particular purpose (UCC § 2-315) where there was no evidence to show that such contraceptive had contained any foreign ingredients or impurities that rendered it inherently dangerous for human consumption, and where evidence revealed that plaintiff was suffering from hypertension when her doctor prescribed the contraceptive. *Chambers v. G.D. Searle & Co.*, 441 F. Supp. 377 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. Md. 1977).

In action by egg producer against feed manufacturer for breach of warranties based on claim that feed supplied contained improper nutritional balance, resulting in obesity and "fatty liver syndrome" in producer's laying hens, thereby reducing egg production and requiring producer to purchase eggs in open market in order to supply its various supermarket customers, evidence was sufficient to permit jury to draw inference that manufacturer's feed caused excess obesity, and hence low egg production, in all of producer's flocks where there was competent evidence that flocks fed with manufacturer's feed were obese and suffered from fatty liver syndrome and low egg production, whereas control flock, which was fed on another manufacturer's feed, were normal. *Vermont Food Indus., Inc. v. Ralston Purina Co.*, 514 F.2d 456 (2d Cir. Vt. 1975).

Special implied warranty of fitness protected electronic components sold to operator of cable television system, but operator could not recover for breach of warranty absent evidence that capacitors in question were defective. *Multivision N.W., Inc. v. Jerrold Elecs. Corp.*, 356 F. Supp. 207 (N.D. Ga. 1972).

Where evidence made it clear that cattle food contained stilbestrol, and that the food had not been purchased for beef cattle, the tainted food constituted a clear breach of the implied warranty of merchantability and of the warranty of fitness for a particular purpose. *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

45. Defenses.

In actions for breach of warranty under UCC § 2-314(1) and § 2-315 to recover damages for injuries resulting from the use of a product, there is generally no liability on the part of the seller if the buyer was unusually susceptible to injury from the product. A manufacturer cannot be required, under a theory of breach of implied warranty, to insure against the susceptibility of a particular individual to the manufacturer's product. The manufacturer's duty is to guard against probabilities, not possibilities. *Chambers v. G.D. Searle & Co.*, 441 F. Supp. 377 (D. Md. 1975), *aff'd*, 567 F.2d 269 (4th Cir. Md. 1977).

In lessor's action to recover balance due under automobile lease, lessee who claimed benefits of implied warranty of merchantability under UCC 2-314 and implied warranty of fitness for particular purpose under UCC § 2-315 could not escape liability by contending that its duty to make payments was conditioned on vehicle's remaining merchantable and repairable and that lessor had breached implied warranties relied on, since assuming that such warranties applied to transaction, neither warranty encompassed commitment that leased vehicle would remain serviceable during term of lease. *A-Leet Leasing Corp. v. Kingshead Corp.*, 150 N.J. Super. 384, 375 A.2d 1208 (App. Div. 1977), certification denied, 75 N.J. 528, 384 A.2d 508 (1977).

Recovery for breach of warranty of fitness for a particular purpose shall not be barred by user's contributory negligence in taking second sip from Coca-Cola bottle, where evidence of contributory negligence fell short of showing that user had partaken of Coke with actual knowledge of potentially dangerous condition thereof. *Young v. Coca-Cola Bottling Co.*, 109 R.I. 458, 287 A.2d 345 (1972) but see

Fiske v. MacGregor, 464 A.2d 719 (R.I. 1983).

46. —Limitations and laches.

Where buyer brought suit in 1973 on defective sewage system installed in 1968, and thus limitation period was a controlling issue, trial court should have made findings of fact as to duration of express warranty, whether breach occurred during warranty period, and whether buyer commenced action within 4 years of discovering breach. *Daughtry v. Jet Aeration Co.*, 91 Wash. 2d 704, 592 P.2d 631 (1979).

47. —Failure to follow instructions.

In action for eye injury following application of false eyelashes by manufacturer's representative, (1) where representative had warned plaintiff of possible irritation if adhesive glue supplied with eyelashes came into contact with skin or eyes, lashes that were applied properly to one eye had caused no injury, and adhesive glue was inadvertently introduced into plaintiff's damaged eye; and (2) where plaintiff's sole theory of action was breach by defendant of implied warranty of fitness of eyelashes for particular purpose under UCC § 2-315 and breach of implied warranty of merchantability under UCC § 2-314, summary judgment for defendant was proper, since (1) plaintiff's testimony that eyelashes, when properly applied to one eye, had caused her no injury contradicted her claim of breach of warranty, and (2) such warranties did not apply to use of defendant's product in other than normal manner. *Caldwell v. Lord & Taylor, Inc.*, 142 Ga. App. 137, 235 S.E.2d 546 (1977).

In breach of warranty action by developer of subdivision against seller-manufacturer of coating product used on plywood exterior of certain of developer's houses following delamination and checking of surfaces painted with seller's product, finding that seller neither breached implied warranty of merchantability under UCC § 2-314 nor implied warranty of fitness for particular purpose under UCC § 2-315 was proper where there was evidence that coating material was free from defects and was proper material for use intended, and that delamination and checking occurred as result of combina-

tion of improper preparation of plywood surface and incompetent application of coating material. *Shore Line Properties, Inc. v. Deer-O-Paints & Chems., Ltd*, 24 Ariz. App. 331, 538 P.2d 760 (1975).

Where well driller entered into contract with federal government to construct injection well in accord with plans and specifications supplied by government, including specifications for well casing which were furnished by government after consultation with well casing supplier, and casing collapsed during construction of well while it was being used in manner not intended by supplier or specified by government, and there was no question as to quality of casing or compliance with specifications by supplier and no proof of defect, well driller could not recover from supplier for breach of warranty since collapse was occasioned either by driller's failure to follow specifications during construction of well or by government's failure to specify casing of sufficient thickness and strength. *Layne-Atlantic Co. v. Koppers Co.*, 214 Va. 467, 201 S.E.2d 609 (1974).

In action by husband and wife against manufacturer of household cleaner to recover damages for injuries sustained by wife, allegedly resulting from use of cleaner to remove wax from floor, evidence that wife did not use dilutions recommended on label but instead used concentrations greatly exceeding those given in directions, manufacturer was not liable for breach of express or implied warranties, if any, where article was not used in normal manner or, as here, according to directions on label. *Evershine Prods., Inc. v. Schmitt*, 130 Ga. App. 34, 202 S.E.2d 228 (1973).

48. Instructions to jury.

In action by trucker against truck manufacturer for breach of implied warranty, trial court committed reversible error by instructing jury that contributory negligence on trucker's part would defeat his right to recover damages due to manufacturer's alleged breach of implied warranty. *Gregory v. White Truck & Equip. Co.*, 163 Ind. App. 240, 323 N.E.2d 280 (1975).

In an action by the buyer against the seller of day-old chicks for breach of im-

plied warranties of merchantability and fitness, an instruction that if the jury concludes that chickens had leukosis when delivered to the plaintiff jury should find for the plaintiff and proceed to the question of damages is not erroneous on the ground that it constitutes a charge of absolute liability. *Vlases v. Montgomery Ward & Co.*, 377 F.2d 846 (3d Cir. Pa. 1967).

E. Specific Goods as Fit for Particular Purpose.

49. In general.

In action by lessor of ice-vending machine against lessee for overdue lease payments, in which lessee cross-complained against machine's seller alleging breach of seller's implied warranty of fitness for a particular purpose, where evidence showed (1) that seller had sold machine to lessor in order to facilitate leasing it to lessee, (2) that both seller and lessor had advised lessee not to accept machine until he was satisfied with its performance, and (3) that both machine's acceptance notice and lease itself expressly declared that lessee understood that lessor made no warranties, express or implied, concerning machine, court held (1) that since lease agreement between lessor and lessee was merely a financing tool whereby lessee acquired use of machine after seller sold it to lessor, lessor thus was lessee's agent in purchasing machine from seller, (2) that as a result, seller's implied warranty of fitness of machine for particular purpose under UCC § 2-315 extended to lessee, (3) that seller breached such warranty when machine proved to be only 80 percent effective when used, (4) that lessee, by signing acceptance notice wherein he acknowledged that machine was operative and had no defects, accepted it under UCC § 2-606(1) in an "as is" condition and thus released seller from its implied warranty, and (5) that lessee's use of machine for 22 months with full knowledge of its limitations was unreasonable and prevented him from revoking his acceptance under UCC § 2-608(2). *World Wide Lease, Inc. v. Grobschmit*, 21 Wash. App. 537, 586 P.2d 889 (1978), review denied, 91 Wash. 2d 1023 (1979).

The implied warranties under the Uniform Commercial Code apply to the sale of used goods. *Natale v. Martin Volkswagen, Inc.*, 92 Misc. 2d 1046 (1978).

Sale of used goods, such as sauna heater, may carry with it implied warranty of fitness when elements prescribed in UCC § 2-315 are fulfilled. *Centennial Ins. Co. v. Vic Tanny Int'l of Toledo, Inc.*, 46 Ohio App. 2d 137, 346 N.E.2d 330 (1975).

Absent evidence that plaintiff ordered tank for use other than underground storage of gasoline, implied warranty of fitness ran with sale of 10,000-gallon capacity tank ordered by operator of gasoline station. *Larrance Tank Corp. v. Burroughs*, 476 P.2d 346 (Okla. 1970).

Contract did not specify that each leather skin had to be fit for the cutting of a jacket, but only that the entire shipment would be, and even the pieces too small for an entire jacket could be used for pockets, flaps and hangers; held, although seller did know purpose for which leather was ordered, it could be found that leather supplied was fit for such purpose according to trade custom. *Wakerman Leather Co. v. Irvin B. Foster Sportswear Co.*, 34 A.D.2d 594 (3d Dep't 1970), appeal denied, 26 N.Y.2d 614 (1970).

Evidence was insufficient to show breach of warranty of fitness for particular purpose in sale of centennial coins which were found not violative of federal currency laws as alleged. *Anchorage Centennial Dev. Co. v. Van Wormer & Rodrigues, Inc.*, 443 P.2d 596 (Alaska 1968).

In connection with a contract for the sale of an elevator, there was an implied warranty of fitness of the elevator for its use for that purpose, unless excluded under provisions of UCC § 2-316. *Little Rock Land Co. v. Raper*, 245 Ark. 641, 433 S.W.2d 836 (1968).

50. Food and drink.

In action for injury to tooth sustained when plaintiff bit into "nuttled cheese" sandwich which contained large, hard walnut shell, presence of shell could not be reasonably anticipated to be in food as served, and restaurant owner was liable for breach of implied warranty of fitness.

Stark v. Chock Full O'Nuts, 77 Misc. 2d 553 (1974).

In action against manufacturer of birth control pills and association from whom pills were purchased arising when plaintiff suffered stroke, lack of privity between plaintiff and manufacturer under UCC § 2-318 was of no consequence and 4 year statute of limitations under UCC § 2-725 governed; birth control association which gave advice and dispensed birth control pills was engaged in sale of goods as required by Code and plaintiff's failure to allege that pills did not prevent contraception would not bar recovery on theory of breach of implied warranty of fitness for particular purpose under UCC § 2-315; however, under UCC § 2-607(3)(a), plaintiff was required to notify association of alleged breach of implied warranty. *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550, 70 A.L.R.3d 304 (1974).

The sale of a salami for human consumption in which a piece of metal was embedded, was a breach of an implied warranty of fitness for which the seller was liable to the buyer for all injury or damage proximately resulting from the buyer's attempted consumption of the salami. *Primak v. Star Mkt. Co.*, 38 Mass. App. Dec. 218 (1967).

Evidence established that a crusty roll sold by cart vendor to a customer was of such hardness that it was not reasonably fit for human consumption and entitled the customer to recover on ground of breach of implied warranty for damages sustained when his tooth broke off as he bit into roll. The fact that the customer's tooth might have been weak was no defense, since a vendor took the customer as he found him. Neither was the vendor relieved from liability by the fact that he might be classified as a restaurant keeper. *Scanlon v. Food Crafts, Inc.*, 2 Conn. Cir. Ct. 3, 193 A.2d 610 (1963).

51. Drugs and medicine.

In action against pharmacist and physician to recover damages for stroke allegedly suffered as result of oral contraceptive drug available only by prescription, implied warranties of merchantability under UCC § 2-314 and of fitness under UCC § 2-315 were not applicable to transaction with pharmacist, since pharmacist

filled prescription as issued by physician. Furthermore, Physician issuing was not "seller" within meaning of UCC § 2-106(1) by virtue of issuing prescription for oral contraceptive drug and, thus, he was not subject to liability on theory of breach of implied warranties of merchantability under UCC § 2-314 and of fitness under UCC § 2-315. *Batiste v. American Home Prods. Corp.*, 32 N.C. App. 1, 231 S.E.2d 269 (1977), cert. denied, 292 N.C. 466, 233 S.E.2d 921 (1977).

52. Household products and chemicals.

In action by husband and wife against manufacturer of household cleaner to recover damages for injuries sustained by wife, allegedly resulting from use of cleaner to remove wax from floor, evidence that wife did not use dilutions recommended on label but instead used concentrations greatly exceeding those given in directions, manufacturer was not liable for breach of express or implied warranties, if any, where article was not used in normal manner or, as here, according to directions on label. *Evershine Prods., Inc. v. Schmitt*, 130 Ga. App. 34, 202 S.E.2d 228 (1973).

53. Packaging materials and containers.

Where manufacturer of gift or holiday boxes intended to be used as containers for individual bottles of purchaser's whiskey did not know the size of the shipping cases into which the packages were to be inserted and was never asked or expected to conform the packages to such size and form as would fit purchaser's standard cases, the fact that it was difficult if not impossible to fit the packages into the cases without damage did not constitute a breach of warranty under this section. *Standard Packaging Corp. v. Continental Distilling Corp.*, 259 F. Supp. 919 (E.D. Pa. 1966), aff'd, 378 F.2d 505 (3d Cir. Pa. 1967).

54. Fixtures or the like.

Although, in proper case, implied warranty provisions of UCC might apply to "sale of goods" aspect of hybrid sales-service contract, where record was devoid of any evidence that pipe installed by

subcontractor was unfit for its intended purpose and where entire thrust of plaintiffs' proof was that pipe was installed in negligent manner, trial court properly refused to charge jury with respect to implied warranty of fitness for particular purpose under UCC § 2-315. *Milau Assocs. v. North Ave. Dev. Corp.*, 56 A.D.2d 587 (2d Dep't 1977), aff'd, 42 N.Y.2d 482, 398 N.Y.S.2d 882, 368 N.E.2d 1247 (1977).

55. —Carpeting.

In action arising when hotel refused to pay for specially manufactured carpeting because of excessive shading, there was no breach of express warranty under UCC § 2-313 where carpet conformed precisely to both description of goods contained in purchase order and to sample which had been approved by buyer; neither were implied warranties of merchantability and fitness breached under UCC §§ 2-314 and 2-315 where buyer relied on his own judgment to select goods and manufacturer was not at liberty to alter detailed specifications. *Mohasco Indus., Inc. v. Anderson Halverson Corp.*, 90 Nev. 114, 520 P.2d 234 (1974).

56. —Sewage or waste treatment facility.

Where buyer brought suit in 1973 on defective sewage system installed in 1968, and thus limitation period was a controlling issue, trial court should have made findings of fact as to duration of express warranty, whether breach occurred during warranty period, and whether buyer commenced action within four years of discovering breach. *Daughtry v. Jet Aeration Co.*, 91 Wash. 2d 704, 592 P.2d 631 (1979).

Packinghouse waste processing plant was constructed subject to implied warranty of merchantability under UCC § 2-314 and to implied warranty of fitness for particular purpose under UCC § 2-315, where seller knew particular purpose for which processing plant was required, buyer relied on seller's skill and judgment to furnish suitable plant, and these warranties were not excluded pursuant to UCC § 2-316. *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F. Supp. 1069 (D. Neb. 1976).

57. Building materials.

In action by roofing contractor against supplier of roofing materials to recover damages sustained when contractor was required to reroof buildings due to defective roofing materials supplied by defendant, supplier gave and breached implied warranty of fitness for particular use under UCC § 2-315 where, inter alia, particular use envisioned by contractor was that supplier's materials, when used in built-up roofing system, would produce 20 year bonded roof, where supplier's agents knew of particular use contemplated by contractor, and where materials supplied by defendant were inherently insufficient to produce 20 year bonded roof. *Certain-Teed Prods. Corp. v. Goslee Roofing & Sheet Metal, Inc.*, 26 Md. App. 452, 339 A.2d 302 (1975).

58. —Paint or the like.

In action for breach of implied warranty of fitness for particular purpose (UCC § 2-315) of industrial paint manufactured by defendant for application in electrodeposition process on plaintiff's products, court held (1) that express warranty (which defendant also had made with respect to its paint, but concerning which no issue was submitted to jury) and implied warranty of fitness were not mutually exclusive, (2) that plaintiff therefore had cause of action for defendant's breach of its implied warranty of fitness, and (3) that evidence sufficiently showed that defendant's paint had caused blotches and streaks on plaintiff's products. *Singer Co. v. E.I. du Pont de Nemours & Co.*, 579 F.2d 433 (8th Cir. Mo. 1978).

In breach of warranty action by developer of subdivision against seller-manufacturer of coating product used on plywood exterior of certain of developer's houses following delamination and checking of surfaces painted with seller's product, finding that seller neither breached implied warranty of merchantability under UCC § 2-314 nor implied warranty of fitness for particular purpose under UCC § 2-315 was proper where there was evidence that coating material was free from defects and was proper material for use intended, and that delamination and checking occurred as result of combina-

tion of improper preparation of plywood surface and incompetent application of coating material. *Shore Line Properties, Inc. v. Deer-O-Paints & Chems., Ltd*, 24 Ariz. App. 331, 538 P.2d 760 (1975).

59. —Concrete.

The fact that concrete mixed with the vendor's patented equipment and according to its formula did not meet the standard required of it gave rise to no breach of an implied warranty of fitness where the contractor's use of the same did not depend upon its reliance on the vendor's skill and judgment, but was upon the contractor's own judgment and that of city engineers following initial tests. *Vacuum Concrete Corp. of Am. v. Berlanti Constr. Co.*, 206 Pa. Super. 548, 214 A.2d 729 (1965).

60. Machinery and tools.

UCC § 2-314, implied warranty of merchantability, and UCC § 2-315, implied warranty of fitness for particular purpose, would be extended to lease transaction under which equipment company leased three motor scraper units to construction company since same considerations which give rise to creation of implied warranties in sales transaction were present: lessor was merchant specializing in sale and leasing of heavy construction equipment and lessee claimed it relied on lessor's expertise; lessor placed product into stream of commerce and sought to reap economic benefits from lease of product; and, finally, lessor was in better position to control antecedent factors which affect condition of product. Furthermore, UCC § 2-316, which allows seller to disclaim implied warranties and provides specific means for such disclaimer, would be extended to lease in question by analogy. *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 97 Idaho 216, 541 P.2d 1184 (1975).

61. —Pipe, tubing, or the like.

In action for breach of implied warranty of fitness for particular purpose which arose when tests of water pipeline disclosed numerous leaks and in which there was conflicting evidence as to whether buyer notified seller that cement would not bond joints, buyer was precluded under UCC § 2-316 from claiming existence

of implied warranty; buyer's confirmation that supplier's invoices showed that correct product had been ordered was not reasonable basis for continuing to construct with cement that was not satisfactory to experienced workmen making use of it and was not performing tasks for which it was purchased. *Davis v. Pumpco, Inc.*, 519 P.2d 557 (Okla. Ct. App. 1974).

62. —Expansion joints.

In action for breach of express and implied warranties in sale of bellows-expansion joints purchased for use in buyer's steam utility system, (1) seller's recommendation in letter to buyer that joints be made of Monel metal, rather than stainless steel, did not amount to implied warranty of fitness of joints for particular purpose under UCC § 2-315, since buyer did not inform seller that buyer was relying on seller to select metal that would satisfy buyer's need for an extremely anticorrosive substance; (2) buyer did not establish breach of implied warranty of merchantability of joints under UCC § 2-314(1), since joints furnished by seller met all quality standards prescribed by UCC § 2-314(2); (3) statement in seller's letter that seller would guarantee "operation of the application as well as the recommended expansion joints" if joints were installed according to seller's recommendations was not express warranty (see UCC § 2-313(1)(a)) that each joint would work, but was only guarantee that seller's application scheme for placement of joints would adequately absorb expansion and contraction of buyer's steam pipes; and (4) purchase-order warranty that joints would comply with all specifications and would be free of defects in workmanship and materials was not breached, since buyer (a) did not furnish any specifications as to required service longevity of joints or degree of their resistance to corrosion, and (b) alleged design defects of joints, with regard to seller's failure to anneal joints, liner design of joints, and thickness of bellow walls of joints, were not shown to have caused failure of joints after their installation in buyer's utility system. *Wisconsin Elec. Power Co. v. Zallea Bros.*, 443 F. Supp. 946 (E.D. Wis. 1978), *aff'd*, 606 F.2d 697 (7th Cir. Wis. 1979).

In action by buyer of four oil tankers against shipbuilder-seller for consequential damages under UCC § 2-714(3) and § 2-715(2) for losses incurred when tankers were inoperative because of cargo-pump and expansion-joint failures, in which shipbuilder filed third-party complaint against manufacturer of defective cargo pumps and manufacturer of pumps filed fourth-party complaint against manufacturer of defective expansion joints, (1) shipbuilder-seller breached express warranty to buyer under UCC § 2-313(1) that tankers would be built to operate efficiently and also implied warranties under UCC § 2-314(1) and § 2-315 of merchantability and fitness of tankers for particular purpose (transportation of aviation fuels); (2) buyer of tankers was entitled only to consequential damages caused by defects in design and was not entitled to damages caused by defects in materials or workmanship; (3) shipbuilder-seller's foreseeable liability to buyer was \$500,000, which was amount of adjusted revenues lost by buyer when two of its tankers were inoperative because of cargo-pump and expansion-joint failures due to defective design; (4) manufacturer of defective cargo pumps breached its express and implied warranties to shipbuilder and was liable, in amount of \$2,000,000, for losses sustained by shipbuilder as result of cargo-pump and expansion-joint failures in tankers sold to buyer (including shipbuilder's liability to buyer for lost revenues during period tankers were inoperative), but was not liable to shipbuilder for cost of installing separate stripping on each tanker; and (5) manufacturer of defective expansion joints, which were used in connection, with cargo pumps, breached its express and implied warranties concerning such joints and was liable to manufacturer of pumps for costs of replacing all defective joints. *Falcon Tankers, Inc. v. Litton Sys.*, 380 A.2d 569 (Del. Super. 1977).

63. —Heaters and furnaces.

Since the heat pump manufacturer should have known when selling a heat pump that if it failed to properly heat, the buyers would seek alternative sources of heat, the buyers could recover for conse-

quential damages suffered. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

Where plumbing and heating subcontractor selected, purchased and installed floor furnace in plaintiff's home, and where it was claimed that installation of furnace was faulty, installation of furnace by subcontractor was covered by implied warranties of UCC §§ 2-314 and 2-315. *O'Laughlin v. Minnesota Natural Gas Co.*, 253 N.W.2d 826 (Minn. 1977).

An implied warranty of fitness for the purpose intended was made in the sale of a furnace, where the seller knew that the particular purpose for which the buyers wanted the furnace was to heat their whole house, and the buyers relied upon the seller's judgment. *Holland Furnace Co. v. Jackson*, 106 Pitts. Legal J. 341 (Pa. 1958).

No implied warranty of fitness for the purpose intended arose out of a sale of a furnace, where at the time of the execution of the sales agreement it was contemplated by the parties that the unit installed might not satisfactorily heat the buyer's premises. *Howard W. Frantz & Sons v. Moses*, 54 Schuyl. L. Rec. 39 (Pa. 1958).

64. —Lawnmowers.

Implied warranty of fitness as to rotary power mower means implied warranty that mower was fit to cut grass safely when used in normal manner, not that plaintiff would not be injured when he fell on slope and his foot slipped under mower. *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969), but see *Hartford Ins. Co. v. Manor Inn*, 335 Md. 135, 642 A.2d 219 (1994).

65. —Gas cylinders.

An action for damages against the manufacturer of a valve attached to a cylinder of gas, predicated upon a breach of the implied warranty of fitness, was barred by the 4-year statute of limitations set out in § 2-725, where the cylinder and valve were purchased in March of 1956, the explosion causing injuries occurred in December of 1957 and suit was not filed until July of 1960. *Rufo v. Bastian-Blessing Co.*, 417 Pa. 107, 207 A.2d 823 (1965).

No implied warranty of fitness for the purpose intended arose out of a sale of a

pressurized cylinder of oxygen gas intended to be used in welding work where there was nothing to show that the oxygen failed in its purpose to increase the heat of a welding flame, and this section has no application to a personal injury action for damage resulting from a fire, particularly where the cylinder did not explode but was intact even after the fire had occurred. *Delta Oxygen Co. v. Scott*, 238 Ark. 534, 383 S.W.2d 885 (1964).

66. Motor vehicles and related equipment.

In breach-of-warranty action for damages by buyer of allegedly defective dump trailers against manufacturer-seller, court held (1) that buyer and its ultimate Mexican customers were “merchants” within meaning of UCC § 2-104(1); (2) that seller was “merchant” within meaning of both UCC § 2-104(1) and § 2-314(1); (3) that telephoned order for 20 additional trailers was not enforceable under statute of frauds in UCC § 2-201(1) because it did not come within exceptions to such statute contained in UCC § 2-201(3); (4) that “specially manufactured goods” exception in UCC § 2-201(3)(a) applies only when seller, rather than buyer, seeks to escape statute-of-fraud defense; (5) that since three trailers purchased under valid written contract were put to improper use by buyer’s Mexican customers, rather than being used for their “ordinary purposes,” no breach of implied warranty of merchantability under UCC § 2-314(1) and (2)(c) occurred; (6) that use of trailers for improper purposes, rather than for their stated “particular purpose,” prevented recovery under implied warranty of fitness in UCC § 2-315; (7) that buyer could not recover for breach of express warranty under UCC § 2-313(1)(a) because it failed to prove that it had relied on statements in manufacturer-seller’s brochure either prior to or contemporaneously with making of parties’ contract; and (8) that since buyer had no right under UCC § 2-601(a) to reject two unused and undamaged trailers, manufacturer-seller was not required to retake them or to refund their purchase price to buyer. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

In an action for damages arising out of an alleged breach of implied and express warranties on a used automobile purchased by the plaintiff, no breach of any implied warranty of merchantability existed as a matter of law where the vehicle had been driven for over two years and 26,649 miles before the plaintiff experienced any difficulty with it; neither was there any breach of an implied warranty of fitness for a particular purpose where the vehicle had been purchased for a very ordinary purpose. *Ford Motor Co. v. Fairley*, 398 So. 2d 216 (Miss. 1981).

Under UCC § 2-315 and 2-316, there were no implied warranties in connection with sale of automobile since they were excluded by express “as is” in bill of sale. *Lancaster v. Eberhardt*, 141 Ga. App. 534, 233 S.E.2d 880 (1977).

Declaration alleging that negligent design of automobile enhanced injuries suffered by passenger when vehicle rolled over stated causes of action against manufacturer in negligence and for breach of warranty and stated a cause of action against dealer for breach of warranty. *Frericks v. GMC*, 274 Md. 288, 336 A.2d 118 (1975).

Language of automobile warranty disclaimer referred only to subject of express warranties, which warranties then expressly excluded radio and certain other equipment, so that there remained implied warranties that radio was fit for particular purpose for which it was supplied as standard equipment and was of merchantable quality. *Mintz v. Daimler-Benz of N. Am., Inc.*, 73 Misc. 2d 212 (1973).

Where there was nothing to show that use of trucks on milk route would differ from use of ordinary trucks in general or that seller had any special skills relative to trucks on which buyer had relied, it was not against manifest weight of evidence for jury to have found that no warranty of fitness for a particular purpose under UCC § 2-315 existed. *Janssen v. Hook*, 1 Ill. App. 3d 318, 272 N.E.2d 385 (2d Dist. 1971).

Where the purchaser never intended to buy anything other than a 7-year-old secondhand automobile, the defendant never purported to sell anything other than such

an automobile, the automobile was reasonably fit for the general purpose for which it was sold, and the purchaser did not rely solely upon any special judgment of the defendant, in the complete absence of any special warranties no rescission or recovery could be had of the seller. *Basta v. Riviello*, 66 Lack. Jur. 77 (Pa. 1964).

Where one could detect vibrations and whine in an automobile, when listening carefully, but the defect was a minor one which could be repaired, and in any event would disappear after the break-in period, this did not constitute a breach of an implied warranty that the automobile was fit for the ordinary purposes for which it was used, and the buyer was not justified in revoking his acceptance. *Gruccella v. GMC*, 10 Pa. D. & C.2d 65 (1957).

67. —Tires.

In action arising out of automobile accident which was allegedly caused by latent defect in recapped tire, driver of automobile was entitled to protection under UCC § 2-318 despite lack of privity of contract where she was member of purchaser's family; nor did lack of privity bar relief sought by innocent third party bystander; cause of action for breach of implied warranty of fitness for particular purpose under UCC § 2-315 was not stated where tires were purchased for general use upon ordinary highways; but cause of action for breach of implied warranty of merchantability under UCC § 2-314 was stated where sale of recapped tires by service station operator was not isolated sale and retailer qualified as merchant with respect to goods sold. *McHugh v. Carlton*, 369 F. Supp. 1271 (D.C.S.C. 1974).

Sale of retread tire carried with it implied warranty of fitness for particular auto on which it was installed. *Van Winkle v. Firestone Tire & Rubber Co.*, 117 Ill. App. 2d 324, 253 N.E.2d 588 (3d Dist. 1969).

68. Mobile homes.

In action by buyer of mobile home under UCC § 2-315 against seller for breach of implied warranty of fitness of home for particular purpose, breach of warranty was established by evidence which showed that at time buyer purchased home, it was infested with "confused flour

beetles"; that presence of such insects in numbers described by plaintiff and his wife rendered home unfit for use as residence; and that defendant was responsible for home's defective condition. *Sauers v. Tibbs*, 48 Ill. App. 3d 805, 363 N.E.2d 444 (4th Dist. 1977).

69. Boats and watercraft.

Defendant seller breached implied warranty of fitness contained in UCC § 2-315, where plaintiff purchased houseboat, immediately had difficulty with engines attached thereon, sought advice of officer of defendant corporation as to what type of engines to install, and after following this advice, experienced 12 failures with power train package; plaintiff was entitled to rely upon representations of defendant that engines purchased would properly propel his houseboat. *Chrysler Corp. v. Miller*, 310 So. 2d 356 (Fla. App. 1975).

70. Aircraft.

An implied warranty of fitness existed as a matter of law where the seller knew purposes for which a helicopter was purchased by the buyer and the seller had itself stimulated and suggested some of the purposes, and it was uncontradicted that the buyer had relied on the seller's skill and judgment, it appearing that buyer's officers had no previous experience or knowledge relating to the operation or performance of helicopters. *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. Minn. 1964).

71. Farm goods.

Where prior to using artificial insemination rancher got 95 percent calf crop via natural service, and obtained 70 percent calf crop during first year of artificial insemination, but obtained only 7 percent calf crop during second year using semen from same bull under almost identical conditions, only logical inference was that something was wrong with semen purchased in second year and that express warranties made by breeding service company to rancher were not met, nor were implied warranties of merchantability and fitness met. *Waddell v. American Breeders Serv., Inc.*, 161 Mont. 221, 505 P.2d 417, 61 A.L.R.3d 801 (1973).

72. —Fixtures or the like.

A seller of farm machinery breached its new equipment warranty and the implied warranty of merchantability found in § 75-2-314(2)(c) where neither a new grain drill nor a used combine sold to the purchaser were fit for the ordinary purposes for which such goods were to be used; the seller also breached the implied warranty of fitness for a particular purpose found in § 75-2-315 where the evidence established that the purchaser relied upon the skill of the seller's salesman who had explained to the purchaser all that he knew about farming and had assisted the purchaser in selecting the equipment that he would need in his initial farming operation. A new agricultural equipment warranty which warrants new agricultural equipment to be free of defects in material and workmanship at the time of delivery to the first retail purchaser encompasses the proposition that the equipment will be in "field ready" condition; "field ready" condition simply means that the equipment is ready to be used in the field and is consistent with the warranty that the machinery is free of defects in material and workmanship at the time of delivery. The seller's attempt to avoid any warranty, express or implied, in relation to used equipment sold to the purchaser was prohibited by § 75-2-719(14). *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15 (Miss. 1981).

Evidence in buyer's suit against manufacturer and seller of farm sprinkler irrigation system for breach of warranties made in connection with sale of system supported trial court's findings (1) that both manufacturer and seller had made and breached express warranties under UCC § 2-313 concerning system's operation and durability; (2) that both defendants had breached implied warranty of merchantability attaching to system under UCC § 2-314(1) and (2)(c); and (3) that both defendants had also breached implied warranty under UCC § 2-315 that system was fit for particular purpose for which buyer had purchased it. Moreover, since such express and implied warranties were made before date on which contract of sale was made, disclaimer of warranties contained in manufacturer's

erection manual, which buyer received after entering into contract, did not negate such warranties (noting also that even if buyer had received manufacturer's erection manual before entering into contract, general warranty disclaimer contained in manual would not have destroyed specific express warranties that were made orally by seller and were set forth in writing in manufacturer's advertising brochure). *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977).

73. —Livestock.

In action arising out of sale of bull, seller's answer, which alleged, inter alia, that by custom of trade in breeding animals there was no implied warranty of fitness for particular purpose in sale of bull, was sufficient under UCC § 1-205(6) to put buyers on notice of defense of exclusion under UCC § 2-316 of implied warranty of fitness under UCC § 2-315. *Torstenson v. Melcher*, 195 Neb. 764, 241 N.W.2d 103 (1976).

Where seller sold piglets for purpose of breeding and raising pigs and improving quality of herd, knowing buyer's requirements and knowing that buyer relied in seller to select and furnish suitable animals, implied warranty of fitness for specific purpose arose under UCC § 2-315 and seller was liable for breach of implied warranty of fitness where piglets were infected with disease which caused smaller litters and longer time to bring piglets to market condition; and such liability was not affected by fact that seller was unaware of existence of disease at time of sale and delivery of animals. *Ruskamp v. Hog Bldrs., Inc.*, 192 Neb. 168, 219 N.W.2d 750 (1974).

In action by buyer of cattle which had brucellosis when purchased and could not be used for breeding as buyer planned, finding that there was no implied warranty of fitness for particular purpose was supported by evidence showing that buyer relied on his own judgment in selecting cattle to be purchased and did not inform sellers of his plans for cattle. *Fear Ranches, Inc. v. Berry*, 470 F.2d 905 (10th Cir. N.M. 1972).

74. —Feed.

In action by dairy farmer to recover damages from feed manufacturer for loss

of milk production and injury to dairy cows allegedly caused by use of feed supplement, evidence was sufficient to establish breach of both express warranty under UCC § 2-313 and implied warranty of fitness under UCC § 2-315 where there was express representation that use of feed supplement would increase milk production and where there was decrease in milk production resulting from wrong instructions about proper way to use feed supplement. However, farmer was not entitled to recover consequential damages under UCC §§ 2-714(3) and 2-715(2): (1) considering that there were many factors which could affect production of milk, to permit use of difference between total milk production figures for whole of year during which feed supplement was used for approximately 2 months, and total production figures for whole of preceding year, as measure of damages, would constitute rankest form of speculation and conjecture; (2) with respect to damages for decrease in market value of cows affected by feed, it could not reasonably be determined how much of decline in valuation of cattle between date of injury and day on which they were sold was attributable to injury and how much to changes, if any, in market value between those dates. *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

Where evidence made it clear that cattle food contained stilbestrol, and that the food had not been purchased for beef cattle, the tainted food constituted a clear breach of the implied warranty of merchantability and of the warranty of fitness for a particular purpose. *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

75. —Seed.

Seller of okra seed was liable to buyer for breach of implied warranty of fitness for particular purpose, notwithstanding seller's claim that buyer neither informed seller of any particular purpose in ordering seed nor told seller about resale of

seed to agricultural cooperative, where seller knew at time of contracting that buyer intended to resell seed, where seller in past knew that its seed was used to produce commercial crops, where buyer had no time to check quality of seed because its customer requested delivery of seed in one month, and where seller falsely labeled seed as "C/S okra" even though it was off variety. *Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057 (6th Cir. Tenn. 1977).

76. —Fertilizer and soil conditioners.

In action brought by buyer of fertilizer against seller for damages resulting when use of fertilizer on tobacco plants, represented by sellers to be appropriate and safe for tobacco, caused plants to wither and die, buyer's pleading stated cause of action under UCC § 2-313 for breach of express warranty rather than breach of implied warranty under UCC § 2-315. *Potter v. Tyndall*, 22 N.C. App. 129, 205 S.E.2d 808 (1974), cert. denied, 285 N.C. 661, 207 S.E.2d 762 (1974).

77. —Pesticides and herbicides.

Distributor of weed killer was liable in damages to truck gardener purchaser whose crop of squash was substantially destroyed when he applied it under adverse weather conditions on the representation of distributor's agent that the chemical was suitable for immediate use. However the manufacturer was not liable, though the labels on its containers contained no warnings whatsoever as to use under adverse conditions. *Wilson v. E-Z Flo Chem. Co.*, 281 N.C. 506, 189 S.E.2d 221 (1972).

A herbicide retailer, who answered farmers' question as to use of particular herbicide to meet particular needs, was held liable for breach of implied warranty of fitness for particular purpose when crop losses were sustained by farmers due to suggested application of herbicide. *Dobias v. Western Farmers Ass'n*, 6 Wash. App. 194, 491 P.2d 1346 (1971).

ATTORNEY GENERAL OPINIONS

The Mississippi Department of Information Technology Services deals in com-

puter hardware, software, and computer services and has knowledge or skill pecu-

liar to such transactions and so is clearly a “merchant” within the meaning of the statute. Litchliter, May 29, 1998, A.G. Op. #98-0288.

Merchants can limit or disclaim implied warranties in offering computer hardware and computer software to the Mississippi Department of Information Technology Services (ITS) or other state agencies through ITS; however, ITS can make it a

condition of any bid process or request for proposals or other offer to purchase that the computer hardware and software solicited carry the implied warranties of merchantability and fitness for a particular purpose or, indeed, any other standard it deems necessary and advisable. Litchliter, May 29, 1998, A.G. Op. #98-0288.

RESEARCH REFERENCES

ALR. Implied warranty of fitness by one serving food. 7 A.L.R.2d 1027.

What amounts to “sale by sample” as regards implied warranties. 12 A.L.R.2d 524.

Purchaser’s use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty. 33 A.L.R.2d 511.

Implied warranty of fitness on sale of livestock. 53 A.L.R.2d 892.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury. 75 A.L.R.2d 39.

Manufacturer’s or seller’s duty as to product design as affecting his liability for product-caused injury. 76 A.L.R.2d 91.

Liability of manufacturer or seller for injury caused by food or food product sold. 77 A.L.R.2d 7.

Liability of manufacturer or seller for injury caused by beverage sold. 77 A.L.R.2d 215.

Liability of seller of defective or unsafe automobile for injury or damage caused thereby. 78 A.L.R.2d 460.

Liability of manufacturer or seller for injury caused by animal feed or medicines, crop sprays, fertilizers, insecticides, rodenticides, and similar products. 81 A.L.R.2d 138.

Liability of manufacturer or seller of product sold in container or package for injury caused by container or packaging. 81 A.L.R.2d 229.

Liability of manufacturer or seller of container such as bottle, barrel, drum, tank, etc., or other packaging material for injury caused thereby. 81 A.L.R.2d 350.

Extent of liability of seller of livestock infected with communicable disease. 87 A.L.R.2d 1317.

Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article “as is,” in the condition in which it is, or equivalent term. 24 A.L.R.3d 465.

Uniform Commercial Code: implied warranty of fitness for particular purpose as including fitness for ordinary use. 83 A.L.R.3d 656.

What constitutes “particular purpose” within meaning of UCC § 2-315 dealing with implied warranty of fitness. 83 A.L.R.3d 669.

Products liability: air guns and BB guns. 94 A.L.R.3d 291.

Products liability: toys and games. 95 A.L.R.3d 390.

Products liability: forklift trucks. 95 A.L.R.3d 541.

Products liability: modern cases determining whether product is defectively designed. 96 A.L.R.3d 22.

Products liability: defective vehicular gasoline tanks. 96 A.L.R.3d 265.

Products liability: liability for personal injury or death allegedly caused by defect in motorcycle or its parts, supplies, or equipment. 98 A.L.R.3d 317.

Products liability: protective clothing and equipment. 27 A.L.R.4th 815.

Strict products liability: liability for failure to warn as dependent on defendant’s knowledge of danger. 33 A.L.R.4th 368.

Products liability: medical machinery used in plaintiff’s treatment. 34 A.L.R.4th 532.

Products liability: household equipment relating to storage, preparation, cooking, and disposal of food. 35 A.L.R.4th 663.

Products liability: equipment and devices directly relating to passengers' standing or seating safety in land carriers. 35 A.L.R.4th 1050.

Computer sales and leases; breach of warranty, misrepresentation, or failure of consideration as defense or ground for affirmative relief. 37 A.L.R.4th 110.

Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability. 41 A.L.R.4th 9.

Products liability: alcoholic beverages. 42 A.L.R.4th 253.

Products liability: construction materials or insulation containing formaldehyde. 45 A.L.R.4th 751.

Products liability: liability of manufacturer or seller as affected by failure of subsequent party in distribution chain to remedy or warn against defect of which he knew. 45 A.L.R.4th 777.

Products liability: perfumes, colognes, or deodorants. 46 A.L.R.4th 1197.

Applicability of warranty of fitness under UCC § 2-315 to supplies or equipment used in performance of service contract. 47 A.L.R.4th 238.

Products liability: admissibility of defendant's evidence of industry custom or practice in strict liability action. 47 A.L.R.4th 621.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning athletic, exercise, or recreational equipment. 50 A.L.R.4th 1226.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning agricultural implements and equipment. 60 A.L.R.4th 678.

Products liability: electricity. 60 A.L.R.4th 732.

Products liability: overhead garage doors and openers. 61 A.L.R.4th 94.

Products liability: building and construction lumber. 61 A.L.R.4th 121.

Products liability: sufficiency of evidence to support product misuse defense in actions concerning building components and materials. 61 A.L.R.4th 156.

Products liability: what is an "unavoidably unsafe" product. 70 A.L.R.4th 16.

Strict products liability: recovery for damage to product alone. 72 A.L.R.4th 12.

Products liability: motor vehicle exhaust systems. 72 A.L.R.4th 62.

Products liability: industrial refrigeration equipment. 72 A.L.R.4th 90.

Implied warranty coverage for service transactions under state consumer protection and deceptive trade statutes. 72 A.L.R.4th 282.

Products liability: tractors. 75 A.L.R.4th 312.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury. 75 A.L.R.4th 443.

Products liability: contributory negligence or assumption of risk as defense in action for strict liability or breach of warranty based on failure to provide safety device for product causing injury. 75 A.L.R.4th 538.

Forum non conveniens in products liability cases. 76 A.L.R.4th 22.

Products liability: bicycles and accessories. 76 A.L.R.4th 117.

Products liability: exercise and related equipment. 76 A.L.R.4th 145.

Products liability: trampolines and similar devices. 76 A.L.R.4th 171.

Products liability: competitive sports equipment. 76 A.L.R.4th 201.

Products liability: skiing equipment. 76 A.L.R.4th 256.

Products liability: general recreational equipment. 77 A.L.R.4th 1121.

Products liability: mechanical amusement rides and devices. 77 A.L.R.4th 1152.

Burden of proving feasibility of alternative safe design in products liability action based on defective design. 78 A.L.R.4th 154.

Products liability: seller's right to indemnity from manufacturer. 79 A.L.R.4th 278.

Products liability: lubricating products and systems. 80 A.L.R.4th 972.

Products liability: all-terrain vehicles (ATVs). 83 A.L.R.4th 70.

Liability of auctioneer under doctrine of strict products liability. 83 A.L.R.4th 1188.

Products liability: hair straighteners and relaxants. 84 A.L.R.4th 1090.

Products liability: cutting or heating torches. 84 A.L.R.4th 1123.

Products liability: Manufacturer's postsale obligation to modify, repair, or recall product. 47 A.L.R.5th 395.

Products liability: Recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect. 50 A.L.R.5th 275.

Products liability: paints, stains, and similar products. 69 A.L.R.5th 137.

Products liability: Helicopters. 72 A.L.R.5th 299.

Products liability: consumer expectations test. 73 A.L.R.5th 75.

Products liability: firearms, ammunition, and chemical weapons. 96 A.L.R.5th 239.

Federal pre-emption of state common-law products liability claims pertaining to motor vehicles. 97 A.L.R. Fed. 853.

Federal pre-emption of state common-law products liability claims pertaining to tobacco products. 97 A.L.R. Fed. 890.

Federal pre-emption of state common-law products liability claims pertaining to drugs, medical devices, and other health-related items. 98 A.L.R. Fed. 124.

Federal pre-emption of state common-law products liability claims pertaining to pesticides. 101 A.L.R. Fed. 887.

Am Jur. 38 Am. Jur. 2d, Guaranty § 10.

63 Am. Jur. 2d, Products Liability §§ 659-662, 704 et seq.

67A Am. Jur. 2d, Sales §§ 743, 745, 761, 765, 777.

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Forms 31 et seq. (breach of warranty as basis of liability).

20 Am. Jur. Pl & Pr Forms (Rev), Products Liability, Forms 91 et seq. (liability for particular products).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:321-2:335. (Implied warranties; fitness for particular purpose).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2-Sales, §§ 253:931 et seq. (Implied warranty of fitness for particular purpose).

10 Am. Jur. Trials, Exploding Bottle Litigation §§ 1 et seq.

12 Am. Jur. Trials, Products Liability Cases §§ 1 et seq.

14 Am. Jur. Trials, Glass Door Accidents §§ 1 et seq.

14 Am. Jur. Trials, Liquefied Petroleum (LP) Gas Fires and Explosions §§ 1 et seq.

17 Am. Jur. Trials, Power Press Accident Cases §§ 1 et seq.

41 Am. Jur. Trials 161, Motorboat Propeller Injury Accidents.

12 Am. Jur. Proof of Facts, Water Heater Explosions, Proof No. 1 (proof of water heater explosion by testimony of metallurgist).

17 Am. Jur. Proof of Facts, Automobile Tire Defects and Hazards, p 124 (proofs respecting blowout accidents).

17 Am. Jur. Proof of Facts, Ladder Accidents, § 67 (proof of leg injuries caused by improper construction of wood stepladder).

17 Am. Jur. Proof of Facts, Ladder Accidents, § 68 (proof of back injuries caused by improper construction of metal stepladder).

18 Am. Jur. Proof of Facts, Farm Machinery Accidents, § 76 (proof of overturning of row-crop tractor because of operator's negligence).

18 Am. Jur. Proof of Facts, Farm Machinery Accidents, § 77 (proof of injuries from ungarded tractor power take-off shaft).

18 Am. Jur. Proof of Facts, Farm Machinery Accidents, § 78 (proof of hay baler injuries caused by improper operating instructions).

18 Am. Jur. Proof of Facts, Farm Machinery Accidents, § 79 (proof of improper removal of operator's safety bar from hay bale stacker).

18 Am. Jur. Proof of Facts, Farm Machinery Accidents, § 80 (proof of corn picker injuries caused by failure to provide proper operating instructions and to install necessary safety devices).

18 Am. Jur. Proof of Facts, Farm Machinery Accidents, § 81 (proof of explosion of cast-iron flywheel on ensilage cutter).

21 Am. Jur. Proof of Facts, Side Effects of Drugs, § 43 (proof of injury produced by drug side effects).

21 Am. Jur. Proof of Facts, Side Effects of Drugs, § 44 (proof of teratological side effect caused by a drug).

6 Am. Jur. Proof of Facts 2d, Failure of Product to Meet Manufacturer's Specifications or Standards, §§ 25 et seq. (proof of

failure to meet specifications or standards).

23 Am. Jur. Proof of Facts 2d, Defective Design or Installation of Air Conditioning System, §§ 11 et seq. (proof of defective design, construction, and installation of commercial air conditioning system).

27 Am. Jur. Proof of Facts 2d 243, Sales: Implied Warranty of Fitness for Particular Purpose.

35 Am. Jur. Proof of Facts 2d 255, False Representation as to Quality or Character of Product.

35 Am. Jur. Proof of Facts 2d 607, Misrepresentation in Sale of Animal.

7 Am. Jur. Proof of Facts 3d 1, Injuries from Drugs.

7 Am. Jur. Proof of Facts 3d 225, Defective Design of Golf Cart.

7 Am. Jur. Proof of Facts 3d 305, Products Liability: The "Sophisticated User" Defense.

8 Am. Jur. Proof of Facts 3d 547, Failure to Warn as Proximate Cause of Injury.

8 Am. Jur. Proof of Facts 3d 615, Defective Forklift Trunk.

CJS. 77 C.J.S., Sales §§ 258-260.

Law Reviews. Alldredge, Uniform Commercial Code — Should the U.C.C. furnish rules of decision in equipment leasing controversies? 7 Miss. C. L. Rev. 209, Spring, 1987.

2 Am Law Prod Liab 3d, Implied Warranties § 20:24.

1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss L. J. 141, March 1983.

§ 75-2-315.1. Limitation of exclusion or modification of warranties to consumers.

(1) Any oral or written language used by a seller of consumer goods and services, which attempts to exclude or modify any implied warranties of merchantability and fitness for a particular purpose or to exclude or modify the consumer's remedies for breach of those warranties, is unenforceable. However, the seller may recover from the manufacturer any damages resulting from breach of the implied warranty of merchantability or fitness for a particular purpose.

(2) Any oral or written language used by a manufacturer of consumer goods, which attempts to limit or modify a consumer's remedies for breach of the manufacturer's express warranties, is unenforceable.

(3)(a) The provisions of this section do not apply to a motor vehicle:

(i) Required to be titled under the state law;

(ii) That is over six (6) model years old or that has been driven more than seventy-five thousand (75,000) miles; and

(iii) If, at the time of the sale of the motor vehicle, the seller gives the purchaser notice of the inapplicability of this section on the form prescribed by the State Attorney General.

(b)(i) An exclusion or modification of an implied warranty of merchantability, or any part of a warranty under this subsection shall be in writing, mention merchantability, and be conspicuous.

(ii) An exclusion or modification of the implied warranty of fitness shall be in writing and conspicuous.

(iii) Any exclusion or modification of either warranty shall be separately acknowledged by the signature of the buyer.

Nothing in this section shall prohibit the express disclaimer or express modification of any implied warranties of merchantability and fitness for a particular purpose or any express limitation of remedies for breach of such

warranties concerning computer hardware, computer software, and services performed on computer hardware and computer software which are sold between merchants.

SOURCES: Laws, 1987, ch. 362; Laws, 1998, ch. 513, § 3, eff from and after July 1, 1998.

JUDICIAL DECISIONS

1. Applicability.

The statute did not apply in an action arising from the installation of a roof on a manufacturing plant because (1) the owner of the plant hired a roofing consulting firm to monitor the roof installation

and, therefore, the expertise of the roofing firm was imputed to it and it was a “merchant,” and (2) the roof was not “consumer goods.” *Cooper Indus., Inc. v. Tarmac Roofing Sys.*, 276 F.3d 704 (5th Cir. 2002).

RESEARCH REFERENCES

ALR. Form and substance of notice which buyer must give in order to recover damages for seller’s breach of warranty. 53 A.L.R.2d 270.

Requirement of notice, by buyer of goods, of breach of warranty as applicable to actions for personal injury. 6 A.L.R.3d 1371.

Implied warranty of fitness for particular purpose as including fitness for ordinary use. 83 A.L.R.3d 656.

What constitutes “particular purpose” within meaning of UCC § 2-315 dealing with implied warranty of fitness. 83 A.L.R.3d 669.

Unconscionability, under UCC § 2-302 or § 2-719(3), of disclaimer of warranties

of limitation or exclusion of damages in contract subject of UCC Article (Sales). 38 A.L.R.4th 25.

Products liability: what is an “unavoidably unsafe” product. 70 A.L.R.4th 16.

Products liability: Manufacturer’s postsale obligation to modify, repair, or recall product. 47 A.L.R.5th 395.

Am Jur. 63 Am. Jur. 2d, Products Liability §§ 794, 799-803, 826, 828-830.

11 Am. Jur. Proof of Facts 3d 343, “Lemon Law” Litigation — Existence of Substantial Defect.

CJS. 77 C.J.S., Sales §§ 263, 266-270.

§ 75-2-317. Cumulation and conflict of warranties express or implied.

Warranties whether express or implied shall be construed as consistent with each other and as cumulative, but if such construction is unreasonable the intention of the parties shall determine which warranty is dominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

SOURCES: Codes, 1942, § 41A:2-317; Laws, 1966, ch. 316, § 2-317, eff March 31, 1968.

Cross References — Express warranties, see § 75-2-313.
Implied warranties, see §§ 75-2-314, 75-2-315.

JUDICIAL DECISIONS

1. In general.

Unless the implied warranty of fitness is specifically and conspicuously excluded, courts, often relying on UCC § 2-317 (providing that whenever it is reasonable, warranties, whether express or implied, shall be construed to be consistent with each other and cumulative), have found that it and an express warranty can be cumulative and coexist within the same agreement. *Singer Co. v. E.I. du Pont de Nemours & Co.*, 579 F.2d 433 (8th Cir. Mo. 1978).

In action by buyers of air conditioner against seller for breach of seller's implied warranty of merchantability, trial court erred in concluding that seller's implied warranty was not effective until after manufacturer's express warranty had expired; there was no language in contract of sale or express warranty which excluded or modified implied warranty of merchantability arising out of sale, and seller's implied warranty was not so inconsistent with manufacturer's express warranty that both could not exist under UCC § 2-317. *Lee v. Air Care, Inc.*, 325 A.2d 598 (D.C. 1974).

In an action brought by buyer against seller of paint for breach of implied warranties of fitness under UCC § 2-315 when paint, purchased as primer for structural steel, failed to adhere and prevent rusting, defendant-seller's contention that specifications for paint disclosed intent that express specifications should supersede any implied warranty under UCC § 2-317 was rejected where understanding that suitable paint to provide primer coat for steel was needed was inherent in all dealings between parties and specifications were not exact or technical specifications, and even if specifications could be construed as express warranty, express warranty cannot displace implied warranty of fitness for particular

purpose. *Geo. C. Christopher & Son v. Kansas Paint & Color Co.*, 215 Kan. 185, 523 P.2d 709 (1974), modified on denial of reh'g, 215 Kan. 510, 525 P.2d 626 (1974).

Where seller sold piglets for purpose of breeding and raising pigs and improving quality of herd, knowing buyer's requirements and knowing that buyer relied on seller to select and furnish suitable animals, implied warranty of fitness for specific purpose arose under UCC § 2-315 and seller was liable for breach of implied warranty of fitness where piglets were infected with disease which caused smaller litters and longer time to bring piglets to market condition; and seller's purchase order and guarantee form containing express warranties that animals were vaccinated for certain diseases did not operate to displace any implied warranties of fitness under UCC 2-317. *Ruskamp v. Hog Bldrs., Inc.*, 192 Neb. 168, 219 N.W.2d 750 (1974).

In a case decided under former law the defense of implied warranty of fitness, although it should have been pleaded as an affirmative defense, was nevertheless an issue in the trial for breach of contract by farmer against canner who refused tomatoes because their condition and quality was unacceptable and the verdict for the farmer was properly set aside as compromise. *Robusto v. Furber*, 34 A.D.2d 1093 (4th Dep't 1970).

The express written warranty of merchantability contained in a contract of sale of a number of drink pouring devices could not exclude or modify the warranty of fitness for a particular purpose, since these warranties are not inconsistent and the warranty of fitness is expressly saved from such exclusion by subsection (c) of this section of the Commercial Code. *L. & N. Sales Co. v. Stuski*, 188 Pa. Super. 117, 146 A.2d 154 (1958).

RESEARCH REFERENCES

ALR. Burden of proving feasibility of alternative safe design in products liability action based on defective design. 78 A.L.R.4th 154.

Products liability: Manufacturer's postsale obligation to modify, repair, or recall product. 47 A.L.R.5th 395.

Am Jur. 6 Am. Jur. Pl & Pr Forms (Rev) Sales, Form 2:212. (Instruction to jury; construction of two or more inconsistent warranties).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2-Sales,

§§ 253:961, 253:962. (Cumulation and conflict of warranties express and implied).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2-Sales, §§ 253:961 et seq. (cumulation and conflict of warranties express and implied).

2 Am Law Prod Liab 3d, Waiver, Exclusion, or Modification of Warranties § 22:44.

CJS. 77 C.J.S., Sales §§ 236, 240 et seq.

§ 75-2-318. Third party beneficiaries of warranties express or implied.

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

SOURCES: Codes, 1942, § 41A:2-318; Laws, 1966, ch. 316, § 2-318, eff March 31, 1968.

JUDICIAL DECISIONS

A. In General.

1. Generally.
2. Comparison with other laws.
3. Retroactive application.
4. Conflict of laws.
5. Tort liability distinguished.
6. Services distinguished.

B. Scope of Protection.

7. In general.
8. Reasonable expectation of use.
9. Particular persons or classes.
10. —Family or household member.
11. —Guests.
12. —Automobile guests distinguished.
13. —Lessees and lessors.
14. —Employees and repairmen; protected.
15. —Employees and repairmen; not protected.
16. —Military personnel.
17. —Subpurchasers.
18. —Bystanders or the like.

19. —Corporations.
20. —Municipalities.
21. Losses contemplated; personal injury or property damage.
22. —Economic or commercial loss.
23. Injury to person.
24. —Mental distress or the like.

C. Remedies and Procedure.

25. In general; remedies.
27. Privity.
28. —Required.
29. —Not required.
30. Limitations and laches.

A. In General.

1. Generally.

The fact that the plaintiff brought and lost an action for breach of warranty does not bar him from bringing a second action based on negligence of the vendor-manufacturer; the first action does not in any way bar the second because the remedies

are consistent [The court rejected as dicta numerous statements in the cases which would suggest that the plaintiff had to make an election of remedies by the time of the trial, and also rejected the view that the plaintiff was barred by principles of res judicata or estoppel]. *Silverman v. Oil City Glass Bottle Co.*, 203 Pa. Super. 400, 199 A.2d 509 (1964).

2. Comparison with other laws.

See *Greenberg v. Lorenz*, 9 N.Y.2d 195, 173 N.E.2d 773 (1961), following the rule of § 2-318 prior to the adoption of the Code in New York, permitting minor child of buyer to sue retail food seller.

Under the Sales Act, which has been superseded by the Uniform Commercial Code, an action for breach of warranty could be brought only by the one to whom the warranty was given, but under § 2-318 of the Uniform Commercial Code the warranty would cover "any natural person who is in the family or household" of the buyer. *Sullivan v. H.P. Hood & Sons*, 341 Mass. 216, 168 N.E.2d 80 (1960).

3. Retroactive application.

In suit by person suffering from degenerative osteoarthritis against manufacturer of artificial hip prosthesis for breach of implied warranty of fitness and merchantability contained in UCC § 2-314, where evidence showed that device manufactured by defendant was implanted in plaintiff's hip in September, 1971, that device failed to function properly in May, 1974, and that plaintiff suffered pain as result, judgment for plaintiff under 1973 amendment of Massachusetts version of UCC § 2-318, which eliminated requirement of privity with respect to third-party beneficiaries of express or implied warranties, was proper because (1) plaintiff's injury occurred after effective date of such amendment; and (2) since amendment's elimination of privity requirement had as its purpose deemphasizing sale transaction and emphasizing harm that may result from defects contained in items in commerce that cause injury to class of persons specified in amendment, fact that defendant's device was sold before enactment of amendment did not bar plaintiff's recovery on ground that amendment would thus be applied retroactively.

Hoffman v. Howmedica, Inc., 373 Mass. 32, 364 N.E.2d 1215 (1977).

In action arising when aluminum step-ladder which had been loaned to plaintiff collapsed, plaintiff could not recover for breach of implied warranty where application of code to "transactions in goods" under UCC § 2-102 was not extended to loan of goods which were sold before UCC became law and question of whether plaintiff was foreseeable user of goods under UCC § 2-318 was moot. *Harvey v. Sears, Roebuck & Co.*, 315 A.2d 599 (Del. Super. 1973).

4. Conflict of laws.

In action by employees under third-party-beneficiary-of-warranty provisions in Alabama version of UCC § 2-318 for breach of warranties made in connection with sale of sandblasting hoods and respirators, evidence that such items were sold to Alabama company for resale in Alabama, that items were to be used in Alabama, and that warranties made in connection with items were to be performed in Alabama was sufficient to establish appropriate relationship necessary under UCC § 1-105(1) to apply Alabama law to controversy. *Simmons v. American Mut. Liab. Ins. Co.*, 433 F. Supp. 747 (S.D. Ala. 1976), aff'd sub nom. *Love v. American Mut. Liab. Ins. Co.*, 560 F.2d 1021 (5th Cir. Ala. 1977), aff'd, 560 F.2d 1022 (5th Cir. Ala. 1977).

In action by employees under third-party-beneficiary-of-warranty provisions in Alabama version of UCC § 2-318 for silicosis injuries allegedly sustained as result of breach of warranties made in connection with sale of sandblasting hoods and respirators used by plaintiffs in their work, four-year statute of limitations prescribed by Alabama version of UCC § 2-725(1) applied and began to run from time of plaintiffs' injury. Accordingly, (1) since under Alabama law silicosis is deemed to be continuing injury time of which is determined by last date of exposure, and (2) since last date of exposure is deemed to be last date of employment in work causing such injury, statute of limitations in present case began to run on last date plaintiffs used the defective hoods and respirators in their employment. *Simmons v. American Mut. Liab.*

Ins. Co., 433 F. Supp. 747 (S.D. Ala. 1976), *aff'd sub nom. Love v. American Mut. Liab. Ins. Co.*, 560 F.2d 1021 (5th Cir. Ala. 1977), *aff'd*, 560 F.2d 1022 (5th Cir. Ala. 1977).

5. Tort liability distinguished.

Under the traditional doctrine of strict liability in tort, a manufacturer who places a defective product on the market may be held liable for damages incurred by virtue of the product if it was placed on the market in the regular course of business, the rule applying in New York to those responsible for placing the defective product in the market place including manufacturers, distributors, retailers, processors and makers of component parts; the doctrine of strict products liability is not applicable to providers of services, including repairmen; however, in a proper case, a hybrid service-sale transaction where the defendant is both a repairer and seller can give rise to a cause of action for breach of warranty (Uniform Commercial Code, § 2-318) or strict products liability if the sales aspect of the transaction predominates and the service aspect is merely incidental; accordingly, since defendant only repaired a forklift which exploded causing injuries to plaintiff and no sale was involved, no cause of action for strict products liability in tort lies. *Nickel v. Hyster Co.*, 97 Misc. 2d 770 (1978).

Employee of dry-cleaning plant, who was injured when his clothing caught fire after being saturated with cleaning solvent and who, with respect to use of such solvent, was covered by warranties of fitness for purpose and merchantability contained in UCC § 2-314, § 2-315, and § 2-318, could not recover from manufacturers and distributors of solvent on theory of strict liability in tort for defective manufacture and failure to warn plaintiff of its flammability since legislature, by adopting Uniform Commercial Code, preempted field of tort liability in direct sale relationships, so as to prevent court from applying strict liability doctrine. *Wilhelm v. Globe Solvent Co.*, 373 A.2d 218 (Del. Super. 1977) but see *Wilhelm v. Globe Solvent Co.*, 411 A.2d 611 (Del. 1979).

Legislative adoption of UCC warranties without privity provision does not preclude judicial adoption of theory of strict liability in tort, and warranties provided by UCC are not exclusive means of recovery without showing of negligence or fault. *Larson v. Clark Equip. Co.*, 33 Colo. App. 277, 518 P.2d 308 (1974).

Whether the defendant manufacturer warranted the product is immaterial when he is sued in trespass for negligence in its manufacture. *Grove v. York County Gas Co.*, 25 Pa. D. & C.2d 522 (1962).

6. Services distinguished.

There is no "sale" to a beauty parlor customer of materials used in giving her treatments, for the materials used in the performance of such services are patently incidental to the treatment itself and do not constitute a purchase of an article by the customer. *Epstein v. Giannattasio*, 25 Conn. Supp. 109, 197 A.2d 342 (1963).

A former section of the Connecticut Sales Act extended the warranty of fitness of food or drink "to the purchaser and to all persons for whom such food or drink is intended" whereas § 2-315 extends an implied warranty of fitness for a particular purpose, if the seller has reason to know of that purpose, and § 2-318 extends an express or implied warranty to any person in the family or household of the buyer, or who is a guest in his home. Thus, it would seem that the Uniform Commercial Code represents an expansion of the old law to include any article, and a contraction from "all persons for whom...[it] is intended." *Simpson v. Powered Prods. of Mich., Inc.*, 24 Conn. Supp. 409, 192 A.2d 555 (1963).

B. Scope of Protection.

7. In general.

Regardless of privity, merchant who sold shotgun to father of decedent might be held liable as third-party defendant in action by mother of decedent against minor who shot decedent. *Shell v. Watts*, 125 Ga. App. 542, 188 S.E.2d 269 (1972), *rev'd* on other grounds, 229 Ga. 474, 192 S.E.2d 265 (1972), on remand, 127 Ga. App. 378, 193 S.E.2d 566 (1972).

Pennsylvania has joined the fast growing list of jurisdictions that have eliminated the privity requirement in assump-

sit suits by purchasers against remote manufacturers for breach of implied warranty. *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

There is no rational basis for distinguishing, as respects person in whose favor warranties run, in terms of the nature of the product. *Simpson v. Powered Prods. of Mich., Inc.*, 24 Conn. Supp. 409, 192 A.2d 555 (1963).

Plaintiff, made ill by a hot dog purchased for her by a boyfriend in defendant's restaurant was not a third party beneficiary under the provisions of this section and could not recover against defendant, for she was not a member of buyer's family or household, or a guest in his house at the time she ate the offending food. *Galanek v. Howard Johnson, Inc.*, 24 Mass. App. Dec. 134 (1962).

This section was intended to have application only when a person, not the buyer, seeks his remedy against the buyer's immediate seller. *Kaczmarkiewicz v. J.A. Williams Co.*, 13 Pa. D. & C.2d 14 (1958).

8. Reasonable expectation of use.

Automobile manufacturer was not liable for injury to child which occurred when child, who was riding his bicycle, collided with automobile and impact of collision broke parking light on automobile, causing tendon in child's knee to be severed, although child was within class of persons who might reasonably be expected to be affected by such automobile under UCC § 2-318, where vehicle in question was fit for ordinary purposes for which such vehicle is used under UCC § 2-314; part of car involved was essential item on car, and not mere ornamentation; of necessity lens had to be made of transparent or translucent material and, in general, such materials are fragile; light did not shatter under normal usage, but shattered under impact with metal; and breakage resulted from external force and injury did not occur to user of vehicle. *Nacci v. Volkswagen of Am., Inc.*, 325 A.2d 617 (Del. Super. 1974).

Elimination of lack of privity as a defense in any action brought against the manufacturer or seller of goods for breach of warranty, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume

or be affected by the goods, was applicable to economic or commercial losses and was not restricted to cases involving injury or damage to persons or property. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), but see, *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

The legislature has provided for a specific implied warranty, extending from the manufacturer to third party beneficiaries including any natural person who is in the family or household of the buyer or who is a guest in the buyer's home if it is reasonable to expect that such person may use or be affected by the goods and who is injured by breach of warranty. *Finocchiaro v. Ward Baking Co.*, 104 R.I. 5, 241 A.2d 619 (1968).

9. Particular persons or classes.

Airplane passenger could maintain action for personal injuries against airplane manufacturer, based on breach of implied warranty under UCC § 2-715, notwithstanding passenger was not in privity with manufacturer. *Roberts v. General Dynamics, Convair Corp.*, 425 F. Supp. 688 (S.D. Tex. 1977).

Breach of warranty action based on personal injuries to purchaser who is natural person is cognizable under UCC § 2-318 and therefore is not prohibited from being maintained in conjunction with action based on strict tort liability. *Cerrato v. R.H. Crown Co.*, 58 A.D.2d 721 (3d Dep't 1977).

No cause of action for breach of express or implied warranty existed, in insurer's action as subrogee against company supplying defective filtration plant equipment to subcontracting company insured by plaintiff, where (1) no seller-buyer relationship or sale contract existed under UCC § 2-314 and § 2-315 between subcontracting company and defendant supplier and (2) plaintiff insurer was neither "natural person" nor "injured in person" within meaning of UCC § 2-318. *Potsdam Welding & Mach. Co. v. Neptune Microfloc, Inc.*, 57 A.D.2d 993 (3d Dep't 1977).

Where there was no exclusion or modification by manufacturer of any warranties in sale of printing press to distributor-retailer, implied warranty of

merchantability was created under South Dakota UCC § 2-314(1) which extended under South Dakota UCC § 2-318 to print-shop operator who bought press from distributor. *Drier v. Perfection, Inc.*, 259 N.W.2d 496 (S.D. 1977).

Although Georgia formerly followed traditional view requiring privity in contract actions based on warranties, Georgia UCC § 2-318 has extended vertical privity under contract only to original purchaser and horizontal privity to any natural person who is in original purchaser's family or household, or who is guest in his home, if certain stated conditions are met. However, privity is not extended to purchaser's employee. *Beam v. Omark Indus., Inc.*, 143 Ga. App. 142, 237 S.E.2d 607 (1977).

In action by husband and wife, who were customers of purchaser, against manufacturer of plastic container for damages resulting when container fell from shelf and contents spilled onto wife's body, UCC § 2-725 statute of limitations for breach of warranty actions was inapplicable because under UCC § 2-318, plaintiffs were beyond scope of statutory warranty protection and action was governed by two-year statute of limitations for actions for injuries to rights of another. *Moss v. Polyco, Inc.*, 522 P.2d 622 (Okla. 1974).

UCC § 2-318 does not limit the claims of persons who can sue for breach of contract to those persons enumerated in that Section. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

A sale of goods in Pennsylvania extends warranties to the buyer, members of the buyer's family or household, or to any natural person who is a guest in the buyer's home. *Wilson v. American Chain & Cable Co.*, 216 F. Supp. 32 (E.D. Pa. 1963).

10. —Family or household member.

In action against dealer, who assembled truck and camper unit sold to plaintiffs, for injuries sustained by plaintiffs and their niece when truck's rear tire blew out and caused truck to go out of control, (1) evidence showed that blowout was caused by combination of vehicle overloading and rear tire's underinflation, (2) adequate warnings were not contained in operator's manual furnished with truck by manufac-

turer, or by "rating plate" affixed by manufacturer to truck's door which listed recommended maximum gross vehicle weight rating, (3) plaintiffs' niece was member of class of persons who under UCC § 2-318 are third-party beneficiaries of express and implied warranties, and (4) since warnings furnished by truck's manufacturer were inadequate to prevent danger of blowout when truck and camper unit were used by ordinary user for purposes for which such goods are ordinarily used, and since a product is unmerchantable if it is sold without a suitable warning, dealer's sale breached warranty of merchantability created by UCC § 2-314(1) and (2)(c). *Sorensen v. Travelers Indem. Co.*, 1978 Adv. Sheets 550 (Mass. App. Div. 1978).

Although wife purchased automobile from dealer, husband was proper party to bring action for breach of warranty where, *inter alia*, husband filled out credit application, signed note and was making payments from joint efforts of husband and wife. *Black v. Littleton*, 532 P.2d 486 (Okla. Ct. App. 1975).

Both seller and manufacturer of new car with defective tie-rod assembly were liable for injuries sustained by owner's son under breach of implied warranty of merchantability. *Langford v. Chrysler Motors Corp.*, 373 F. Supp. 1251 (E.D.N.Y. 1974), *aff'd*, 513 F.2d 1121 (2d Cir. N.Y. 1975).

Seven-year-old child was entitled to benefit of express warranty that product was "non-toxic," even though child was unable to read the label. *Tirino v. Kenner Prods. Co.*, 72 Misc. 2d 1094 (1973).

Infant nephew of buyer, living in house next door to buyer's, was in her family within the meaning of this section, and when he was scalded to death by vaporizer-humidifier purchased by buyer, his personal representative could maintain an action in assumpsit under "survival" statute against retail seller of device. *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966), but see, *Kassb v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

A married stepdaughter of the purchaser of an automobile was held to be a member of his family within the meaning of this section. *Johnson v. Fore River Motors, Inc.*, 26 Mass. App. Dec. 184 (1963).

Where nine-year-old son of purchaser of bottled beer was injured by a defect in the bottle when opening the beer at his father's direction he was entitled to sue the seller under § 2-318. *Harris v. Great Atl. & Pac. Tea Co.*, 23 Mass. App. Dec. 169 (1962).

Under the Sales Act, which has been superseded by the Uniform Commercial Code, an action for breach of warranty could be brought only by the one to whom the warranty was given, but under § 2-318 of the Uniform Commercial Code the warranty would cover "any natural person who is in the family or household" of the buyer. *Sullivan v. H.P. Hood & Sons*, 341 Mass. 216, 168 N.E.2d 80 (1960).

This section extends the benefit of warranties, express or implied, to any natural person in the family or household of the buyer, under some circumstances. *Jacquot v. Wm. Filene's Sons Co.*, 337 Mass. 312, 149 N.E.2d 635 (1958).

11. —Guests.

A minor third party beneficiary as to a manufacturer's express and implied warranties injured while a guest in the home of the ultimate purchaser of a bicycle, as a consequence of its defective condition, has a cause of action against the manufacturer and no notice is required to be given the manufacturer by such third party beneficiary. *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 217 A.2d 71 (1965).

A minor guest in the home of the ultimate purchaser of a child's bicycle who was caused to be thrown from it and injured, due to certain alleged defects in the bicycle charged to have resulted from a breach of the manufacturer's warranty, has a cause of action against the manufacturer. *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 217 A.2d 71 (1965).

12. —Automobile guests distinguished.

In breach of warranty action against automobile manufacturer by one who had borrowed automobile from its owner, plaintiff was not entitled to take advantage of any warranties implied by UCC, since evidence showed that she was not member of family or household or guest in home of buyer so as to escape privity requirement. *Williams v. GMC*, 19 N.C.

App. 337, 198 S.E.2d 766 (1973), cert. denied, 284 N.C. 258, 200 S.E.2d 659 (1973).

Plaintiff-auto passenger was not purchaser of automobile and could not obtain benefit of any warranties extended by automobile manufacturer to purchaser under Pennsylvania law which has eliminated only vertical and not horizontal privity. *Dyson v. GMC*, 298 F. Supp. 1064 (E.D. Pa. 1969).

The "guest in his home" provision of this section cannot be extended to include "guest in his automobile," and an automobile guest passenger who was injured when a new tire purchased by the automobile owner blew out cannot maintain an action in assumpsit against the seller of the tire on the theory that he had breached express and implied warranties of the tire's merchantability and fitness. *Marcus v. Spada Bros. Auto Serv.*, 41 Pa. D. & C.2d 794 (1967).

13. —Lessees and lessors.

Manufacturer of common, household drain cleaner that contained highly caustic concentration of sodium hydroxide, breached its implied warranty of merchantability under UCC § 2-314(2)(c) by marketing product that was inherently and unnecessarily dangerous, and therefore not "fit for the ordinary purposes for which such goods are used." Furthermore, under UCC § 2-318 such warranty inured to benefit of child whose mother was tenant in purchaser's boarding house and who was injured by drain cleaner. *Drayton v. Jiffie Chem. Corp.*, 1 Ohio Op. 3d 325, 395 F. Supp. 1081 (N.D. Ohio 1975), motion denied, 413 F. Supp. 834 (N.D. Ohio 1976), modified, 12 Ohio Op. 3d 135, 591 F.2d 352 (N.D. Ohio 1978).

Although lessee of machine does not directly receive benefit of warranties made by seller to lessor-buyer, lessee under UCC § 2-318 may be third-party beneficiary of such warranties who could reasonably be expected to use, consume, or be affected by the goods. *Lease Fin., Inc. v. Burger*, 40 Colo. App. 107, 575 P.2d 857 (1977).

Lessee of real estate did not come within class of persons under UCC § 2-318 to whom seller's express or implied warranty extended where sale of hot wa-

ter heater was made to owner of real estate. *Neofes v. Robertshaw Controls Co.*, 409 F. Supp. 1376 (S.D. Ind. 1976).

Corporate landlord, whose premises were damaged as result of alleged defect in chemicals purchased by tenant, was not entitled under UCC § 2-318 to assert breach of warranty claim against seller of chemical. *Monsanto Co. v. Alden Leeds, Inc.*, 130 N.J. Super. 245, 326 A.2d 90 (1974).

In third-party action by lessees of printing equipment against manufacturer of equipment for breach of warranty, after lessee had refused to make further payments on lease and lessor repossessed equipment, sold it and brought action against lessees for balance due on lease under their separate guarantee of lease: (1) although privity of contract was requisite to action for breach of warranty, not involving personal injury, manufacturer was estopped from denying lessees benefits of express warranty in present case where equipment was delivered to lessees and was serviced by manufacturer, manufacturer's machine warranty was delivered to lessee, and numerous service calls were made without charge as result of manufacturer's having voluntarily extended 30-day guarantee period because machinery would not stay in adjustment; (2) measure of damages provided in UCC § 2-714(2) was not only recovery possible, lessees were entitled to keep goods and seek incidental and consequential damages as well, provided manufacturer was given, as it was, reasonable notice of defect as required by UCC § 2-607(3)(a), and, hence, lessees were entitled to recover pursuant to UCC § 2-715, as consequential damage, amount they were forced to pay lessor under guaranty. *Addressograph-Multigraph Corp. v. Zink*, 273 Md. 277, 329 A.2d 28 (1974).

Where an automobile is leased, an action cannot be brought against the lessor for breach of an implied warranty of fitness by a third person injured as privity is lacking between him and the lessor. *Debbis v. Hertz Corp.*, 269 F. Supp. 671 (D. Md. 1967). But see *Farwell v. Un*, 902 F.2d 282 (4th Cir. Md. 1990).

14. —Employees and repairmen; protected.

Where automobile body repairman was injured as result of using defective body alignment clamp manufactured by defendant and sold to repairman's employer, repairman's breach of warranty claim as third party beneficiary of warranties under UCC § 2-318, was not barred by his failure to notify seller of breach prior to filing suit, notwithstanding repairman dealt directly with defendant's salesman and requested his employer to buy clamps. *Mattos, Inc. v. Hash*, 279 Md. 371, 368 A.2d 993 (1977).

Defense of lack of privity was not available to manufacturer of industrial drain cleaner where personal injury action by purchaser's employee was based on strict statutory tort liability, not on contract. *Center Chem. Co. v. Parzini*, 234 Ga. 868, 218 S.E.2d 580 (1975), on remand, 136 Ga. App. 396, 221 S.E.2d 475 (1975).

Employee of purchaser of steam boiler, who was injured when boiler exploded, was not barred from bringing action for breach of warranty against manufacturer of boiler, though he was not within class of persons enumerated in UCC § 2-318 and lacked "horizontal" privity. *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 319 A.2d 903 (1974).

Injured employee of purchaser of steam boiler which exploded was entitled to sue seller in assumpsit for breach of implied warranty despite lack of contractual privity between injured party and seller and despite Code § 2-318 extending seller's warranty to "any natural person who is in the family or household of his buyer or who is a guest in his home." *Salvador v. I.H. English of Phila., Inc.*, 224 Pa. Super. 377, 307 A.2d 398 (1973), aff'd, 457 Pa. 24, 319 A.2d 903 (1974).

Plaintiff who alleged that he was injured when he was struck in head by piece of wood expelled from orifice in side of wood chipping machine manufactured by defendant and sold to plaintiff's employer, while such machine was being used for its intended purpose, stated claim for breach of warranty under UCC § 2-318; in light of fundamental policy of § 2-318, plaintiff, by virtue of being employee of last pur-

chaser of wood chipper and who in course of his employment duties was required to be in contact with, or close proximity to, that machine, was beneficiary of warranties given to his employer; plaintiff's employer would want plaintiff, as "donee-beneficiary," to be protected by warranties, expressed or implied, relating to fitness and safety of wood chipper when used for purposes for which it was intended, and plaintiff, as employee of corporate "buyer," may be regarded as member of such "family" as corporation may reasonably be said to have. *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (Me. 1973).

Since a hotel manager who, on behalf of his employer, personally purchased from a state liquor store champagne which was intended for the use and consumption by guests of the hotel was a buyer within the meaning of § 2-103 and definitely in the distributive chain, the manager could maintain an action against the wine producer and bottler, predicated on alleged breach of implied warranty, for injury sustained when a cap from one of the bottles suddenly ejected, propelled through the air and hit the manager in the eye. *Yentzer v. Taylor Wine Co.*, 414 Pa. 272, 199 A.2d 463, 2 U.C.C. Rep. Serv. 151 (1964).

The court stating that the rigid construction placed on a seller's warranty in *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575, 1 U.C.C. Rep. Serv. 130 (1963), should not be extended to the instant situation. *Yentzer v. Taylor Wine Co.*, 414 Pa. 272, 199 A.2d 463, 2 U.C.C. Rep. Serv. 151 (1964).

15. —Employees and repairmen; not protected.

UCC § 2-318 does not extend coverage of implied warranty of merchantability to employees of purchaser; thus, plaintiff who was injured while using cleaning compound purchased by his employer was barred from recovering against manufacturer of cleaning compound on theory of breach of implied warranty of merchantability. *Hester v. Purex Corp.*, 534 P.2d 1306 (Okla. 1975).

Truck driver who obtained gasoline for his employer's truck and charged gasoline to his employer was not in privity with

service station that sold gasoline and, thus, could not maintain action for breach of warranty against service station for injuries sustained when his truck became disabled and was struck by another vehicle allegedly as result of water in gasoline; under UCC § 2-103(1)(a) truck driver was not "buyer" of gasoline, but mere agent of buyer to whom UCC sales warranties did not extend; under UCC § 2-314 employee of buyer was not in privity with seller. *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 218 S.E.2d 260 (1975).

In action against seller of garage door, maid employed by buyer at time of injury sustained when folding panels of door amputated her finger was not within category of persons benefiting from implied warranty extending "to any natural person who is in the family or household of his buyer or who is a guest in his home." *Verddier v. Neal Blun Co.*, 128 Ga. App. 321, 196 S.E.2d 469 (1973).

Statute abolishing requirement of privity in all actions for personal injury, whether brought under theory of tort, negligence or warranty was substantive change in law and could not be applied retrospectively to action for damages resulting from injuries sustained by plaintiff in fall from defective ladder which plaintiff's employer had purchased from defendant manufacturer. *Anderson v. Watling Ladder Co.*, 472 F.2d 576 (6th Cir. Tenn. 1973).

Privity requirement bars breach of warranty action brought by employee against employer's vendor. *Tucker v. Capitol Mach., Inc.*, 307 F. Supp. 291 (M.D. Pa. 1969).

Where plaintiff-electrician was injured when fuse exploded during repair, plaintiff was beyond scope of statutory warranty protection where he had not purchased fuse from defendant; count in plaintiff's complaint alleging breach of statutory express and implied warranties dismissed. *Klimas v. ITT*, 297 F. Supp. 937 (D.R.I. 1969).

The employee of the buyer cannot sue the seller or the manufacturer for breach of warranty as such action is barred by the absence of privity. *Haley v. Allied Chem. Corp.*, 353 Mass. 325, 231 N.E.2d 549 (1967).

A wholesale dealer of a stepladder was not liable under this section for breach of warranty, in an action brought by an employee of one who purchased the stepladder from a retail dealer, for injuries sustained by the employee when the stepladder collapsed, because even if the employee were considered a member of the buyer's household, she could proceed only against the retail seller, with whom the buyer was in privity, and not against the remote vendor. *Kaczmarkiewicz v. J.A. Williams Co.*, 13 Pa. D. & C.2d 14 (1958).

16. —Military personnel.

Member of armed forces injured by product purchased by Federal government did not fall within ambit of UCC § 2-318 which extends seller's warranty to third party beneficiary of contract only if he is in family or household of buyer or guest in his house. *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029 (N.D. Ga. 1974).

Enlisted man could not sue manufacturer of grenade or grenade fuse for breach of warranty because of lack of privity. *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 38 A.L.R.3d 1229 (5th Cir. Ga. 1969), reh'g denied, 424 F.2d 549, 38 A.L.R.3d 1244 (5th Cir. Ga. 1970).

17. —Subpurchasers.

Plaintiff, the subpurchaser of a defective used crane, may not recover its economic loss resulting from the inability to make use of the defective crane from defendant, the manufacturer of the crane, under the theory of breach of warranty since there is no contractual relationship between the parties and therefore no warranty either express or implied under the Uniform Commercial Code; the extended protection of warranty to persons who may reasonably be expected to use, consume or be affected by goods, is afforded only to natural persons who suffer personal injuries (Uniform Commercial Code, § 2-318) or to subpurchasers who justifiably relied upon representations made by the manufacturer to the public through advertising and in labels tagged to the goods themselves (see *Randy Knitwear v. American Cyanamid Co.*, 11 NY2d 5) and plaintiff, which purchased the crane "as is", assumed risks based on the prior use of the crane and cannot show justifiable

reliance and, in any event, since the crane was delivered to the initial purchaser in 1970, the action based on breach of warranty is barred by the Statute of Limitations. *Steckmar Nat'l Realty & Inv. Corp. v. JI Case Co.*, 99 Misc. 2d 212 (1979).

Auto manufacturer sold auto in defective condition so as to be unreasonably dangerous; held, manufacturer was subject to liability for harm caused by auto to innocent bystander or to his property. *Wasik v. Borg*, 423 F.2d 44 (2d Cir. Vt. 1970).

The employee of a subpurchaser cannot sue the remote manufacturer for breach of implied warranty. *Carney v. Barnett*, 278 F. Supp. 572 (E.D. Pa. 1967).

The extension of warranties to the third party beneficiaries listed in this section is not intended to exclude others, and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain. *Rhodes Pharmacal Co. v. Continental Can Co.*, 72 Ill. App. 2d 362, 219 N.E.2d 726 (1st Dist. 1966).

The exception to the privity requirement that a sub-purchaser is entitled to recover from a manufacturer of an automobile part that is inherently dangerous or defectively manufactured is not superseded nor modified by the provisions of this section. *Suvada v. White Motor Co.*, 51 Ill. App. 2d 318, 201 N.E.2d 313 (1st Dist. 1964), aff'd, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

Where subpurchaser had purchased water heater from the former owner of a dwelling to which it was fixed, and the former owner had brought the water heater from a dealer who in turn had purchased the appliance from the manufacturer, an action, predicated on breach of express or implied warranties, could not be maintained against the manufacturer for injuries resulting in the death of the subpurchaser when the water heater exploded in her cellar. Under Massachusetts law lack of privity is an absolute defense to an action for breach of an express or implied warranty. *Barnard v. Pennsylvania Range Boiler Co.*, 216 F. Supp. 560 (E.D. Pa. 1963).

Although it would appear that the plaintiffs were correct in their contention

that under Pennsylvania law lack of privity is not a defense to suit by subpurchaser or members of his family against the manufacturer on breach of warranty principles, the court could not strike the privity defense in an action against the manufacturer to recover for injuries sustained by the son of a subpurchaser where no showing had been made as to whether the warranty involved was express or implied, and there was no showing that the manufacturer either by means of national advertising, labels, manuals, or legend upon the container intended either an express or implied warranty to flow through the conduit of the contractual chain to the subpurchaser and his family. *Wilson v. American Chain & Cable Co.*, 216 F. Supp. 32 (E.D. Pa. 1963).

18. —Bystanders or the like.

Under UCC § 2-318, no warranty extended from seller of truck to decedent who was killed in vehicular collision, where decedent was driver of vehicle which crashed into truck which ceased to function in rush hour traffic due to defect in the truck's alternator. *GMC v. Davis*, 141 Ga. App. 495, 233 S.E.2d 825, 5 A.L.R.4th 654 (1977).

In action arising out of automobile accident which was allegedly caused by latent defect in recapped tire, driver of automobile was entitled to protection under UCC § 2-318 despite lack of privity of contract where she was member of purchaser's family; nor did lack of privity bar relief sought by innocent third party bystander; cause of action for breach of implied warranty of fitness for particular purpose under UCC § 2-315 was not stated where tires were purchased for general use upon ordinary highways; but cause of action for breach of implied warranty of merchantability under UCC § 2-314 was stated where sale of recapped tires by service station operator was not isolated sale and retailer qualified as merchant with respect to goods sold. *McHugh v. Carlton*, 369 F. Supp. 1271 (D.C.S.C. 1974).

UCC § 2-318 has left door open to courts to extend protection of warranty to greater number of plaintiffs, and it is both reasonable and just to extend to bystanders protection against defective manufac-

tured article. *Ciampichini v. Ring Bros.*, 40 A.D.2d 289 (4th Dep't 1973).

19. —Corporations.

Where Iowa corporation contracted with Michigan corporation to purchase electro-hydraulic drop forging hammers which were to be manufactured by German manufacturer, where Iowa corporation's purchase agreement was directly with, and signed by, Michigan corporation only, and where Michigan corporation was not subsidiary or commission agent of German corporation, but rather bought and resold products of German manufacturer and other firms, any implied warranties accompanying sale of drop forging hammers by German corporation to Michigan corporation extended to Iowa corporation even though it did not purchase directly from, and therefore was not in privity with, German corporation. *Midland Forge, Inc. v. Letts Indus., Inc.*, 395 F. Supp. 506 (N.D. Iowa 1975).

UCC § 2-318 does not represent an exclusive extension of warranty benefits. See UCC § 2-318, Comment 3, for rationale allowing court to extend warranty benefits to corporation which did not acquire allegedly defective machinery in sale and purchase and which was not in privity with machine's manufacturer-defendant. *Fashion Novelty Corp. v. Cocker Mach. & Foundry Co.*, 331 F. Supp. 960 (D.N.J. 1971).

20. —Municipalities.

Although city was not party to contract for sale of packinghouse waste processing plant, it was third-party beneficiary of seller's warranties under UCC § 2-318, notwithstanding that city was not "natural person," where city was in "vertical" privity with seller. *Omaha Pollution Control Corp. v. Carver-Greenfield Corp.*, 413 F. Supp. 1069 (D. Neb. 1976).

21. Losses contemplated; personal injury or property damage.

Defendant car manufacturer is liable for property damage sustained by plaintiff as the result of an accident caused by a defective steering mechanism under the theory of strict liability in tort since plaintiff excluded all other causes of the accident not attributable to the accident; since

there is no claim for personal injuries, there is no liability for breach of implied warranties (Uniform Commercial Code, § 2-318). *Maure v. Fordham Motor Sales, Inc.*, 98 Misc. 2d 979 (1979).

Where plaintiff's daughter paid extra cash for Christmas tree in reliance on representation that tree had been fire-proofed and tree subsequently caught fire causing property damage to plaintiff's home, plaintiff was entitled to recover for property damage: (1) UCC § 2-318 was not intended to restrict development of Minnesota common law relating to third-party beneficiaries of warranties and (2) destruction of home and physical damage to personal property is no less an injury to one who sustains them than bodily injury. *Milbank Mut. Ins. Co. v. Proksch*, 309 Minn. 106, 244 N.W.2d 105 (1976).

Liability of seller of refrigerator to tenant-in-common and mother of buyer is limited to injuries to person of tenant-in-common; although tenant-in-common might recover for fire damage to house allegedly caused by defective refrigerator wiring in count based on negligence, she could not recover from seller of refrigerator for such property damage with respect to any claim for breach of warranty. *Kenney v. Sears, Roebuck & Co.*, 355 Mass. 604, 246 N.E.2d 649 (1969).

22. —Economic or commercial loss.

Ultimate purchaser of clothes dryer parts may not recover for economic loss on theory of implied warranty in action against manufacturer, where parts were purchased through intermediate seller. *Hupp Corp. v. Metered Washer Serv.*, 256 Or. 245, 472 P.2d 816 (1970).

Elimination of lack of privity as a defense in any action brought against the manufacturer or seller of goods for breach of warranty, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods, was applicable to economic or commercial losses and was not restricted to cases involving injury or damage to persons or property. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), but see, *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

23. Injury to person.

Action for breach of contract of sale, to which four-year period of limitations prescribed by New York UCC § 2-725(1) applies, includes action for personal injuries arising from breach of warranty in view of provisions of (1) New York UCC § 2-318, which explicitly states that seller's warranty, whether express or implied, extends to any natural person who is injured in person by breach of the warranty, (2) New York UCC § 2-715(2)(b), which states that consequential damages resulting from seller's breach include injury to person or property proximately resulting from any breach of warranty, and (3) New York UCC § 2-719(3), which makes a limitation of consequential damages for injury to the person caused by consumer goods *prima facie* unconscionable. *McCarthy v. Bristol Labs.*, 61 A.D.2d 196 (2d Dep't 1978).

Automobile manufacturer was not liable for injury to child which occurred when child, who was riding his bicycle, collided with automobile and impact of collision broke parking light on automobile, causing tendon in child's knee to be severed, although child was within class of persons who might reasonably be expected to be affected by such automobile under UCC § 2-318, where vehicle in question was fit for ordinary purposes for which such vehicle is used under UCC § 2-314; part of car involved was essential item on car, and not mere ornamentation; of necessity lens had to be made of transparent or translucent material and, in general, such materials are fragile; light did not shatter under normal usage, but shattered under impact with metal; and breakage resulted from external force and injury did not occur to user of vehicle. *Nacci v. Volkswagen of Am., Inc.*, 325 A.2d 617 (Del. Super. 1974).

24. —Mental distress or the like.

Under UCC § 2-714(3) and UCC § 2-715(2)(b), consequential damages are properly awarded for manufacturer's breach of express warranty in sale of casket, which on disinterment of decedent three months after his burial was found to contain water as against manufacturer's express warranty that casket would not leak, since no violence is done in such case

to word "person" in UCC § 2-715(2)(b) to hold that that which brings on grief does damage to the person. Furthermore, under UCC § 2-318, consequential damages are properly awarded for such breach of warranty to members of decedent's family other than member who purchased casket from defendant. *Hirst v. Elgin Metal Casket Co.*, 438 F. Supp. 906 (D. Mont. 1977).

C. Remedies and Procedure.

25. In general; remedies.

In third-party action by lessees of printing equipment against manufacturer of equipment for breach of warranty, after lessee had refused to make further payments on lease and lessor repossessed equipment, sold it and brought action against lessees for balance due on lease under their separate guarantee of lease, although privity of contract was requisite to action for breach of warranty, not involving personal injury, manufacturer was estopped from denying lessees benefits of express warranty in present case where equipment was delivered to lessees and was serviced by manufacturer, manufacturer's machine warranty was delivered to lessee, and numerous service calls were made without charge as result of manufacturer's having voluntarily extended 30-day guarantee period because machinery would not stay in adjustment. *Addressograph-Multigraph Corp. v. Zink*, 273 Md. 277, 329 A.2d 28 (1974).

27. Privity.

Although prior to September 1, 1975, under section 2-318 of the Uniform Commercial Code, which provided that a "seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty", it was possible to hold a seller liable for a breach of an expressed or implied warranty resulting in an injury to a person for whom the seller never intended his product or by whom he would not have expected his product to be used or consumed, as, for example, where the person was in the purchaser's family, un-

der the amended statute, which deletes the phrase "who is in the family or household of his buyer or who is a guest in his home", the removal of the designated beneficiaries removes the possibility of such an unintended statutory application, while not totally dissolving privity; the amendment is thus both contractive, in its deletion of the absolute waiver of privity barriers for certain designated persons, and expansive, in its redefinition of the extension of those within privity to the purchaser. Accordingly, the purchaser and ultimate consumer of an allegedly offending product has a cause of action against a defendant who is engaged in the distribution and sale of the product upon a theory of breach of an implied or express warranty of merchantability, although she did not purchase the product from the defendant; while privity has not been abandoned in New York, neither has the Court of Appeals reconstructed privity to only those instances of direct contact between purchaser and seller in *Martin v. Dierck Equip. Co.* (43 NY2d 583), which, rather, delineated the appropriateness of contract warranty and tortious strict products liability. *Martin v. Drackett Prods. Co.*, 100 Misc. 2d 728 (1979).

Manufacturer of automobile can be held responsible without regard to privity of contract for economic loss that results to buyer, who brought vehicle from dealer, from manufacturer's breach of implied warranty of merchantability. *Ford Motor Co. v. Tidwell*, 563 S.W.2d 831 (Tex. Civ. App. 1978).

The Massachusetts version of the Uniform Commercial Code makes it clear that the Massachusetts legislature has transformed warranty liability into a remedy that is intended to be fully as comprehensive as the strict liability theory of recovery that obtains in many other jurisdictions. By amending UCC § 2-318, the Massachusetts legislature abolished the requirement of privity, which previously had been deemed essential to recovery, and also sanctioned, in a proper case, the judicial extension of warranty liability to nonsales transactions, such as commercial leases. Under the Massachusetts version of UCC § 2-318, suppliers of goods may not exclude or limit the operation of

that section by contract, nor may merchants disclaim the implied warranty of merchantability. All of these features of the Massachusetts law on warranty liability clearly indicate that the duty that a plaintiff sues to enforce in a "warranty" action for personal injuries is one that is imposed by law as a matter of social policy, and not necessarily one that the defendant has acquired by contract. (stating that Massachusetts law of warranty is congruent in nearly all respects with principles expressed in Restatement of Torts (2d ed.) § 402A). *Back v. Wickes Corp.*, 375 Mass. 633, 378 N.E.2d 964 (1978).

Although UCC § 2-318 dispenses with requirement of privity in suits brought under Article 2 of UCC, this provision does not alter rule demanding privity of contract in warranty actions against architects. *Gravely v. Providence Partnership*, 549 F.2d 958 (4th Cir. Va. 1977).

Owner of pistol was not entitled to bring action for breach of express and implied warranty of merchantability and fitness against manufacturer of pistol where owner was not within class of persons enumerated in UCC § 2-318 (Alternative A) and, thus, not in privity with manufacturer. *Smith v. Sturm, Ruger & Co.*, 524 F.2d 776 (9th Cir. Alaska 1975).

Statute abolishing requirement of privity in all actions for personal injury, whether brought under theory of tort, negligence or warranty was substantive change in law and could not be applied retrospectively to action for damages resulting from injuries sustained by plaintiff in fall from defective ladder which plaintiff's employer had purchased from defendant manufacturer. *Anderson v. Watling Ladder Co.*, 472 F.2d 576 (6th Cir. Tenn. 1973).

The drafters of the Code never intended § 2-318 to set any limits on vertical privity, nor did they intend all changes in the law to come only from the legislature. *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

The Code does not abolish the requirement of privity as is seen by the limiting terms of UCC § 2-318 and the continued requirement of notice of the defect by the buyer to the seller. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

The fact that the Code has taken a neutral position with respect to the question of privity except as expressly affected by the instant section is not to be regarded as showing any policy to limit the cases in which privity is not required to those which come within the scope of that section. *Drew v. John Deere Co. of Syracuse, Inc.*, 19 A.D.2d 308 (4th Dep't 1963).

28. —Required.

Where an automobile is leased, an action cannot be brought against the lessor for breach of an implied warranty of fitness by a third person injured as privity is lacking between him and the lessor. *Debbis v. Hertz Corp.*, 269 F. Supp. 671 (D. Md. 1967). But see *Farwell v. Un*, 902 F.2d 282 (4th Cir. Md. 1990).

In action against sellers of used automobile and repairman to recover for personal injuries suffered by plaintiffs when they were struck by automobile while it was being driven by buyer, plaintiffs could not recover from sellers on theory that there was express warranty from sellers to buyer that automobile was free from defects, including defects from repair of automobile, since plaintiffs had no contract relation with sellers and were not within scope of UCC § 2-318; nor did they come within judicial exception to privity requirement inasmuch as sellers were neither merchants within meaning of UCC § 2-104(1), nor engaged in business of selling automobiles. Similarly, plaintiffs could not recover against repairman on breach of warranty theory, there being no privity of contract between plaintiff and repairman, and any warranties, express or implied, that repairman might have given sellers did not extend to plaintiffs. *Lemley v. J & B Tire Co.*, 426 F. Supp. 1376 (W.D. Pa. 1977).

In action by town for breach of warranty with respect to defective roofing materials supplied by defendants which were installed in new school building, where evidence showed that such materials were first sold by defendants to subcontractor who thereafter sold materials to plaintiff, summary judgment should have been granted to defendants because Massachusetts version of UCC § 2-318 in force at time defective materials were installed required that privity of contract exist be-

tween injured party and seller in order to charge seller with breach of warranty, and such privity did not exist between plaintiff and defendants. *Town of Mansfield v. GAF Corp.*, 5 Mass. App. Ct. 551, 364 N.E.2d 1292 (1977).

UCC § 2-318 being neutral on the requirement of privity, and privity being an essential element in an action based on either express or implied warranty, there is no reason for changing this requirement, and weed control buyer cannot recover from manufacturer where there is no privity. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

Manufacturer of defective mobile home could be held liable for breach of implied warranties of merchantability and fitness for particular purpose, under UCC §§ 2-314 and 2-315, without regard to privity of contract between manufacturer and consumer, and this liability embraced not only personal injuries and property damage, but also economic loss. *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alaska 1976).

Testimony of plaintiff that he purchased defective low-water cutoff directly from defendant corporation rather than from its agent or distributor was sufficient to warrant finding of privity as required by UCC § 2-318. *Slater v. Burnham Corp.*, 4 Mass. App. Ct. 791, 343 N.E.2d 885 (1976).

A schoolgirl injured in the eye as a result of a rock being thrown through a classroom window by a rotary power lawnmower could not avail herself as a third party beneficiary of any warranties, express or implied, made by the manufacturer or distributor of the lawnmower to the purchasing school. *Stovall & Co. v. Tate*, 124 Ga. App. 605, 184 S.E.2d 834 (1971), overruled on other grounds, *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. Ga. 1976).

In action by tire store employees against truck manufacturer, manufacturer of truck wheel and rim, and truck dealer, for injuries received while they were changing tires on truck: (1) employees failed to establish breach of warranty against dealer since there was no sale when dealer delivered truck to plaintiffs' employer for purpose of having tires

changed; (2) plaintiffs also failed to state cause of action for breach of warranty against truck manufacturer or manufacturer of wheel and rim since there was no privity between plaintiffs and manufacturers. *Favors v. Firestone Tire & Rubber Co.*, 309 So. 2d 69 (Fla. App. 1975).

Privity is required in actions based on breach of express or implied warranties except as provided in UCC § 2-318. *Stewart v. Gainesville Glass Co.*, 233 Ga. 578, 212 S.E.2d 377 (1975).

In action by drug user seeking to recover damages for personal injuries resulting from blood clot that allegedly developed as result of plaintiff's use of defendant's oral contraceptive, plaintiff failed to state cause of action against manufacturer under UCC § 2-715 for breach of warranty; since defendant gave allegedly defective product to plaintiff's physician as free sample and there was no payment by physician to defendant, (1) there was no sale which would form basis of cause of action, and, furthermore, (2) there was no privity between the parties. *Allen v. Ortho Pharmaceutical Corp.*, 387 F. Supp. 364 (S.D. Tex. 1974).

In action between owner of used automobile and manufacturer arising when automobile caught fire while being driven, absence of privity of contract under UCC § 2-318 precluded owner's right of action for property damage on implied warranty of merchantability or fitness for use. *Wear v. Chenault Motor Co.*, 52 Ala. App. 382, 293 So. 2d 298 (Civ. App. 1974), writ denied, 292 Ala. 756, 293 So. 2d 301 (1974).

Absence of privity of contract between helicopter manufacturer and plaintiff injured by helicopter prevented plaintiff from maintaining claim for breach of warranty. *Anderson v. Fairchild Hiller Corp.*, 358 F. Supp. 976 (D. Alaska 1973).

In products liability action arising out of purchase and consumption of allegedly unwholesome bottle of carbonated beverage manufacturer was shielded from liability by lack of privity under Code § 2-316, but supermarket-seller was in privity with buyer and could be held liable to buyer's mother under Code § 2-318. *Chaffin v. Atlanta Coca Cola Bottling Co.*, 127 Ga. App. 619, 194 S.E.2d 513 (1972).

There could be no recovery by purchaser of used car from auto manufacturer for breach of implied warranty because of lack of privity between purchaser and manufacturer, i.e. since neither manufacturer nor its authorized dealer sold car to ultimate secondhand purchaser, latter is not a party to whom an implied warranty is extended by terms of UCC § 2-318 (recognizing rule; implied warranties disclaimed by express warranty). *GMC v. Halco Instruments, Inc.*, 124 Ga. App. 630, 185 S.E.2d 619 (1971).

Since neither General Motors nor its authorized dealer sold the car in question to purchaser, purchaser is not a party to whom an implied warranty is extended by terms of UCC § 2-318. *GMC v. Halco Instruments, Inc.*, 124 Ga. App. 630, 185 S.E.2d 619 (1971).

Enlisted man could not sue manufacturer of grenade or grenade fuse for breach of warranty because of lack of privity. *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 38 A.L.R.3d 1229 (5th Cir. Ga. 1969), reh'g denied, 424 F.2d 549, 38 A.L.R.3d 1244 (5th Cir. Ga. 1970).

In the absence of privity of contract between ultimate buyer and seller, this section has no application. *Henry v. John W. Eshelman & Sons*, 99 R.I. 518, 209 A.2d 46 (1965).

Although it would appear that the plaintiffs were correct in their contention that under Pennsylvania law lack of privity is not a defense to suit by subpurchaser or members of his family against the manufacturer on breach of warranty principles, the court could not strike the privity defense in an action against the manufacturer to recover for injuries sustained by the son of a subpurchaser where no showing had been made as to whether the warranty involved was express or implied, and there was no showing that the manufacturer either by means of national advertising, labels, manuals, or legend upon the container intended either an express or implied warranty to flow through the conduit of the contractual chain to the subpurchaser and his family. *Wilson v. American Chain & Cable Co.*, 216 F. Supp. 32 (E.D. Pa. 1963).

29. —Not required.

Airplane passenger could maintain action for personal injuries against airplane

manufacturer, based on breach of implied warranty under UCC § 2-715, notwithstanding passenger was not in privity with manufacturer. *Roberts v. General Dynamics, Convair Corp.*, 425 F. Supp. 688 (S.D. Tex. 1977).

Privity was not a requirement in mobile home buyer's implied warranty action against manufacturer for economic loss. *Nobility Homes of Tex., Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977).

UCC § 2-318 is neutral on requirement of vertical privity and lack of privity between buyer and manufacturer did not preclude action against manufacturer for recovery of economic losses caused by breach of warranties. *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 560 P.2d 154 (1977).

Requirement of privity of contract in action for breach of express or implied warranty is abolished. *Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975).

In action against manufacturer of birth control pills and association from whom pills were purchased arising when plaintiff suffered stroke, lack of privity between plaintiff and manufacturer under UCC § 2-318 was of no consequence and 4 year statute of limitations under UCC § 2-725 governed; birth control association which gave advice and dispensed birth-control pills was engaged in sale of goods as required by Code and plaintiff's failure to allege that pills did not prevent contraception would not bar recovery on theory of breach of implied warranty of fitness for particular purpose under UCC § 2-315; however, under UCC § 2-607(3)(a), plaintiff was required to notify association of alleged breach of implied warranty. *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550, 70 A.L.R.3d 304 (1974).

UCC § 2-318 freeing third party beneficiaries from any technical privity rules says nothing whatsoever about what limitations period governs an action for the breach of a manufacturer's obligations to a third party beneficiary. *Kelly v. Ford Motor Co.*, 110 R.I. 83, 290 A.2d 607 (1972).

Elimination of lack of privity as a defense in any action brought against the manufacturer or seller of goods for breach

of warranty, if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume or be affected by the goods, was applicable to economic or commercial losses and was not restricted to cases involving injury or damage to persons or property. *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.*, 246 Ark. 101, 437 S.W.2d 459 (1969), but see, *Cavette v. Ford Motor Credit Co.*, 260 Ark. 874, 545 S.W.2d 612 (1977).

Seller of tomato seed might reasonably expect commercial grower of tomatoes to "use, consume, or be affected by" seeds distributed and sold on market by seller; defense or shield of lack of privity cannot be invoked by seller of seed in action by buyer to recover damages for alleged breach of warranty. *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969).

Pennsylvania joins the fast growing list of jurisdictions that have eliminated the privity requirement in assumpsit suits by purchasers against remote manufacturers for breach of implied warranty. *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

Privity is not required where an action is brought for breach of an implied warranty. *Bustamante v. Carborundum Co.*, 375 F.2d 688 (7th Cir. Ill. 1967).

The Code does not abolish the requirement of privity as is seen by the limiting terms of UCC § 2-318 and the continued requirement of notice of the defect by the buyer to the seller. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

The Code does not apply to liability predicated upon strict tort and therefore "privity" limitations of the Code do not apply. *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

A minor third party beneficiary as to a manufacturer's express and implied warranties injured while a guest in the home of the ultimate purchaser of a bicycle, as a consequence of its defective condition, has a cause of action against the manufacturer and no notice is required to be given the manufacturer by such third party beneficiary. *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 217 A.2d 71 (1965).

The exception to the privity requirement that a sub-purchaser is entitled to

recover from a manufacturer of an automobile part that is inherently dangerous or defectively manufactured is not superseded nor modified by the provisions of this section. *Suvada v. White Motor Co.*, 51 Ill. App. 2d 318, 201 N.E.2d 313 (1st Dist. 1964), aff'd, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

Sound public policy requires that a manufacturer be held strictly accountable to a plaintiff who, using his product in a way it was intended, is injured as a result of a defect in manufacture of which the plaintiff was not aware, and this section negatives the former doctrine of privity of contract. *Chairaluce v. Stanley Warner Mgt. Corp.*, 236 F. Supp. 385 (D. Conn. 1964).

This section abolishes the rule of privity of contract insofar as the persons therein named are concerned. *Delta Oxygen Co. v. Scott*, 238 Ark. 534, 383 S.W.2d 885 (1964).

Privity is not required when the manufacturer advertises nationally to consumers. *Rufo v. Bastian-Blessing Co.*, 405 Pa. 12, 173 A.2d 123 (1961).

Third party beneficiaries of warranties are not required to give the notice which the original buyer is required to provide under § 2-607 of this section. *Menard v. Great Atl. & Pac. Tea Co.*, 22 Mass. App. Dec. 170 (1961).

30. Limitations and laches.

Plaintiff, the subpurchaser of a defective used crane, may not recover its economic loss resulting from the inability to make use of the defective crane from defendant, the manufacturer of the crane, under the theory of breach of warranty since there is no contractual relationship between the parties and therefore no warranty either express or implied under the Uniform Commercial Code; the extended protection of warranty to persons who may reasonably be expected to use, consume or be affected by goods, is afforded only to natural persons who suffer personal injuries (Uniform Commercial Code, § 2-318) or to subpurchasers who justifiably relied upon representations made by the manufacturer to the public through advertising and in labels tagged to the goods themselves (see *Randy Knitwear v. American Cyanamid Co.*, 11 NY2d 5) and

plaintiff, which purchased the crane “as is”, assumed risks based on the prior use of the crane and cannot show justifiable reliance and, in any event, since the crane was delivered to the initial purchaser in

1970, the action based on breach of warranty is barred by the Statute of Limitations. *Steckmar Nat'l Realty & Inv. Corp. v. JI Case Co.*, 99 Misc. 2d 212 (1979).

RESEARCH REFERENCES

ALR. Products liability: extension of strict liability in tort to permit recovery by a third person who was neither a purchaser nor user of product. 33 A.L.R.3d 415.

Third-party beneficiaries of warranties under UCC § 2-318. 100 A.L.R.3d 743.

Bystander recovery for emotional distress at witnessing another's injury under strict products liability or breach of warranty. 31 A.L.R.4th 162.

Products liability: modern cases on explosion or breakage of beverage bottles. 36 A.L.R.4th 419.

Liability under state law for injuries resulting from defective automobile

seatbelt, shoulder harness, or restraint system. 48 A.L.R.5th 1.

Third-party beneficiaries of warranties under UCC § 2-318. 50 A.L.R.5th 327.

Am Jur. 35 Am. Jur. 2d, Food § 88.

67A Am. Jur. 2d, Sales §§ 690, 701, 702, 706, 723, 739, 837, 840.

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:971 et seq. (Third party beneficiaries of warranties express or implied).

2 Am Law Prod Liab 3d, Privity of Contract § 21:2.

CJS. 77 C.J.S., Sales §§ 240, 241.

§ 75-2-319. F.O.B. and F.A.S. terms.

(1) Unless otherwise agreed the term F.O.B. (which means “free on board”) at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this chapter (Section 2-504) [Section 75-2-504] and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this chapter (Section 2-503) [Section 75-2-503];

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this chapter on the form of bill of lading (Section 2-323) [Section 75-2-323].

(2) Unless otherwise agreed the term F.A.S. vessel (which means “free alongside”) at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this chapter (Section 2-311) [Section 75-2-311]. He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

SOURCES: Codes, 1942, § 41A:2-319; Laws, 1966, ch. 316, § 2-319, eff March 31, 1968.

Cross References — Contract leaving specification of particulars of performance to one of the parties, see § 75-2-311.

Overseas shipment, see § 75-2-323.

Tender of delivery by seller, see § 75-2-503.

Obligations of seller authorized or required to send goods to buyer, see § 75-2-504.

JUDICIAL DECISIONS

1. In general.

Under UCC § 2-319(1)(a), shipment of boat by Florida seller to Louisiana buyer "FOB Florida" simply meant that title to boat and risk of its loss passed to buyer in Florida, and that buyer bore cost of shipping boat from Florida to Louisiana. *Charia v. Cigarette Racing Team, Inc.*, 583 F.2d 184 (5th Cir. La. 1978).

In action by account-assignee to recover money due on account receivable covering table-hockey games sold by assignor-seller to defendant buyer, where (1) in connection with purchase orders placed by defendant with assignor-seller, defendant and assignor-seller agreed in writing that defendant would be allowed \$22,000 to advertise goods purchased and that such sum could be deducted from any of seller's invoices, (2) defendant received goods worth \$28,517 that were covered by three invoices, but goods worth \$10,053 that were covered by two other invoices were stolen, (3) defendant expended virtually all of its advertising allowance to promote sale of goods, (4) defendant, although not paying for any of the goods, reshipped some goods at assignor-seller's direction to third party, who paid seller \$7,300 therefor, and (5) defendant also reshipped

some goods to another third party after assignor-seller went out of business, and neither plaintiff account-assignee nor defendant were paid therefor, court held (1) that since assignor-seller had complied with requirements of UCC § 2-319(1)(a), dealing with shipment of goods F.O.B. place of shipment, and UCC § 2-504, dealing with shipment of goods under "shipment" contract, plaintiff account-assignee was entitled to recover from defendant buyer invoice value of goods which were stolen, (2) defendant was also liable for value of unpaid-for goods that it shipped to third party after assignor had gone out of business, and (3) defendant was entitled to deduct from its total liability its \$22,000 advertising allowance (applying Mo Law; entering judgment for plaintiff for \$9,270, which represented award of \$31,270 for goods sold and delivered, less the \$22,000 advertising allowance). *United Nat'l Indus., Inc. v. Pool Mart, Inc.*, 449 F. Supp. 583 (E.D. Mo. 1978).

Ordinarily, under contracts for sale of goods contemplating transportation by a carrier, the seller is not obligated to deliver at a named destination unless he has specifically agreed to do so or the commercial understanding of the terms used by

the parties contemplates such delivery (see UCC § 2-503, Official Comment 5). Such an agreement is called a "destination contract," under which the seller's duty is to deliver conforming goods to the buyer at the named destination. On the other hand, the manner of delivery may be designated under what is called a "shipment contract." Under such a contract, the seller is required or authorized to ship the goods to the buyer, but is not required to deliver them at a particular destination (See UCC § 2-504, Official Comment 1). Both of these types of contracts usually employ mercantile terms or trade symbols that specify the requirements for delivery, such as "F.O.B. the place of shipment" (see UCC § 2-319(1)(a)) or "F.O.B. the place of destination" (See UCC § 2-319(1)(b)). Where no such term is employed and there has been no specific agreement to the contrary, a contract for the transportation of goods by carrier will be presumed to be a "shipment contract." *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 376 N.E.2d 548 (1978).

Shippers' failure to notify consignee of grain shipments before they were loaded, thus preventing consignee from exercising its right under contracts of purchase and UCC § 2-319 to name vessels by which grain moved, was immaterial with respect to consignee's liability for demurrage charges where consignee's export manager testified that barges were never delayed at consignee's elevator merely because they belonged to one barge company rather than another and where consignee waived any objections by accepting delivery of grain on other barges. *Shaver Transp. Co. v. Louis Dreyfus Corp.*, 414 F. Supp. 1040 (D. Or. 1976).

Under UCC § 2-319(1), term "F.O.B. PLANT," within purchase order form wherein buyer typed instructions "Pick Up from your Plant" after words "Ship via" and typed words "F.O.B. PLANT PER LB. \$1.35" in price column, was delivery term, even though it was used only in connection with stated price. *A.M. Knitwear Corp. v. All Am. Export-Import Corp.*, 41 N.Y.2d 14, 359 N.E.2d 342 (1976).

In action on note whose figures indicated amount payable was \$19,896.01,

but whose words stated amount due was "Nineteen hundred eight hundred ninety-six _____ and 01/100 Dollars": (1) under UCC § 3-118, words were ambiguous and were therefore controlled by figures; and (2) under UCC § 3-119, loan application form showing principal of loan to be \$19,896.01 was properly received as evidence of true nature of transaction. *Wall v. East Tex. Teachers Credit Union*, 526 S.W.2d 148 (Tex. Civ. App. 1975), rev'd, 533 S.W.2d 918 (Tex. 1976).

Contract for purchase of one million pounds of grain at \$2.50 per hundred, *F.O.B. Levelland, Texas*, was contract in writing to perform obligation, i.e., delivery of grain, in *Hockley County*, expressly naming a definite place therein by such writing, within meaning of venue statute. *Kiser v. Lemco Indus., Inc.*, 521 S.W.2d 142 (Tex. Civ. App. 1975).

Under contract for sale of scrap metal which required delivery "FAS Steamer your berth Port Elizabeth, New Jersey," where delivery was made according to these terms, and barge was at buyer's berth at least 3 days before it capsized and was for at least 2 days alongside vessel which was to receive scrap metal, title to scrap metal passed to buyer, and buyer was liable to seller for purchase price, in absence of any evidence that loss of cargo resulted from seller's negligence in selecting carrier or any evidence of improper loading of cargo. *Luria Bros. & Co. v. Associated Metals & Minerals Corp.*, 73 Misc. 2d 937 (1972).

Scrap metal dealer was entitled to recover from buyer the cost of scrap metal lost when shipper's barge capsized at buyer's docks to which scrap was shipped *fas*, and buyer was in turn entitled to recover from shipper, where unexplained capsizing of barge in calm waters at a sheltered berth with no shipping activity created presumption of unseaworthiness in addition to affirmative evidence of unseaworthiness, there was no proof of buyer's negligence, and shipper was negligent in failing to properly inspect barge. *Luria Bros. & Co. v. Associated Metals & Minerals Corp.*, 73 Misc. 2d 937 (1972).

A shipment of merchandise made "FAS Vessel, Mobile, Alabama" required the seller at its own expense and risk to de-

liver the goods alongside the vessel, with title not passing until such delivery was made. *Southern Ry. Sys. v. Leyden Shipping Corp.*, 290 F. Supp. 742 (S.D.N.Y. 1968).

Under a shipment contract providing "F.O.B. point-job site", the delivery of a truckload of lumber was completed and possession of the lumber relinquished when the truck was stopped at the job site. *Bituminous Cas. Corp. v. Horn Lumber Co.*, 283 F. Supp. 365 (W.D. Ark. 1968).

A contract calling for shipment FOB the seller's city passes title and risk of loss when the goods are placed with the carrier and this conclusion is not altered by the fact that the address is specified "ship to" buyer as this does not overcome the presumption in favor of a shipment contract rather than a destination contract. *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F. Supp. 550 (D. Conn. 1968).

Directions in a contract for the sale of lamb pelts "F.O.B. Toronto", that the goods were to be shipped via the Pennsylvania Railroad, destination Philadelphia, were merely shipping directions which the buyer could have changed to any other destination in the world, and hence when the Bureau of Animal Industry of the United States government issued such strict regulations on the importation of lamb pelts into the United States as to prevent further shipments from the seller in Toronto to the buyer in Philadelphia, the buyer was not excused from performing by reason of a provision in the contract that neither party was to be liable for "orders or acts of any government or governmental agency." *Swift Canadian Co. v. Banet*, 224 F.2d 36 (3d Cir. Pa. 1955).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 552, 566, 568 et seq.

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2-Sales,

§§ 253:981 et seq. (F.O.B. and F.A.S. terms).

CJS. 77 C.J.S., Sales §§ 94-98, 168, 176 et seq.

§ 75-2-320. C.I.F. and C. & F. terms.

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

SOURCES: Codes, 1942, § 41A:2-320; Laws, 1966, ch. 316, § 2-320, eff March 31, 1968.

Cross References — Varying effect of code provisions by agreement, see § 75-1-102. Inspection of goods preliminary to payment, see § 75-2-321.

Overseas shipment, see § 75-2-323.

Seller's cure of nonconforming delivery, see § 75-2-508.

Risk of loss, see § 75-2-509.

Contract requiring payment before inspection, see § 75-2-512.

Inspection of goods, when buyer not entitled to, before payment, see § 75-2-513.

Buyer's failure to state particular defect in connection with rejection, see § 75-2-605.

Letters of credit, see §§ 75-5-101 et seq.

JUDICIAL DECISIONS

1. In general.

Under UCC § 2-320(1), "C.I.F." means that the price includes the cost of the goods and also the insurance and freight charges to the named destination. *Capitol Cake Co. v. Lloyd's Underwriters*, 453 F. Supp. 1156 (D. Md. 1978).

Under UCC § 2-320(2)(c), an essential term of a C.I.F. contract is the seller's obligation to obtain a policy of insurance that is of a kind and on terms then current at the port of shipment. *Capitol Cake Co. v. Lloyd's Underwriters*, 453 F. Supp. 1156 (D. Md. 1978).

Buyer breached contract for sale of steel by improperly and prematurely rejecting shipment, although contract called for shipment date of September-October, 1974 and steel was not shipped until November 14, 1974, where steel in question did arrive at destination on November 29, 1974, and where, under recognized trade usage, shipment term of September-October implied delivery by October-November and, thus, any delay in shipment was

cured by timely delivery; contract in question included "C.I.F." shipping term, which rendered contract shipment as opposed to destination contract under UCC § 2-320. *Harlow & Jones, Inc. v. Advance Steel Co.*, 424 F. Supp. 770 (E.D. Mich. 1976).

In action by seller of low sulphur fuel oil, for unpaid balance of purchase price, commercially reasonable variation in contract as to date of payment was not allowed to impair existence of true CIF contract under UCC § 2-320. *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503 (E.D.N.Y. 1974).

In action by seller of low sulphur fuel oil, for unpaid balance of purchase price, commercially reasonable variation in contract as to date of payment was not allowed to impair existence of true CIF contract under UCC § 2-320; in addition to action for price under UCC § 2-709, seller was also allowed to recover "incidental damages" under UCC §§ 2-709 and

2-710, but "consequential damages" were not recoverable under Code. *Petroleo Brasileiro, S.A., Petrobras v. Ameropan*

Oil Corp., 372 F. Supp. 503 (E.D.N.Y. 1974).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 393, 394, 553, 557.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:181. (Complaint, petition, or declaration; allegation; failure of seller to make settlement after price adjustment under C.I.F. "net landed weights" contract).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:991 et seq. (C.I.F. and C. & F. terms).

CJS. 77 C.J.S., Sales § 167.

§ 75-2-321. C.I.F. or C. & F.: "net landed weights;" "payment on arrival;" warranty of condition on arrival.

Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to "net landed weights," "delivered weights," "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

SOURCES: Codes, 1942, § 41A:2-321; Laws, 1966, ch. 316, § 2-321, eff March 31, 1968.

Cross References — Varying effect of code provisions by agreement, see § 75-1-102. Term "no arrival, no sale", see § 75-2-324. Risk of loss, see § 75-2-509.

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 392, 394, 423, 424, 612, 613.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:181. (Complaint, petition, or declaration; allegation; failure of seller to

make settlement after price adjustment under C.I.F. "net landed weights" contract).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§ 253:1001. (C.I.F. or C. & F.; “net landed weights;” “payment on arrival;” warranty of condition on arrival).

CJS. 77 C.J.S., Sales §§ 208 et seq.

§ 75-2-322. Delivery “ex-ship”.

(1) Unless otherwise agreed a term for delivery of goods “ex-ship” (which means from the carrying vessel) or in equivalent language is not restricted to a particular ship and requires delivery from a ship which has reached a place at the named port of destination where goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed

(a) the seller must discharge all liens arising out of the carriage and furnish the buyer with a direction which puts the carrier under a duty to deliver the goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ship’s tackle or are otherwise properly unloaded.

SOURCES: Codes, 1942, § 41A:2-322; Laws, 1966, ch. 316, § 2-322, eff March 31, 1968.

Cross References — Varying effect of code provisions by agreement, see § 75-1-102.

Term F.A.S. vessel (“free alongside”), see § 75-2-319.

Risk of loss generally, see § 75-2-509.

RESEARCH REFERENCES

ALR. Delay in delivery placing goods at the risk of the party at fault under § 22(b) of Uniform Sales Act. 38 A.L.R.2d 658.

Am Jur. 67 Am. Jur. 2d, Sales §§ 393, 411, 419 et seq., 559.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:182. (Complaint, petition, or declaration; allegation; payment by buyer on

failure of seller to satisfy carrier’s lien under contract for delivery “ex-ship”).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1011, 253:1012. (Delivery “ex ship”).

CJS. 77 C.J.S., Sales § 94-98.

§ 75-2-323. Form of bill of lading required in overseas shipment; “overseas.”

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded on board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a bill of lading has been issued in a set of parts, unless otherwise agreed if the documents are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

(a) due tender of a single part is acceptable within the provisions of this chapter on cure of improper delivery (subsection (1) of Section 2-508) [Section 75-2-508]; and

(b) even though the full set is demanded, if the documents are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

SOURCES: Codes, 1942, § 41A:2-323; Laws, 1966, ch. 316, § 2-323, eff March 31, 1968.

Cross References — F.O.B. terms, see § 75-2-319.

Substitution of conforming tender, see § 75-2-508.

Banks presenting drafts under letters of credit, indemnities against missing parts, see § 75-5-113.

Issuance of bills of lading in set of parts, see § 75-7-304.

RESEARCH REFERENCES

Am Jur. 13 **Am. Jur.** 2d, Carriers § 324.

15A **Am. Jur.** 2d, Commercial Code § 36.

6 **Am. Jur. Pl & Pr Forms** (Rev), Sales, Form 2:183. (Answer; defense; refusal to accept bill of lading tendered in part for overseas shipment improper where indemnity tendered).

18 **Am. Jur. Legal Forms** 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1021, 253:1022. (Form of bill of lading required in overseas shipment).

18 **Am. Jur. Legal Forms** 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1021 et seq. (form of bill of lading required in overseas shipment).

§ 75-2-324. "No arrival, no sale" term.

Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed,

(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the nonarrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there had been casualty to identified goods (Section 2-613) [§ 75-2-613].

SOURCES: Codes, 1942, § 41A:2-324; Laws, 1966, ch. 316, § 2-324, eff March 31, 1968.

Cross References — Obligation of good faith in performance or in performance of contract or duty, see § 75-1-203.

Buyer's special property and insurable interest in identified existing goods, see § 75-2-501.

Casualty to identified goods, see § 75-2-613.

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 393, 425, 473, 484, 585, 586.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:184. (Answer; defense; nonliability of seller for failure of goods to arrive because of hazards of transportation under “no arrival, no sale” contract).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1031 et seq. (“No arrival, no sale” term).

§ 75-2-325. “Letter of credit” term; “confirmed credit.”

(1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer’s obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term “letter of credit” or “banker’s credit” in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term “confirmed credit” means that the credit must also carry the direct obligation of such an agency which does business in the seller’s financial market.

SOURCES: Codes, 1942, § 41A:2-325; Laws, 1966, ch. 316, § 2-325, eff March 31, 1968.

Cross References — When action taken seasonably, see § 75-1-204.

Power to transfer, see § 75-2-403.

Tender of payment by buyer, see § 75-2-511.

Letters of credit generally, see §§ 75-5-101 et seq.

Assignment of right to proceeds of credit, see § 75-5-116.

JUDICIAL DECISIONS

1. In general.

Where contract for sale of goods does not expressly state that letter of credit may be revocable, language in contract concerning such letter must be construed

under UCC § 2-325(3) as requiring irrevocable instrument. *Diskmakers, Inc. v. DeWitt Equip. Corp.*, 555 F.2d 1177 (3d Cir. N.J. 1977).

RESEARCH REFERENCES

ALR. What is a letter of credit under UCC §§ 5-102, 5-103. 44 A.L.R.4th 172.

Am Jur. 67 Am. Jur. 2d, Sales § 674.

6 Am. Jur. Pl & Pr Forms (Rev), Letters of Credit, Forms 5:21 et seq. (Complaint, petition, or declaration; by issuing bank; against purchaser; damages caused by

failure to make proper notation on notation credit).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1041 et seq. (“Letter of credit”; “confirmed credit”).

CJS. 77 C.J.S., Sales § 208.

§ 75-2-326. Sale on approval and sale or return; consignment sales and rights of creditors.

(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is

(a) A "sale on approval" if the goods are delivered primarily for use, and

(b) A "sale or return" if the goods are delivered primarily for resale.

(2) Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this chapter (Section 75-2-201) and as contradicting the sale aspect of the contract within the provisions of this chapter on parol or extrinsic evidence (Section 75-2-202).

SOURCES: Codes, 1942, § 41A:2-326; Laws, 1966, ch. 316, § 2-326, eff March 31, 1968; Laws, 2001, ch. 495, § 8, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, deleted "Except as provided in subsection (3)" from the beginning of (2); deleted former (3) and redesignated the remaining subsections accordingly; and in present (3), substituted "(Section 75-2-201)" for "(Section 2-201)," and substituted "(Section 75-2-202)" for "(Section 2-202)."

Cross References — Varying effect of code provisions by agreement, see § 75-1-102. Statute of frauds, see § 75-2-201.

Parol or extrinsic evidence, see § 75-2-202.

Risk of loss, passing of title, extensiveness of option to return, see § 75-2-327.

Filing in order to perfect security interest, see §§ 75-9-401 et seq.

JUDICIAL DECISIONS

1. In general.
2. Sale on approval.
3. Sale or return.
4. Sale on "consignment" or "on memorandum".
5. Maintaining place of business, etc.
6. Substantially engaged in selling goods of others.
7. Sale under security agreement.

1. In general.

The Business Sign Statute (§ 15-3-7) does not violate the Due Process Clause of the Fourteenth Amendment and was not repealed by implication in § 75-10-103, but was virtually continued by express direction in § 75-2-326(3)(a); furniture and office equipment "used or acquired" in the business was subject to execution and sale under the statute. *Date Shoe, Inc. v. Nichols*, 642 F.2d 146 (5th Cir. Miss. 1981), reh'g denied, 647 F.2d 1121 (5th Cir. 1981).

In action involving seller's petition to reclaim furniture sold to insolvent buyer, where (1) seller sold furniture to buyer which buyer accepted, (2) at time of delivery, seller did not know that buyer was insolvent, (3) two days after learning of buyer's insolvency, seller sent telegram to buyer demanding rescission under UCC § 2-702 and, after receiver was appointed for buyer, filed petition to reclaim goods, (4) bankruptcy court denied petition on ground that bankruptcy trustee was entitled to goods under § 70(c) of Bankruptcy Act and that UCC § 2-702 conflicted with §§ 64 and 67(c) of Bankruptcy Act, and (5) district court affirmed bankruptcy court's ruling, court held (1) that issue was whether seller could reclaim under UCC § 2-702(2) when seller's demand followed filing of bankruptcy petition, (2) that under § 70(c) of Bankruptcy Act, bankruptcy trustee acquired rights of

hypothetical lien creditor, (3) that buyer was insolvent when it received goods from seller, (4) that seller had discovered such fact and made demand for reclamation within ten days after buyer received goods, as required by UCC § 2-702(2), (5) that state law controlled rights of bankruptcy trustee as hypothetical lien creditor, (6) that reference in UCC § 2-702(3) to rights of lien creditors directs that those rights be found exclusively in UCC Article 2 or in articles to which Article 2 refers, (7) that lien creditor was not "purchaser for value" under UCC § 2-403 and that bankruptcy trustee acquired no rights under UCC § 2-403 as against reclaiming seller, (8) that under facts of case, bankruptcy trustee also acquired no rights under UCC §§ 2-326 or 9-301, and no lien creditor could cut off seller's right to reclaim under UCC § 2-702(2), (9) that by same token, § 70(c) of Bankruptcy Act did not give trustee right to cut off seller's right to reclaim, (10) that UCC § 2-702(2) created something other than a security interest, (11) that UCC § 2-702(2) was not an unlawful priority that conflicted with § 64 of Bankruptcy Act, (12) that UCC § 2-702(2) was not lien subject to invalidation as statutory lien under § 67(c) of Bankruptcy Act, and (13) that reclamation under UCC § 2-702(2) in instant case did not constitute invalid preferential transfer under § 60 of Bankruptcy Act. *Bassett Furn. Indus., Inc. v. Wear*, 583 F.2d 992 (8th Cir. Mo. 1978).

UCC § 2-326 did not apply in garnishment proceeding where subject of garnishment was funds of judgment debtor on deposit in bank checking account, where judgment creditor did not undertake to attach goods possessed by debtor and where seller did not claim entitlement to goods in debtor's possession, only money. *Stewart v. Brown*, 546 S.W.2d 204 (Mo. Ct. App. 1977).

As a result of the definition of "security interest" in UCC § 1-201(37) and the provisions of UCC § 9-102(2), only those consignments intended as security are directly subject to the provisions of UCC Art 9 concerning secured transactions, but all consignments, whether intended as security or not, are subject to the requirements of UCC § 2-326, which is in UCC Art 2

dealing with sales. *GECC v. Town & Country Mobile Homes, Inc.*, 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

An undisclosed oral agreement between manufacturer and retailer cannot be used to defeat secured creditor's priority in view of UCC § 2-326(2). *Modular Hous., Inc. v. G.A.C. Trans-World Acceptance Corp.*, 288 Ala. 77, 257 So. 2d 326 (1972).

UCC § 2-326 operates for protection of secured, as well as general, creditors. *American Nat'l Bank v. Christensen*, 28 Colo. App. 501, 476 P.2d 281 (1970); *American Nat'l Bank v. Tina Marie Homes, Inc.*, 28 Colo. App. 477, 476 P.2d 573, 8 U.C.C. Rep. Serv. 281 (1970); 145 A.L.R. Fed. 335.

This section was intended to cover a situation where the possession and offering for sale of another's merchandise presumably led to extensions of credit in the belief that the merchandise was owned by the possessor. *In re Mincow Bag Co.*, 53 Misc. 2d 599 (1967), *aff'd*, 29 A.D.2d 400, 288 N.Y.S.2d 364 (1st Dep't 1968), *aff'd*, 24 N.Y.2d 776, 300 N.Y.S.2d 115, 248 N.E.2d 26 (1969).

The purpose of subsec (3) is to protect the creditors of the person in possession of goods who would have the right to assume the goods were the property of the person in possession. *Guardian Dist. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

In *General Electric Co. v. Pettingell Supply Co.* (1964) 347 Mass 631, 199 NE2d 326, 2 UCCRS 184, it was conceded that if a delivery of goods to a person was a sale or return of the goods under the instant section the rights of the creditors of the person could be established by an assignee for the benefit of the person's creditors. *GE Co. v. Pettingell Supply Co.*, 347 Mass. 631, 199 N.E.2d 326 (1964).

Where certain lamps were delivered to a person on consignment under a contract by which the person was authorized to sell the lamps directly to some customers, as well as to make deliveries on sales negotiated by the consignor and to distribute the lamps to some subagents of the consignor, a finding was warranted that the lamps were delivered to the person "for sale" within the meaning of the first sentence of subsection (3) of the instant sec-

tion, and this result is not prevented by subsection (1)(b) of the instant section which defines a sale or return but which does not exclude a consignment of the type here involved. *GE Co. v. Pettingell Supply Co.*, 347 Mass. 631, 199 N.E.2d 326 (1964).

2. Sale on approval.

Transaction in which plaintiff purchased gems from company and received contemporaneous oral promise that he could return gems for complete refund at offices of company's New York City franchisee is "sale on approval" under UCC § 2-326 since gems were delivered to plaintiff "primarily for use" and therefore, UCC § 2-201 is applicable to transaction. *Kristinus v. H. Stern Com. E Ind. S.A.*, 466 F. Supp. 903 (S.D.N.Y. 1979).

Type of "sale on approval," "on trial," or "on satisfaction" that is dealt with in UCC § 2-326 involves, as noted in Official Comment 1, contract under which seller undertakes particular business risk to satisfy prospective buyer with appearance or performance of goods in question. Such goods are delivered to proposed purchaser, but they remain property of seller until buyer accepts them. Their price has already been agreed on, and buyer's willingness to receive and test goods is consideration for seller's engagement to deliver and sell. In contrast, type of "sale or return" that UCC § 2-326 involves is sale to merchant whose unwillingness to buy is overcome only by seller's engagement to take back goods in lieu of payment if goods are not resold. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

In buyer's action for seller's breach of written and oral warranties in sale of marine diesel engine, (1) where terms of sale contract were contained in seller's letter to buyer, buyer's written purchase order, and manufacturer's written warranty which accompanied sale of engine; (2) where seller also orally warranted to buyer that engine would deliver specified standard of performance, that if it did not do so it could be removed from buyer's boat at seller's expense, and that it would be delivered in time to meet requirements of builder of buyer's boat; (3) where such

oral warranties were breached and buyer, within six-months period provided in written engine warranty for manufacturer's repair or replacement of defective parts, refused to allow manufacturer's mechanic to inspect defective engine; (4) where buyer, more than six months after date engine was put into operation, notified seller that he had removed engine from his boat, tendered engine back to seller, and demanded return of purchase price; and (5) where such tender and demand were refused by seller, (1) trial court properly found that all terms of sale contract had not been reduced to writing; (2) admission in evidence of oral warranties as part of sale contract did not violate parol evidence rule contained in UCC § 2-202; (3) such oral warranties did not constitute "sale or return" provision in contract under UCC § 2-326(1)(b), but were analogous to "sale on approval" provision under UCC § 2-326(1)(a) and thus were not required by UCC § 2-326(4) to be in writing; (4) buyer's failure to allow seller to exercise right under UCC § 2-508(1) to inspect and repair engine negated warranty provisions of sale contract; (5) buyer accepted engine under UCC § 2-327(1)(b) by not seasonably notifying seller of buyer's election to return engine; and (6) buyer's delay of nearly six months in informing seller of buyer's intention to revoke acceptance of engine was insufficient compliance with buyer's good faith obligation under UCC § 1-203 and did not revoke such acceptance under UCC § 2-608. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

In action to recover balance of purchase price of machine which was returned to seller several months after installation, if buyer accepted goods under UCC § 2-606(1)(b) and did not revoke acceptance within reasonable time by notifying seller under UCC § 2-608(2) or reject machine under UCC § 2-602(1), seller would be entitled to recover unpaid purchase price under UCC §§ 2-607(1) and 2-709(1)(a); even if transaction was "sale on approval" under UCC § 2-326(1)(a), buyer's failure to seasonably notify seller of election to return goods was acceptance under UCC

§ 2-327(1)(b) and reservation of title by seller was limited in effect to reservation of security interest under UCC § 2-401(1); UCC § 2-709(2) provision allowing seller to resell goods did not require seller to make resale over objection of original buyer, but if machine were resold, net proceeds would be credited to seller. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128 (1974).

Where seller issues invoices, delivers goods into purchaser's possession and allows them to remain there for a considerable period of time, title passes to purchaser and seller cannot thereafter contend that goods were delivered "on approval." *Gantman v. Paul*, 203 Pa. Super. 158, 199 A.2d 519 (1964).

3. Sale or return.

Type of "sale on approval," "on trial," or "on satisfaction" that is dealt with in UCC § 2-326 involves, as noted in Official Comment 1, contract under which seller undertakes particular business risk to satisfy prospective buyer with appearance or performance of goods in question. Such goods are delivered to proposed purchaser, but they remain property of seller until buyer accepts them. Their price has already been agreed on, and buyer's willingness to receive and test goods is consideration for seller's engagement to deliver and sell. In contrast, type of "sale or return" that UCC § 2-326 involves is sale to merchant whose unwillingness to buy is overcome only by seller's engagement to take back goods in lieu of payment if goods are not resold. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

Under UCC § 2-326(4), sales contract that contains a "sale or return" provision must be in writing. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

In buyer's action for seller's breach of written and oral warranties in sale of marine diesel engine, (1) where terms of sale contract were contained in seller's letter to buyer, buyer's written purchase order, and manufacturer's written warranty which accompanied sale of engine; (2) where seller also orally warranted to

buyer that engine would deliver specified standard of performance, that if it did not do so it could be removed from buyer's boat at seller's expense, and that it would be delivered in time to meet requirements of builder of buyer's boat; (3) where such oral warranties were breached and buyer, within six-months period provided in written engine warranty for manufacturer's repair or replacement of defective parts, refused to allow manufacturer's mechanic to inspect defective engine; (4) where buyer, more than six months after date engine was put into operation, notified seller that he had removed engine from his boat, tendered engine back to seller, and demanded return of purchase price; and (5) where such tender and demand were refused by seller, (1) trial court properly found that all terms of sale contract had not been reduced to writing; (2) admission in evidence of oral warranties as part of sale contract did not violate parol evidence rule contained in UCC § 2-202; (3) such oral warranties did not constitute "sale or return" provision in contract under UCC § 2-326(1)(b), but were analogous to "sale on approval" provision under UCC § 2-326(1)(a) and thus were not required by UCC § 2-326(4) to be in writing; (4) buyer's failure to allow seller to exercise right under UCC § 2-508(1) to inspect and repair engine negated warranty provisions of sale contract; (5) buyer accepted engine under UCC § 2-327(1)(b) by not seasonably notifying seller of buyer's election to return engine; and (6) buyer's delay of nearly six months in informing seller of buyer's intention to revoke acceptance of engine was insufficient compliance with buyer's good faith obligation under UCC § 1-203 and did not revoke such acceptance under UCC § 2-608. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

Where (1) buyer bought 132 jackets on representation by seller's agent, which agent did not have actual authority to make, that jackets could be returned if they were not sold, (2) buyer at time of entering into contract believed that agent had actual authority to make such representation because of statements by agent

which indicated that he owned interest in seller's business, and (3) there was conflicting evidence as to whether salesmen in clothing business were customarily authorized to make sale-or-return contracts, trial court's finding on competent evidence that such authority was not customarily possessed by clothing salesmen would not be disturbed on appeal, and reviewing court would affirm trial court's ruling (1) that buyer could not treat transaction as sale-or-return transaction within scope of UCC § 2-326(1)(b), and (2) that buyer was liable for cost of all merchandise purchased, except 40 jackets which were non-conforming goods. *Anglo-American Clothing Corp. v. Marjorie's of Tiburon, Inc.*, 571 P.2d 427 (Okla. 1977).

Even in sale-or-return contract as defined by UCC § 2-326(1)(b), terms on which return of goods must be accepted by seller may be agreed on by parties, so that seller is not legally obligated to accept return of all or part of goods which are subject of contract on contract's termination unless goods meet standards agreed on by parties (holding that seller of dishwashers to be used in mobile homes was not obligated under sale-or-return contract to accept return of 1305 dishwashers from buyer, since dishwashers were not readily marketable to mobile-home industry because of changes in local building and residential codes in some areas of United States and would require expensive design changes to make them marketable). *Intertherm, Inc. v. Coronet Imperial Corp.*, 558 S.W.2d 344 (Mo. Ct. App. 1977).

Where (1) plaintiff jewelry company delivered certain jewelry to jewelry merchant under invoice stating that if goods were not purchased or returned within five days after their receipt, goods might be "automatically invoiced" to merchant's account, (2) judgment creditor of merchant subsequently levied execution on such jewelry, and (3) plaintiff in suit against judgment creditor alleged that it owned jewelry because goods had been delivered to merchant on consignment, jewelry would be held to have been delivered to merchant for "sale or return" under UCC § 2-326(1), and under UCC § 2-326(2) plaintiff had neither title to jewelry

nor right to its possession. Although term "consignment" was admittedly used in dealings between plaintiff and merchant, merchant nevertheless maintained place of business for purpose of selling jewelry generally, had authority to sell jewelry in suit, and plaintiff did not seek return of such jewelry. *Bufkor, Inc. v. Star Jewelry Co.*, 552 S.W.2d 522 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Oct. 5, 1977).

In action by inventory financier to recover damages from manufacturer for conversion of ten mobile homes sold by manufacturer on consignment basis to dealer, as to which homes inventory financier claimed perfected security interest, (1) manufacturer's claim that inventory financier's lien never attached to homes, which claim was based on "after-acquired property" nature of financier's lien and financier's alleged failure to advance funds to dealer with specific reference to such homes, could not be sustained, since under UCC § 9-204(3), validity of after-acquired property clauses in security agreements was no longer open to question; (2) in present case, first two requirements of UCC § 9-204(1)-namely, that there must be agreement that security interest attach and secured party must give value-were clearly met by dealer's signing security agreement in favor of inventory financier and financier's advancing substantial funds pursuant to such agreement; (3) third requirement of UCC § 9-204(1)-namely, that debtor must acquire rights in collateral-was satisfied when dealer obtained possession of homes pursuant to consignment agreement between dealer and manufacturer; (4) under UCC § 2-326(2), dealing with goods held on sale or return, homes were subject to claims of dealer's creditors while in dealer's possession; and (5) under UCC § 9-303(1), inventory financier's security interest, which had been properly filed, became perfected when it attached to homes at time dealer obtained possession thereof. *GECC v. Town & Country Mobile Homes, Inc.*, 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

Under UCC § 2-326 sale or return business arrangement, where seller wrongfully refused to accept return of fertilizer, buyer was justified under UCC § 2-604 in storing it at buyer's expense and later

selling fertilizer at best price obtainable, but expenses of caring for and selling fertilizer could not include storage of other stock in rented warehouse due to fact that fertilizer took up other storage space needed for other stock. *Gulf Oil Corp. v. Rice & Agric. Co-op, Inc.*, 536 S.W.2d 236 (Tex. Civ. App. 1976), writ ref'd n.r.e., (Sept. 29, 1976).

Where first automobile dealer frequently allowed cars which had been acquired from second automobile dealer to remain on second dealer's lots to be sold on commission by second dealer, such cars, although owned by first dealer, were in possession of second dealer under circumstances deemed to be "sale or return" under UCC § 2-326 and since first dealer did not post signs, comply with filing provisions of Article 9, or establish that second dealer was "generally known by his creditors to be substantially engaged in selling the goods of others," such cars were subject to claims of second dealer's creditors. *Weidinger Chevrolet, Inc. v. Universal C.I.T. Credit Corp.*, 501 F.2d 459 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1033, 95 S. Ct. 516, 42 L. Ed. 2d 309 (1974).

Where owner of tires delivered them to person who was engaged in business of selling tires in his own name and left them with him for a period of time "to sell if they would fit in his program," arrangement was "sale or return" under UCC § 2-326(3) and under UCC § 2-326(2) tires were subject to execution levied on behalf of judgment creditor of dealer since owner did not file any financing statement or have any security agreement, and there were no notices posted on premises indicating that tires were held either on consignment or any other type of agreement whereby dealer had no title to them. *Nassar v. Smith*, 21 Ill. App. 3d 462, 315 N.E.2d 692 (4th Dist. 1974).

Where parties had long standing business relationship whereby plaintiff would deliver jewels to defendant who would in turn sell jewels to retail customers and pay plaintiff agreed price, or if unable to sell jewels, defendant would return them to plaintiff, transaction was "sale or return" as defined by Code § 2-326, and was governed by UCC. *Harold Klein & Co. v.*

Lopardo, 113 N.H. 400, 308 A.2d 538, 66 A.L.R.3d 187 (1973).

Delivery of used auto by auto dealer to trailer dealer as incident to sales promotion, which would return \$950 to auto dealer if and when auto was sold with any amount above \$950 to be divided between auto and trailer dealers, is not sale of auto by auto dealer to trailer dealer within "sale or return" provision. *Security Ins. Co. v. Alliance Mut. Ins. Cos.*, 408 F.2d 878 (10th Cir. N.M. 1969).

Supply arrangement designed to protect accounts receivable and to prevent insolvency or bankruptcy proceeding, and not result of arms length bargaining was "sale or return" within Code § 2-326(1). *Vonins, Inc. v. Raff*, 101 N.J. Super. 172, 243 A.2d 836 (App. Div. 1968).

An agency for sale is not a sale and return. Therefore when the owner of an automobile left it with a dealer to obtain an offer of purchase and the owner would then be required to approve in order to effect a sale, there was no "sale or return" and creditors of the dealer could therefore not execute upon the automobile. *Allgeier v. Campisi*, 117 Ga. App. 105, 159 S.E.2d 458 (1968).

Subsection (3) of the instant section is by its terms concerned with certain transactions which, although they may not be sales within the meaning of § 2-106(1) of the instant chapter, are nevertheless deemed to be on sale or return with respect to claims of creditors and the subsection is specifically stated to be applicable even though the "agreement purports to reserve title to the person making delivery until payment or resale or uses such words as 'on consignment' or 'on memorandum'". *GE Co. v. Pettingell Supply Co.*, 347 Mass. 631, 199 N.E.2d 326 (1964).

A "return" provision cannot be added to a written sales transaction by an alleged contemporaneous oral agreement. *Wolcov v. Russell*, 46 Del. Co. 202 (1959).

4. Sale on "consignment" or "on memorandum".

Requirement that consignor seeking to protect ownership interest must give same notice to secured party of debtor that he would have to give if his transaction with consignee was in form of secu-

city transaction applies only where consignor attempts to protect his interest by filing, and not where he has given public notice by posting business sign or where he establishes that creditors have general knowledge that debtor is consignee. In re Sullivan, 103 B.R. 792 (Bankr. N.D. Miss. 1989).

Placement of signs on poles upholding canopy above gasoline pumps, indicating consignor's ownership of property, was sufficient notice to third parties of consignor's ownership interest in gasoline dispensing equipment, thereby perfecting consignor's interest as against debtor consignee's bankruptcy estate. In re Sullivan, 103 B.R. 792 (Bankr. N.D. Miss. 1989).

In action for conversion of food products, UCC § 2-326(3), dealing with delivery of goods to person under name other than name of person making delivery, did not apply where goods in suit were supplied to defendant under consignor's name. American Kitchen Foods, Inc. v. Hersch Cold Storage Co., 449 F. Supp. 34 (W.D. Pa. 1978).

Transactions which once might have been regarded as consignments are now regarded as sales by the Uniform Commercial Code, as indicated by language of UCC § 2-326. The purpose of this change is to permit people to deal with a debtor on the assumption that all property in his possession is unencumbered, unless the contrary is indicated by their own knowledge or by public records. The intention of the parties is no longer determinative of the question whether a transaction is a sale or a consignment. Bufkor, Inc. v. Star Jewelry Co., 552 S.W.2d 522 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Oct. 5, 1977).

Consignment bears some resemblance to both "sale or return" and "sale on approval" (UCC § 2-326(1)). In case of a consignment, as in case of a sale or return, goods are delivered for purpose of resale. Furthermore, unsold goods delivered on consignment, like unsold goods delivered under a sale on approval, are expected to be returned to consignor. International Looms, Inc. v. Jono Textile Co., 34 Conn. Supp. 599, 379 A.2d 3 (1977).

Contention of manufacturer, who sold ten mobile homes to dealer on consignment basis, that even if inventory

financer's security interest in such homes had attached under UCC § 9-303(1) while homes were in dealer's possession, such interest became unenforceable when manufacturer regained possession of homes from dealer, which contention was based on UCC § 2-326(2) which subjects consigned "sale-or-return" goods to claims of buyer's creditors while goods are in buyer's possession, could not be sustained, since UCC § 2-326(2) merely limits creditors whose claims may attach to those who have claims during period of buyer's possession and cannot be interpreted to defeat security interest that has attached during this possessory period. GECC v. Town & Country Mobile Homes, Inc., 117 Ariz. 562, 574 P.2d 50 (Ct. App. 1977).

In action by wholesaler against retailer for recovery of purchase price of two motorcycles, under UCC §§ 1-205, 2-202 and 2-326(4) trial court properly denied admissibility to defendant's proposed parol evidence that agreement was actually consignment sale agreement under "sale or return" arrangement, where written sales agreement between parties was not ambiguous. Recreatives, Inc. v. Travel-On Motorcycles Co., 29 N.C. App. 727, 225 S.E.2d 637 (1976).

Trial court's finding that consignor of construction equipment had not established that consignee was generally known by its creditors to be substantially engaged in selling goods of others was not clearly erroneous and bank's security interest in machines, having attached while they were in consignee's possession, was not affected by subsequent transfer of possession of machines from consignee to consignor. American Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Where dealer had machines on consignment from owner at time it gave bank security interest in its inventory including consigned machines, bank's security interest in machines was superior to interests of owner and was not affected by subsequent transfer of possession of machines from dealer to owner, so that bank was entitled to recover possession of machines from owner or to recover value of machines if return could not be had. American Nat'l Bank v. Quad Constr., Inc., 31 Colo. App. 373, 504 P.2d 1113 (1972).

Repairs to tractor made by equipment dealer were incidental to sale which was dominant purpose of delivery; held, dealer was consignee and his secured creditor had interest in tractor superior to that of owner. *American Nat'l Bank v. Etter*, 28 Colo. App. 511, 476 P.2d 287 (1970).

Gas station operator used his name and word "dealer" over door to premises; oil company required operator to execute retail dealer consignment agreement for gasoline delivered to assure payment out of proceeds of sale of gasoline; held, operator was not doing business under name of his supplier, any more than any other gasoline dealer who sells branded gasolines on his own account at stations identified as those at which particular brand of gas is sold; hence, treating assignment as "true" consignment, it follows that as against claim of operator's other creditors, supplier may not rely on its purported reservation of title to gasoline. *Mann v. Clark Oil & Ref. Corp.*, 302 F. Supp. 1376 (E.D. Mo. 1969), aff'd, 425 F.2d 736 (8th Cir. Mo. 1970).

Where, in action by supplier of merchandise to dealer on consignment against trustee of creditor of such dealer, who holds valid security agreement which includes after-acquired property, supplier depends for his right to maintain such action upon code provision relating to consignment sales and rights of creditors, and it is incumbent upon supplier to show that dealer's creditors knew that such dealers would subsequently engage in selling goods of others. *Sussen Rubber Co. v. Hertz*, 19 Ohio App. 2d 1, 249 N.E.2d 65 (1969).

Where the consignee of ladies' accessories entered an agreement with a manufacturer of ladies' gloves, whereby the manufacturer would deliver gloves on consignment directly to stores with title to the gloves remaining in the manufacturer and the consignee receiving a commission for having arranged the retail sales, and the goods were never delivered to the consignee's place of business; the assignee of creditors of the consignee had no right to merchandise remaining in possession of the manufacturer previously consigned nor to any proceeds received by the manufacturer from the sale of merchandise pre-

viously consigned. In re *Mincow Bag Co.*, 29 A.D.2d 400 (1st Dep't 1968), aff'd, 24 N.Y.2d 776, 300 N.Y.S.2d 115, 248 N.E.2d 26 (1969).

Where goods which were sold on consignment were delivered by the seller not to the consignee but to chain and department stores in many parts of the country the underlying basis for UCC § 2-326 of the danger of third persons being misled by the apparent ownership of goods in the possession of the consignee is lacking and the assignee for the benefit of the creditors of the consignee is not entitled to the proceeds from the sale or such merchandise. In re *Mincow Bag Co.*, 53 Misc. 2d 599 (1967), aff'd, 29 A.D.2d 400, 288 N.Y.S.2d 364 (1st Dep't 1968), aff'd, 24 N.Y.2d 776, 300 N.Y.S.2d 115, 248 N.E.2d 26 (1969).

The first sentence of subsection (3) of the instant section is applicable to transactions which might not ordinarily be characterized as sales, such as a delivery on consignment, and the applicability of the subsection to such transactions is not affected by the second sentence thereof which gives examples of transactions to which the subsection applies but which does not limit the plain meaning of the first sentence thereof, and indeed the second sentence gives a consignment as one of the examples of transactions to which the subsection is applicable. *GE Co. v. Pettingell Supply Co.*, 347 Mass. 631, 199 N.E.2d 326 (1964).

Where a person who did business under its own name was a wholesaler buying and selling electrical, hardware and housewares merchandise and 25 per cent of which business was in the sale and distribution of certain large lamps which were delivered to the person on consignment, the fact that some of the lamps were distributed by the person as serving agent for the consignor did not prevent a finding that the person maintained a place of business in which it dealt in goods of the kind involved, under a name other than the name of the consignor, within the meaning of subsection (3) of the instant section. *GE Co. v. Pettingell Supply Co.*, 347 Mass. 631, 199 N.E.2d 326 (1964).

A person receiving goods for sale on consignment has the power to transfer

title as against the transferor to a buyer in the ordinary course of business (recognizing principle but refusing to apply it in a non-Code state). *United States v. Menier Hdwe. No. 1, Inc.*, 219 F. Supp. 448 (W.D. Tex. 1963).

The power given by UCC § 2-326(3) to a consignee to pass title to a buyer in ordinary course is contrary to the non-Code law of Texas under which the consignee is merely a bailee. *United States v. Menier Hdwe. No. 1, Inc.*, 219 F. Supp. 448 (W.D. Tex. 1963).

5. Maintaining place of business, etc.

Where the consigned goods were delivered to chain and department stores throughout the country and the sales thereof were not made by the consignee or from any places of business maintained by it, the assignee for benefit of consignee's creditors was not entitled to retain the goods or the proceeds of its sales, for no extensions of credit to the consignee could reasonably be presumed to have resulted from such a transaction. *In re Mincow Bag Co.*, 53 Misc. 2d 599 (1967), *aff'd*, 29 A.D.2d 400, 288 N.Y.S.2d 364 (1st Dep't 1968), *aff'd*, 24 N.Y.2d 776, 300 N.Y.S.2d 115, 248 N.E.2d 26 (1969).

Where a person who did business under its own name was a wholesaler buying and selling electrical, hardware and housewares merchandise and 25 per cent of which business was in the sale and distribution of certain large lamps which were delivered to the person on consignment, the fact that some of the lamps were distributed by the person as serving agent for the consignor did not prevent a finding that the person maintained a place of business in which it dealt in goods of the kind involved, under a name other than the name of the consignor, within the meaning of subsection (3) of the instant section. *GE Co. v. Pettingell Supply Co.*, 347 Mass. 631, 199 N.E.2d 326 (1964).

6. Substantially engaged in selling goods of others.

Evidence of isolated sales for one creditor, or of what the dealer knows of his own business, or even what the supplier of the goods knows about the merchandise delivered to such dealer by him, is not sufficient to show that the dealer's creditors

generally know he is substantially engaged in selling the goods of others as provided in subdiv. (b) of subsec. (3). *Guardian Dist. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

Where evidence adduced by defendant, owner of four automobiles he had delivered to a dealer, failed to establish that dealer was generally known by his creditors to be substantially engaged in selling the goods of others, Georgia had no sign law of which the owner could avail himself, and owner had neither taken nor perfected a security interest, the delivery to the dealer constituted a "sale and return," and plaintiff who had advanced money to dealer and obtained from him bills of sale and trust receipts for the automobiles obtained title sufficient to support an action for trover against defendant. *Guardian Dist. Co. v. Settles*, 114 Ga. App. 418, 151 S.E.2d 530 (1966).

7. Sale under security agreement.

Where automobile dealer financed his used car inventory through floor plan arrangement with finance company and, under side arrangement with second automobile dealer, satisfied his obligations to finance company by assigning used cars to second dealer, who would then issue its note to finance company in release of first dealer's note, but such cars were frequently left on first dealer's lot and sold by him on commission basis, and where first automobile dealer then entered into agreement with credit corporation to finance his new car inventory and executed security agreement in favor of credit corporation covering his inventory, including, *inter alia*, his used car inventory: (1) Credit corporation acquired perfected security interest in first dealer's used car inventory; (2) security interest was not waived by clause in security agreement providing that private sale of chattel to dealer in such types of chattels for amount originally paid by dealer for such chattel or at lesser fair price would be "commercially reasonable disposition thereof," nor was it waived by fact that credit corporation treated dealer's used car business as completely separate from his new car business which credit corporation was financing; (3) sales of used cars to second dealer, made at arm's length, without

fraud and at fair price, were sales in ordinary course of business, and, hence, second dealer acquired title to such cars free of security interest. *Weidinger Chevrolet, Inc. v. Universal C.I.T. Credit Corp.*, 501 F.2d 459 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1033, 95 S. Ct. 516, 42 L. Ed. 2d 309 (1974).

Bankrupt filling station operator acquired gasoline under unperfected security agreement, and not under true consignment; bankrupt was dealt with while operating under his own name and not

that of petroleum company; held, gasoline was subject to claims of creditors. *Mann v. Clark Oil & Ref. Corp.*, 425 F.2d 736 (8th Cir. Mo. 1970).

When the transaction is between the secured seller and the debtor-buyer, the interest of the secured party is protected and it is immaterial whether the steps were taken which would be necessary to perfect the interest of the secured party as against innocent third persons. *Rottman v. Wallace*, 52 Luz. Legal Reg. Rep. 187 (Pa. 1962).

RESEARCH REFERENCES

ALR. Consignment transactions under the Uniform Commercial Code. 40 A.L.R.3d 1078.

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 5-8.

67 Am. Jur. 2d, Sales §§ 465, 470 et seq., 482 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:11 et seq. (Complaint, petition, or declaration; breach of contract between merchants; failure to repudiate written confirmation of oral contract).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:391 et seq. (Sales on approval; sale or return; consignment sales).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1051 et seq. (Sale on approval or sale or return; consignment sales and rights of creditors).

1 Am. Jur. Proof of Facts 2d, Consignment, §§ 7 et seq. (proof of consignment agreement).

1 Am. Jur. Proof of Facts 2d, Protection of a Consignment Against Claims of the Consignee's Creditors, §§ 6 et seq. (proof of "true" consignment); §§ 11 et seq. (proof of inapplicability or fulfillment of Uniform Commercial Code notoriety provisions).

§ 75-2-327. Special incidents of sale on approval and sale or return.

(1) Under a sale on approval unless otherwise agreed

(a) although the goods are identified to the contract the risk of loss and the title do not pass to the buyer until acceptance; and

(b) use of the goods consistent with the purpose of trial is not acceptance but failure seasonably to notify the seller of election to return the goods is acceptance, and if the goods conform to the contract acceptance of any part is acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's risk and expense but a merchant buyer must follow any reasonable instructions.

(2) Under a sale or return unless otherwise agreed

(a) the option to return extends to the whole or any commercial unit of the goods while in substantially their original condition, but must be exercised seasonably and

(b) the return is at the buyer's risk and expense.

SOURCES: Codes, 1942, § 41A:2-327; Laws, 1966, ch. 316, § 2-327, eff March 31, 1968.

Cross References — Varying effect of code provisions by agreement, see § 75-1-102. When action taken seasonably, see § 75-1-204.
Claims of buyer's creditors, see § 75-2-326.
Insurable interests of buyer and seller, see § 75-2-501.
Buyer's options in case of nonconforming goods or tender of delivery, see § 75-2-601.
Merchant buyer's duties after rejection of goods, see § 75-2-603.
Acceptance of goods by buyer, effect, see § 75-2-607.
Revocation of acceptance, see § 75-2-608.

JUDICIAL DECISIONS

1. In general.

In buyer's action for seller's breach of written and oral warranties in sale of marine diesel engine, (1) where terms of sale contract were contained in seller's letter to buyer, buyer's written purchase order, and manufacturer's written warranty which accompanied sale of engine; (2) where seller also orally warranted to buyer that engine would deliver specified standard of performance, that if it did not do so it could be removed from buyer's boat at seller's expense, and that it would be delivered in time to meet requirements of builder of buyer's boat; (3) where such oral warranties were breached and buyer, within six-months period provided in written engine warranty for manufacturer's repair or replacement of defective parts, refused to allow manufacturer's mechanic to inspect defective engine; (4) where buyer, more than six months after date engine was put into operation, notified seller that he had removed engine from his boat, tendered engine back to seller, and demanded return of purchase price; and (5) where such tender and demand were refused by seller, (1) trial court properly found that all terms of sale contract had not been reduced to writing; (2) admission in evidence of oral warranties as part of sale contract did not violate parol evidence rule contained in UCC § 2-202; (3) such oral warranties did not constitute "sale or return" provision in contract under UCC § 2-326(1)(b), but were analogous to "sale on approval" provision under UCC § 2-326(1)(a) and thus were not required by UCC § 2-326(4) to be in writing; (4) buyer's failure to allow seller to exercise right under UCC § 2-508(1) to inspect and repair engine negated warranty provisions of sale contract; (5) buyer accepted engine under UCC § 2-327(1)(b) by

not seasonably notifying seller of buyer's election to return engine; and (6) buyer's delay of nearly six months in informing seller of buyer's intention to revoke acceptance of engine was insufficient compliance with buyer's good faith obligation under UCC § 1-203 and did not revoke such acceptance under UCC § 2-608. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

Under UCC § 2-327(1)(b), goods delivered under sale-on-approval transaction are deemed to have been accepted if buyer fails seasonably to notify seller of buyer's election to return goods. If this principle is applied to a consignment, consignee's failure at end of consignment period seasonably to return goods or to notify consignor of consignee's election to return them will permit consignor to treat transaction as completed sale (holding that consignee's failure to return goods or to notify consignor of election to return them for more than four years after goods were delivered to consignee was unreasonable and converted transaction from a consignment into a sale at election of consignor). *International Looms, Inc. v. Jono Textile Co.*, 34 Conn. Supp. 599, 379 A.2d 3 (1977).

Sale on approval did not relieve buyer of liability for purchase of truck under UCC § 2-327 where buyer used truck beyond approval period without complaining and without offering to return truck. *Delaware Valley Equip. Co. v. Granahan*, 409 F. Supp. 1011 (E.D. Pa. 1976).

Where buyers purchased home furnishings from seller and furnishings were delivered to buyers' home "on approval," and where, inter alia, draperies and carpeting had been tailored to and installed in house, and over 2 months had elapsed

without buyers notifying seller of disapproval, there was "failure seasonably to notify the seller of election to return the goods" under UCC § 2-327 and, hence, there was "acceptance" of home furnishings by buyers. *Valley Bank & Trust Co. v. Gerber*, 526 P.2d 1121 (Utah 1974).

In action to recover balance of purchase price of machine which was returned to seller several months after installation, if buyer accepted goods under UCC § 2-606(1)(b) and did not revoke acceptance within reasonable time by notifying seller under UCC § 2-608(2) or reject machine under UCC § 2-602(1), seller would be entitled to recover unpaid purchase price under UCC §§ 2-607(1) and 2-709(1)(a); even if transaction was "sale on approval" under UCC § 2-326(1)(a), buyer's failure to seasonably notify seller of election to return goods was acceptance under UCC § 2-327(1)(b) and reservation of title by

seller was limited in effect to reservation of security interest under UCC § 2-401(1); UCC § 2-709(2) provision allowing seller to resell goods did not require seller to make resale over objection of original buyer, but if machine were resold, net proceeds would be credited to seller. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128 (1974).

Where approximately 10 days after defendant received diamonds as part of "sale or return" transaction, diamonds were stolen from his jewelry store, plaintiff was entitled to contract price of diamonds, regardless of binding effect of memorandum which accompanied shipment of diamonds and provided that jewels were delivered at defendant's risk from all hazards regardless of negligence. *Harold Klein & Co. v. Lopardo*, 113 N.H. 400, 308 A.2d 538, 66 A.L.R.3d 187 (1973).

RESEARCH REFERENCES

ALR. Time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality. 52 A.L.R.2d 900.

Risk of loss of goods in "sale or return" transaction under UCC § 2-327. 66 A.L.R.3d 190.

Auctioneer's action for commissions against seller. 38 A.L.R.4th 170.

Auction sales under UCC § 2-328. 44 A.L.R.4th 110.

Liability of auctioneer under doctrine of strict products liability. 83 A.L.R.4th 1188.

Am Jur. 67 Am. Jur. 2d, Sales §§ 465, 470 et seq., 482 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:391 et seq. (Sales on approval; sales or return; consignment sales).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1071 et seq. (Special incidents of sale on approval or sale or return).

§ 75-2-328. Sale by auction.

(1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's

announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid at a forced sale.

SOURCES: Codes, 1942, § 41A:2-328; Laws, 1966, ch. 316, § 2-328, eff March 31, 1968.

Cross References — Offer by merchant to buy or sell in terms giving assurance offer will be held open, see § 75-2-205.

Auctioneer's duty and liability with respect to bulk transfers, see § 75-6-108(2), (3).

Auction sale of baby chicks, see §§ 75-39-1 et seq.

Jewelry auctions, see §§ 75-61-1 et seq.

JUDICIAL DECISIONS

1. In general.

In action for specific performance of contract for sale of well-drilling equipment, where such equipment was "struck off" at auction sale to buyer, sale under UCC § 2-328(2) was complete, as a matter of law, at fall of auctioneer's hammer. *Bullock v. Joe Bailey Auction Co.*, 580 P.2d 225 (Utah 1978).

Nothing in the Uniform Commercial Code (see UCC §§ 2-328(1) and 2-307) gives an auctioneer the right to condition delivery of one lot of goods sold at an auction sale on the payment of all lots purchased at such sale where the sale is made in the ordinary course of business. *Dulman v. Martin Fein & Co.*, 66 A.D.2d 809 (2d Dep't 1978).

Condition of auction sale imposed by paragraph in instrument stating terms of such sale, which provided that sale was subject to "confirmation of the assignee or attorney and the secured party," was reasonable and was not precluded by UCC § 2-328(2) (holding that Uniform Commercial Code mandates liberal construction of UCC § 2-328(2)). *Dulman v. Martin Fein & Co.*, 66 A.D.2d 809 (2d Dep't 1978).

Notwithstanding announcement was made at auction that some items were subject to owner's reservation of right to reject bid, seller of tractor who reserved right to reject bid on tractor could not, under UCC § 2-328, reject bid accepted by

auctioneer where tractor was not identified in printed sale bill or by announcement before bidding as specifically being subject to reservation and most items being auctioned were not subject to reservation. *Coleman v. Duncan*, 540 S.W.2d 935 (Mo. Ct. App. 1976).

Municipal ordinance requiring auctioneer to refund in full purchase price when demand is made within 72 hours after purchase, provided purchaser returns article or merchandise to place of purchase in same condition as when purchased did not conflict with UCC § 2-328 which was intended to resolve finality of auction sale question, as between parties involved, when bid is made while hammer is falling. *B. Jeselsohn, Inc. v. Atlantic City*, 70 N.J. 238, 358 A.2d 797 (1976).

UCC § 2-328(2) is inapplicable to a sale of land by auction, since Article 2 of the UCC is applicable only to goods. *Hoffman v. Horton*, 212 Va. 565, 186 S.E.2d 79 (1972).

A seller could withdraw a horse from an auction sale even after the fall of the hammer, but only before the horse was taken from the sale ring; when this horse was taken from the ring after being sold, all title and interest passed to the purchaser, regardless of the delivery or non-delivery of papers providing evidence of ownership. *Bradshaw v. Thompson*, 454 F.2d 75 (6th Cir. Tenn. 1972), cert. denied,

409 U.S. 878, 93 S. Ct. 130, 34 L. Ed. 2d 131 (1972).

UCC § 2-328 defining sale by auction does not mean that one cannot enter sales contract or agreement of sale by way of auction; or that where all other incidents of auction are present, transaction is not auction if title is not transferred upon hammer's fall. *Hawaii Jewelers Ass'n v. Fine Arts Gallery, Inc.*, 51 Haw. 502, 463 P.2d 914 (1970).

The Code continues the prior law under which title to property sold at an auction sale passes to the bidder and the sale is complete when the property is knocked down to the bidder. *Diefenbach v. Gorney*, 93 Ill. App. 2d 51, 234 N.E.2d 813 (3d Dist. 1968).

In an auction sale, particularly of farm crops, a tender of delivery of the goods is not a condition precedent to the obligation to pay. *Diefenbach v. Gorney*, 93 Ill. App. 2d 51, 234 N.E.2d 813 (3d Dist. 1968).

The auctioneer is merely the agent of the parties and is not the buyer with respect to the original seller, nor the seller with respect to the ultimate buyer. *Tulsa Auto Dealers Auction v. North Side State Bank*, 431 P.2d 408 (Okla. 1966).

The fact that the auctioneer has the right to commissions in the sale made by him does not give him any proprietary interest in the goods themselves so as to give him a standing superior to a creditor

who has a security interest in the goods. *Tulsa Auto Dealers Auction v. North Side State Bank*, 431 P.2d 408 (Okla. 1966).

An auction with reserve is the normal procedure. *Drew v. John Deere Co. of Syracuse, Inc.*, 19 A.D.2d 308 (4th Dep't 1963).

A statement that the goods would be sold to the highest bidder is not the equivalent of a sale without reserve, and is nothing more than an announcement that a person will sell his property at an auction at which bids will be received. *Drew v. John Deere Co. of Syracuse, Inc.*, 19 A.D.2d 308 (4th Dep't 1963).

If an auction sale is with reserve the seller may purchase and hence the person making the next highest bid cannot contend that the seller is disqualified and such disqualification makes him the highest bidder whose bid must be accepted. *Drew v. John Deere Co. of Syracuse, Inc.*, 19 A.D.2d 308 (4th Dep't 1963).

This section contains approximately the same language as that found in the Pennsylvania Sales Act provision governing auction sales, which provided that a sale by auction was complete when the auctioneer announced its completion by the fall of the hammer, or another customary manner. *Guaranty Trust Co. v. Williamsport Wire Rope Co.*, 222 F.2d 416 (3d Cir. Pa. 1955).

RESEARCH REFERENCES

ALR. Title to goods, as between purchaser from, and one who entrusted them to, auctioneer. 36 A.L.R.2d 1362.

Withdrawal of property from auction sale. 37 A.L.R.2d 1049.

Liability of auctioneer. 80 A.L.R.2d 1237.

Liability of defaulting purchaser to owner's broker or auctioneer. 30 A.L.R.3d 1395.

Am Jur. 7 Am. Jur. 2d, Auctions and Auctioneers §§ 20 et seq.

30 Am. Jur. 2d, Executions § 495.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:411 et seq. (Complaint, petition, or declaration; allegation; auction "without reserve" precluded right to withdraw article after bid).

3 Am. Jur. Legal Forms 2d, Auctions and Auctioneers §§ 31:44 et seq. (Conduct and validity of sale).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1091 et seq. (Sale by auction).

CJS. 7A C.J.S., Auctions and Auctioneers §§ 18-20.

PART 4.

TITLE, CREDITORS AND GOOD FAITH PURCHASERS.

SEC.

- 75-2-401. Passing of title; reservation for security; limited application of this section.
- 75-2-402. Rights of seller's creditors against sold goods.
- 75-2-403. Power to transfer; good faith purchase of goods; "entrusting".

§ 75-2-401. Passing of title; reservation for security; limited application of this section.

Each provision of this chapter with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this chapter and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501) [Section 75-2-501], and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this code. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the chapter on Secured Transactions (Chapter 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts

title to the goods in the seller. Such reversioning occurs by operation of law and is not a "sale."

SOURCES: Codes, 1942, § 41A:2-401; Laws, 1966, ch. 316, § 2-401, eff March 31, 1968.

Cross References — Varying effect of code provisions by agreement, see § 75-1-102. Transactions to which code division on sales does not apply, see § 75-2-102.

Rights of seller's unsecured creditors with respect to goods identified to contract, see § 75-2-402.

Title of purchaser of goods, see § 75-2-403.

Insurable interests of buyer and seller, see § 75-2-501.

Seller's insolvency as affecting buyer's right to goods paid for in full or in part, see § 75-2-502.

Incidents of buyer's special property in identified goods, see §§ 75-2-502, 75-2-716.

Risk of loss, see § 75-2-509.

Buyer's right to replevin for identified goods, see § 75-2-716.

Security interests arising under Code division on sales, see § 75-9-113.

Protection of buyers of goods, see § 75-9-307.

JUDICIAL DECISIONS

1. In general.
2. Construction with other code provisions.
3. Identification.
4. Retention or reservation by seller.
5. When title passes.
6. —Agreement of parties.
7. —Agreement; custom or usage.
8. —Delivery to carrier.
9. —Delivery to buyer.
10. —Delivery to buyer; motor vehicles.
11. —Delivery to buyer; building materials.
12. —Delivery without moving goods.
13. —Documents of title.
14. —Execution of contract.
15. Conflicts of law; where title passes.
16. Rejection or revocation by buyer.
17. Revesting.
18. Tax consequences.
19. Risk of loss; insurance consequences.

1. In general.

Lease agreement leasing automobile for period of 24 months, though it placed burden of repairs, taxes, insurance, etc. upon lessee, was not sale as defined by UCC § 2-106, and provisions of UCC § 2-316 governing exclusion or modification of warranties did not apply; thus, provisions of lease agreement that eliminated any implied warranty of law and the right to recover particular damages claimed

against owner-lessor or assignee were effective, notwithstanding lease agreement did meet requirements of UCC § 2-316. *Mays v. Citizens & S. Nat'l Bank*, 132 Ga. App. 602, 208 S.E.2d 614 (1974).

Transfer of title for consideration is legal act which can be accomplished without property ever entering state. *Sullivan v. United States*, 395 U.S. 169, 89 S. Ct. 1648, 23 L. Ed. 2d 182 (1969).

Under this section it is obvious that unpaid seller may reserve a right of possession or property, or a security interest when goods are shipped. *Chase Manhattan Bank v. Nissho Pac. Corp.*, 22 A.D.2d 215 (1st Dep't 1964), aff'd, 16 N.Y.2d 999, 265 N.Y.S.2d 660, 212 N.E.2d 897 (1965).

The "passage of title" concepts of the Uniform Commercial Code have no application to zoning regulations, in determining whether a building is a warehouse or a store for retail sales on the premises. *Sears, Roebuck & Co. v. Power*, 390 Pa. 206, 134 A.2d 659 (1957).

2. Construction with other code provisions.

In an action in which the purchaser of a truck alleged that the seller had represented a used truck as a new one in violation of Mississippi's Consumer Protection Act (§§ 75-24-1 et seq.) and the Mississippi Motor Vehicle Commission

Law (§§ 63-17-51 et seq.), the trial court did not err in failing to consider § 75-2-401(2), which pertains to passing of title, since the issue was whether the truck was new or used when it was purchased and this question could be answered without exceeding the confines of the Motor Vehicle Commission Law and the Motor Vehicle Title Law (§§ 63-21-1 et seq.). *Hernandez v. Vickery Chevrolet-Oldsmobile Co.*, 652 So. 2d 179 (Miss. 1995).

UCC applies to sales of natural gas, and therefore governs sales contract between oil company and royalty owners in certain Mississippi oil and gas leases; in action by royalty owners seeking unrecovered payments from oil company under leases, gas underground is future goods pursuant to § 75-2-105, and thus no particular gas is sold until it is identified or brought to surface; accordingly, under § 75-2-107(1), contracts are contracts to sell and only become effective as sales when gas is severed from land; where sales contract itself provides that title to gas passes when gas is delivered, gas was not sold until it was produced, and accordingly, basis of royalty should be market value at well at time of production and delivery. *Piney Woods Country Life Sch. v. Shell Oil Co.*, 726 F.2d 225 (5th Cir. 1984), reh'g denied, 750 F.2d 69 (5th Cir. 1984), cert. denied, 471 U.S. 1005, 105 S. Ct. 1868, 85 L. Ed. 2d 161 (1985).

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest

in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re Duplan Corp., 1978, 455 F. Supp. 926

Where (1) leasing company on November 29, 1974 sold automobile to buyer who paid cash and received possession of vehicle and also bill of sale which correctly described vehicle and identified it by its identification number, (2) buyer, who did not receive certificate of title to vehicle until January, 1975, applied for new certificate of title and title was recorded by Division of Motor Vehicles on January 27, 1975, (3) buyer later learned that certificate of title sent to him by lessor-seller was for another vehicle similar to one buyer had purchased, (4) lessor-seller, on January 27, 1975, entered into security

agreement with bank in connection with loan and gave bank security interest in certain items of collateral which included vehicle sold to buyer, (5) bank filed financing statement covering buyer's vehicle and also sent vehicle's real certificate of title to Division of Motor Vehicles for recording of bank's interest, and (6) bank, on lessor-seller's default on loan, sought to liquidate collateral, including vehicle sold to buyer, but buyer refused to relinquish possession of such vehicle, bank's alleged security interest in buyer's vehicle was unenforceable (1) because of uncertainty with which Wisconsin motor vehicle statutes purported to establish time of transfer of title to a motor vehicle, (2) express legislative intent that a certificate of title constituted only prima facie evidence of ownership (3) necessity under UCC § 9-203(1)(c) that debtor (lessor-seller of vehicle in suit) have rights in buyer's vehicle that could be encumbered and (4) fact that lessor-seller, after sale of vehicle in suit, had no rights therein that could be encumbered, since title to vehicle had already passed to buyer under UCC § 2-401(2) when vehicle was delivered to buyer. *National Exch. Bank v. Mann*, 81 Wis. 2d 352, 260 N.W.2d 716 (1978).

Where (1) buyer, under oral agreement to pay cash, bought used trencher and trailer from seller and accepted machinery on its delivery by seller, (2) seller listed buyer on seller's books as debtor but did not have buyer execute any document, (3) bank made loan to buyer, and buyer executed security agreement and financing statement giving bank security interest in machinery bought from seller, (4) bank perfected its security interest in machinery, (5) on buyer's default, seller reclaimed machinery with buyer's consent, but without bank's consent or knowledge, and (6) bank sued seller for possession of machinery or value thereof, trial court properly held that seller's interest in machinery was subordinate to interest of bank, since under UCC § 2-401(1) and § 1-201(37), seller's reservation of title to machinery was limited in effect to reservation of security interest, and bank had perfected its security interest by filing financing statement, but seller had not filed such a statement. *Peerless Equip.*

Co. v. Azle State Bank, 559 S.W.2d 114 (Tex. Civ. App. 1977).

In action by lender to establish security interest in mobile homes "floor-planned" for dealer, (1) where lender pursuant to written agreement advanced money to dealer in Arizona for inventory financing, agreement gave lender security interest in all of dealer's present and after-acquired inventory, and lender filed financing statement with Arizona Secretary of State; (2) where Alabama manufacturer thereafter orally sold 16 mobile homes to dealer but was not paid therefor, invoice accompanying such homes stated that title thereto could be transferred only through manufacturer's certificate of origin, and manufacturer retained all such certificates; (3) where manufacturer did not file financing statement evidencing its interest in such homes with Arizona Secretary of State; and (4) where Arizona motor-vehicle registration code, at time of sale of homes to dealer, exempted them from registration requirement while they were still owned by dealer or manufacturer, plaintiff lender (1) was not required to file financing statement and certificates of title to homes with Arizona motor-vehicle division in order that lender's lien could be indorsed on such certificates and lender's security interest in dealer's inventory could be perfected; (2) lender's security interest in homes was perfected merely by filing financing statement with Arizona Secretary of State pursuant to UCC § 9-302(1) and UCC § 9-401; (3) manufacturer, by retaining title to homes, merely reserved unperfected purchase-money security interest therein under UCC § 2-401; and (4) lender's perfected security interest in homes has priority over manufacturer's unperfected security interest therein under UCC § 9-301. *GECC v. Tidwell Indus., Inc.*, 115 Ariz. 362, 565 P.2d 868 (1977).

Provisions of Code § 2-401 are not applicable to dispute involving sale of structure to be removed from appropriated land, since such dispute is within purview of Code § 2-107 relating to goods to be severed from realty. *Jonus v. Taddio*, 61 Misc. 2d 176 (1969).

3. Identification.

Although UCC has substituted flexible contractual approach for more rigid con-

cept of title to which Uniform Sales Act adhered, UCC § 2-401(1) provides that title to goods does pass when goods are identified to contract. *Tatum v. Richter*, 280 Md. 332, 373 A.2d 923 (1977).

Under § 2-401 title cannot pass before identification of goods; but while § 2-501 does provide that identification may be made at any time and in any manner explicitly agreed to by parties, this does not mean that parties may delay passage of title by simple expedient of agreeing that goods are not yet identified to contract when, in fact, they have already been delivered to buyer. *First Nat'l Bank v. Smoker*, 153 Ind. App. 71, 286 N.E.2d 203 (1972), reh'g denied, 153 Ind. App. 89, 287 N.E.2d 788 (1972).

Agreement that auto leasing agency, in return for loan, would annually supply creditor with automobile does not create interest of creditor in any particular automobile until auto is delivered to him for use, i. e. is "Identified to the contract". *First Nat'l Bank & Trust Co. v. Smithloff*, 119 Ga. App. 284, 167 S.E.2d 190 (1969).

Although this section provides that title cannot pass prior to identification, it does not provide that title must pass once the goods are identified. *Silver v. Sloop Silver Cloud*, 259 F. Supp. 187 (S.D.N.Y. 1966).

4. Retention or reservation by seller.

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law

of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. In re *Duplan Corp.*, 455 F. Supp. 926 (S.D.N.Y. 1978).

Devices whereby title is reserved in the seller-creditor for a period of time following possession by the debtor are treated under UCC Article 9 as though title had been transferred to the debtor and the seller-creditor had retained only a security interest in the goods. *O'Dell v. Kunkel's, Inc.*, 581 P.2d 878 (Okla. 1978).

Title to goods sold is of little relative consequence under the Uniform Commercial Code, since drafters of code intentionally attempted to avoid defining rights of parties to goods in terms of who has title thereto, as is evidence by UCC § 2-401(1), which provides that any retention or reservation by seller of title to goods shipped or delivered to buyer is limited in effect to

reservation of security interest. *Morton Booth Co. v. Tiara Furn., Inc.*, 564 P.2d 210 (Okla. 1977).

In action to recover balance of purchase price of machine which was returned to seller several months after installation, if buyer accepted goods under UCC § 2-606(1)(b) and did not revoke acceptance within reasonable time by notifying seller under UCC § 2-608(2) or reject machine under UCC § 2-602(1), seller would be entitled to recover unpaid purchase price under UCC §§ 2-607(1) and 2-709(1)(a); even if transaction was "sale on approval" under UCC § 2-326(1)(a), buyer's failure to seasonably notify seller of election to return goods was acceptance under UCC § 2-327(1)(b) and reservation of title by seller was limited in effect to reservation of security interest under UCC § 2-401(1); UCC § 2-709(2) provision allowing seller to resell goods did not require seller to make resale over objection of original buyer, but if machine were resold, net proceeds would be credited to seller. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128 (1974).

Reservation of title clause in installment sales contract between purchasers and seller of organ was ineffective as anything other than reservation of security interest; thus, purchasers had title to organ when they sold it, though they had not completed paying for it under contract, and sale of organ to third party could not have constituted "fraudulent conversion." *Commonwealth v. Jett*, 230 Pa. Super. 373, 326 A.2d 508 (1974).

Absent reservation of security interest in agreement for sale of tractor, title to machine vested in buyer; but title revested in seller when buyer executed repossession authorization. *Olson v. Penrod*, 493 S.W.2d 673 (Mo. Ct. App. 1973).

Any agreement concerning passage of title, whether oral or written, is subject to provision in § 2-401 limiting retention of title by seller in goods delivered to buyer to reservation of security interest. *First Nat'l Bank v. Smoker*, 153 Ind. App. 71, 286 N.E.2d 203, 287 N.E.2d 788 (3d Dist. 1972).

Although parties agreed to reserve title in seller upon delivery of goods to buyer,

statutory language of § 2-401(1) clearly subjects parties' title agreement to mandate that seller may only retain security interest after delivery to buyer. *Meinhard-Commercial Corp. v. Hargo Woolen Mills*, 112 N.H. 500, 300 A.2d 321 (1972).

Second sentence of UCC § 2-401(1) stating that retention or reservation by seller of title in goods shipped or delivered is limited in effect to reservation of security interest, cannot be varied by private agreement between parties. *Herington Livestock Auction Co. v. Verschoor*, 179 N.W.2d 491 (Iowa 1970).

Retention of title clause in condition sales agreement is mere retention of lien to secure payment of price; such clause cannot be construed as explicit agreement that title is to remain in seller. In re *Russell*, 300 F. Supp. 6 (E.D. Tenn. 1969).

Under this section it is obvious that unpaid seller may reserve a right of possession or property, or a security interest when goods are shipped. *Chase Manhattan Bank v. Nissho Pac. Corp.*, 22 A.D.2d 215 (1st Dep't 1964), aff'd, 16 N.Y.2d 999, 265 N.Y.S.2d 660, 212 N.E.2d 897 (1965).

An automobile manufacturer who delivered automobiles to its authorized dealer with reservation of title until actual payment therefor has the status of a holder of a security interest, and, where it failed to perfect such security interest, its interest is subordinate to the receiver of the dealer, who, as a lien creditor, is without notice of such unperfected security interest. *Girard Trust Corn Exch. Bank v. Warren Lepley Ford, Inc.*, 12 Pa. D. & C.2d 351 (1957).

5. When title passes.

Under the Uniform Commercial Code, title to goods passes at delivery, with only the reservation of a security interest by the seller permitted (Uniform Commercial Code, § 2-401, subd [1]); rules on chattel mortgages and conditional sales are now governed by article 9 of the code, and are considered as a single security device and, while under section 9-306 a security interest continues in any identifiable proceeds of collateral covered by the security agreement and a third party may be liable in conversion for paying those proceeds without satisfying the secured party's interest, there is no justification for extending the statute to include a cause of action within

the meaning of identifiable proceeds. Accordingly in a negligence action by plaintiff bank against defendant driver of a borrowed car in which the bank had a security interest, which car was destroyed in an accident, allegedly because of defendant's negligence, defendant was granted summary judgment since plaintiff failed to state a cause of action. *Bank of N.Y. v. Margiotta*, 99 Misc. 2d 423 (1979).

Where buyer acquired metal from seller by placing order with seller directing it to deliver metal to third party, seller would ship metal and send buyer invoices reading "sold to" buyer and "shipped to" third party, terms of sale being "net 30 days," where seller kept running account of buyer's indebtedness and billed buyer on monthly basis for all unpaid balances, including service charge for past due invoices, where third party fabricated metal into cookware and stored finished pieces until buyer requested delivery, but where there was no explicit agreement between buyer and seller respecting passing of title nor any reservation of a security interest, under UCC § 2-402(1) title to metal passed on delivery to third party; oral agreement between parties respecting payment of unit sum upon delivery of finished goods from third party to buyer was no more than agreement as to how buyer's indebtedness to seller would be reduced and had no relation to passage of title nor did it make third party agent of seller to hold possession for it. *Thermo-Sentinel Corp. v. Clad Metals, Inc.*, 426 F. Supp. 1179 (W.D. Pa. 1977).

Ships are "goods" within meaning of UCC § 2-105(1); thus, UCC § 2-401 governed passage of title in connection with sale of tugboat and barge where tugboat and barge were to be delivered at boatyard where they were moored and title passed under UCC § 2-401(3)(b) at time when contract for sale was made. *Puamier v. Barge BT 1793*, 395 F. Supp. 1019 (E.D. Va. 1974).

Ownership of gravel stockpile was in contractor and not in purchaser under UCC § 2-401, although contractor had agreed to furnish purchaser 12,000 cubic yards of crushed gravel to be purchased and used over three years at approximately 4,000 cubic yards each year,

where, *inter alia*, contractor could fulfill its obligation by providing 4,000 cubic yards of gravel each year for three years from any place within fifteen mile radius, where nothing indicated that gravel was to be provided each year, or that full 12,000 cubic yards were required to be in stockpile at time of execution of contract or awarding of bid, and where it further appeared that purchaser intended to purchase 4,000 cubic yards each year and not 12,000 with payment spread over three years. *S. De Lia Constr. Corp. v. Green Island Contracting Corp.*, 46 A.D.2d 970 (3d Dep't 1974), appeal denied, 36 N.Y.2d 648 (1975).

One who delivers goods cannot retain title; at most he may retain a security interest or obtain a lien. *Providence Elec. Co. v. Sutton Place, Inc.*, 161 Conn. 242, 287 A.2d 379 (1971).

Whether seller's instruction to defendant-bank to "notify security on arrival" was part of delivery process by seller or instruction to deliver coins to third party, and whether defendant-bank exercised degree of care required of bailee, must be determined by evidence; sustaining of demurrer to petition and rendering judgment for defendant was reversible error. *Sandlin v. First Nat'l Bank*, 20 Ohio App. 2d 200, 253 N.E.2d 313 (1969).

Under the Code, title ordinarily passes when the goods are delivered, unless otherwise explicitly decreed. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

If passage of title is dependent upon the performance of some condition subsequent, one in possession of an article has a voidable title which can be transferred to a bona fide purchaser for value even if the transferor was deceived as to the identity of the purchaser, the delivery was in exchange for a check later dishonored, or procured through a fraud punishable as larcenous under the criminal law. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

Former holding that a seller could retain title to goods until the purchase price was paid has been abolished by adoption of the UCC. *Evans Prods. Co. v. Jorgensen*, 245 Or. 362, 421 P.2d 978 (1966).

Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with respect to the physical delivery of the goods. *Commonwealth v. Kayfield*, 40 Pa. D. & C.2d 689 (1965).

6. —Agreement of parties.

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for perfecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it

superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. *In re Duplan Corp.*, 455 F. Supp. 926 (S.D.N.Y. 1978).

Where buyer contended, in action for conversion of goods allegedly belonging to savings association, that goods had been purchased by association on buyer's behalf and association did not contradict such contention, buyer on receiving possession of goods also received title thereto under UCC § 2-401(2). *Lindsey v. Security Sav. Ass'n*, 556 S.W.2d 570 (Tex. Civ. App. 1977).

Although parties agreed to reserve title in seller upon delivery of goods to buyer, statutory language of § 2-401(1) clearly subjects parties' title agreement to mandate that seller may only retain security interest after delivery to buyer. *Meinhard-Commercial Corp. v. Hargo Woolen Mills*, 112 N.H. 500, 300 A.2d 321 (1972).

Sales contract providing that "Title to the goods is vested in the Seller and shall not pass to Buyer...until the time balance shall have been fully paid", "explicitly agreed" that title to goods vested in seller until full payment was made. *Harney v. Spellman*, 113 Ill. App. 2d 463, 251 N.E.2d 265 (4th Dist. 1969).

Provision in contract for construction of a boat to effect that title would not pass until entire purchase price and any extra or additional charges have been paid fulfills the requirement of this section that an explicit statement can alter the title passing provision with respect to the tender of the property at its destination. *Silver v. Sloop Silver Cloud*, 259 F. Supp. 187 (S.D.N.Y. 1966).

Where by agreement the seller was to deliver the property to the buyer's representative, the transaction is governed by subsection (2) of the instant section, subsection (3) is inapplicable, and title to the property does not pass until delivery.

Newhall v. Second Church & Soc., 349 Mass. 493, 209 N.E.2d 296 (1965).

7. —Agreement; custom or usage.

Where under existing trade practice, buyers of ready-mixed concrete understood that concrete belonged to them when it was placed by seller in seller's trucks for delivery to customers, title to concrete in suit passed to buyer under UCC § 2-401(2)(b) at time concrete was placed in seller's trucks, even though seller was obligated to deliver concrete to job site specified by buyer. Kurtz Concrete, Inc. v. Spradling, 560 S.W.2d 858 (Mo. 1978).

Where tractor which was to be traded in as part of purchase price to be paid for new tractor was damaged in accident while it was being driven to tractor dealer's premises by employee of company which was trading in tractor, and dealer had damaged tractor repaired at its own expense, paid lien balance owed on trade-in vehicle in accordance with contract terms, and did not seek any adjustment to contract for purchase of new tractor because of damage to trade-in vehicle, dealer by its own course of conduct placed its mark of approval on meaning of agreement of parties by completing its performance in manner consistent with transfer of ownership to it prior to accident in question. Home Indem. Co. v. Twin City Fire Ins. Co., 474 F.2d 1081 (7th Cir. Ind. 1973).

Provisions of sales chapter of UCC dealing with custom and usage in trade and course of dealings between parties do not specifically refer to title and so cannot be construed as covering such situations when title becomes material, and in present case in which title was material it was necessary to examine § 2-401 to determine applicable rule for specific situation. First Nat'l Bank v. Smoker, 153 Ind. App. 71, 286 N.E.2d 203, 287 N.E.2d 788 (3d Dist. 1972).

Implicit understanding between parties based on custom and usage of trade was insufficient to meet demands of Code provision that title pass to buyer at time of delivery unless otherwise explicitly agreed upon. First Nat'l Bank v. Smoker, 153 Ind. App. 71, 286 N.E.2d 203 (1972),

reh'g denied, 153 Ind. App. 89, 287 N.E.2d 788 (1972).

8. —Delivery to carrier.

Where firm which accepted orders on behalf of manufacturer of goods had goods shipped by common carrier FOB manufacturer's factory directly to purchaser's place of business, title to goods, under UCC § 2-401(2)(a), passed to buyer at time and place of shipment. Rice Mach., Inc. v. Norberg, 120 R.I. 542, 391 A.2d 66, 2 A.L.R.4th 1110 (1978).

In action to recover for quantity of polyester yarn sold and delivered, summary judgment for defendant was entered where there was neither physical delivery of trailer which contained yarn to carrier in compliance with purchase agreement, nor delivery within meaning of UCC §§ 2-401(2) and 2-509(1)(a), and therefore, title to and responsibility for yarn remained with plaintiff. A.M. Knitwear Corp. v. All Am. Export-Import Corp., 50 A.D.2d 558 (2d Dep't 1975), aff'd, 41 N.Y.2d 14, 390 N.Y.S.2d 832, 359 N.E.2d 342 (1976).

Ohio buyer was subject to jurisdiction of Illinois courts where, under UCC §§ 2-401(2)(a) and 2-509(1)(a), seller's obligation, title, and risk of loss in goods at issue ceased on delivery to carrier in Illinois. Colony Press, Inc. v. Fleeman, 17 Ill. App. 3d 14, 308 N.E.2d 78 (1st Dist. 1974).

Where a driver was employed by a dairy to pick up milk from various farmers and deliver it to the dairy, title to the milk passed to the dairy when the milk was picked up, for delivery to the driver was equivalent to delivery to the dairy for the purpose of passage of title, and the fact that the dairy had a right of rejection of substandard milk strengthened this conclusion since, under ¶(4) of this section rejection of substandard milk served to revest title in the seller. Underwood v. Commonwealth, 390 S.W.2d 635 (Ky. 1965).

Title to lawnmowers passed to the insolvent debtors at the time of delivery to carrier, and language in purchase order signed by debtors directing that the lawnmowers be shipped to a certain address did not connote a reservation of title in the sellers until delivery to a particular place, so as to change the result. Metro-

politan Distribs. v. Eastern Supply Co., 21 Pa. D. & C.2d 128 (1959).

Sale of machines was consummated in Ohio, where the sales contract therefor was negotiated, acknowledged and accepted in Ohio by defendant's sales agents, the machines were manufactured at defendant's plant in that state, and shipped to purchaser in Michigan, f. o. b. city of manufacture. *Welding Eng'rs, Inc. v. Aetna-Standard Eng'g Co.*, 84 Ohio Law Abs. 283, 169 F. Supp. 146, 119 U.S.P.Q. 489 (W.D. Pa. 1958).

9. —Delivery to buyer.

Where (1) service of meals on airline engaged in interstate commerce was not included in price of tickets purchased by passengers in Alabama, (2) airline was not obligated to serve any meals while plane was in flight, (3) airline only served meals on some flights and then only when plane was outside Alabama airspace, and (4) failure to serve meals gave passengers no right to refund, trial court properly concluded that under Alabama UCC § 2-401(2), alleged "sale" of meals on airline occurred at time of physical delivery of meals to passengers while plane was outside Alabama airspace, with result that such meals were not subject to Alabama sales tax (holding that imposition of Alabama sales tax in such circumstances would amount to unconstitutional burden on interstate commerce). *State v. Delta Air Lines*, 356 So. 2d 1205 (Ala. Civ. App. 1978), cert. denied, 356 So. 2d 1208 (Ala. 1978).

In seller's action in Texas court to enforce California default judgment against Texas buyer, seller's contention that buyer had owned personal property in California, because title to goods purchased passed to buyer when seller delivered goods to carrier in California, could not be sustained where (1) trial judge was entitled to conclude, from inclusive evidence presented on matter, that seller was responsible for delivery of goods at buyer's destination in Texas, and (2) that under UCC § 2-401(2), buyer therefore did not own goods while they were in California. *Shelby Intern., Inc. v. Wiener*, 563 S.W.2d 324 (Tex. Civ. App. 1978).

Under UCC § 2-401(2), title can pass at either of two times. If the seller is only

required to ship the goods, title passes at the time and place of shipment. However, if the seller must deliver the goods to the buyer's destination, his performance is not complete, and title does not pass, until delivery is actually made. *Shelby Intern., Inc. v. Wiener*, 563 S.W.2d 324 (Tex. Civ. App. 1978).

To be buyer in ordinary course of business, so as to take free of security interest created by seller, there must be a sale which under UCC § 2-106(1) consists in passing of title from seller to buyer for a price. Moreover, under UCC § 2-401, title passes at time of physical delivery of goods to buyer, unless it is otherwise explicitly agreed. *Integrity Ins. Co. v. Marine Midland Bank-Western*, 90 Misc. 2d 868 (1977).

Under UCC §§ 2-703 and 2-705 seller's sale of appliances to buyer on credit empowered buyer to pass good title to third party by delivery of appliances, under UCC §§ 2-312, 2-401 and 2-403 buyer did not breach any implied warranty of title when appliances were delivered to third party, and under UCC §§ 2-401(2) and 2-703 third party had no obligation to pay seller or return appliances although buyer failed to pay seller. *Mamber v. Levin*, 4 Mass. App. Ct. 157, 344 N.E.2d 192 (1976).

Under UCC § 2-401, title to wheat passed at time and place of contract, where wheat was placed by sellers in buyer's elevator for storage before signing of sales contracts, wheat was identified, and no additional documents were required to be delivered. *Desbien v. Penokee Farmers Union Coop. Ass'n*, 220 Kan. 358, 552 P.2d 917 (1976).

Despite wording of consignment contract between executors of estate of expressionist painter and art dealer, to effect that title would pass when paintings were invoiced to customer by art dealer, sales of paintings took place upon delivery of paintings to purchasers, not on execution of sales invoices, and court injunction against sale of paintings was thus violated when delivery of paintings took place after injunction became effective, even though invoices were executed before such date. *In re Estate of Rothko*, 84 Misc. 2d 830 (1975), modified, 56 A.D.2d 499, 392

N.Y.S.2d 870 (1st Dep't 1977), aff'd, 43 N.Y.2d 305, 401 N.Y.S.2d 449, 372 N.E.2d 291 (1977), on remand, 95 Misc. 2d 492, 407 N.Y.S.2d 954 (1978).

In action by vendors against defaulting purchasers seeking to reform real estate contract to include personalty and to forfeit all properties, and against escrow company and its employee for damages for negligent preparation of documents and unauthorized and negligent delivery to purchasers of bill of sale covering personalty, (1) real estate contract would not be reformed to include personalty, since parties had not explicitly agreed as to time of passage of title and, under UCC § 2-401, title passed to purchasers when personal property was delivered, and (2) since title to personalty passed upon delivery of personalty, delivery of bill of sale was inconsequential and could not be said to have proximately caused damage to vendors. *Hecomovich v. Nielsen*, 10 Wash. App. 563, 518 P.2d 1081 (1974), review denied, 83 Wash. 2d 1012 (1974).

Time of payment was not determinative of question of when sale of bottled soft drinks in self-service store takes place, and sale took place when buyer took drinks into his possession with intention of paying for them at cashier's counter, despite fact that he was entitled to return goods to shelf without liability if he changes his mind about purchase before reaching check-out counter. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Title passed to defendant-buyer upon physical delivery of house trailer to defendant. *Rockwin Corp. v. Kincaid*, 124 Ga. App. 570, 184 S.E.2d 509 (1971).

Title to aircraft passed to buyer when aircraft was delivered, under Code § 2-401(2), even though document or title was to be delivered at different time. *American Aviation, Inc. v. Aviation Ins. Managers, Inc.*, 244 Ark. 829, 427 S.W.2d 544 (1968).

Shrimp, chicken, and loin ribs offered for sale and sold in buckets but fried or otherwise cooked after a customer places an order and after such frying or other cooking packaged or wrapped in the bucket container fall within the terms of subd 5 of § 193 of the Agriculture and Markets Law since according to the terms

of the Uniform Commercial Code § 2-106, subd 1, a sale consists in the passing of title from the seller to the buyer for a price and according to the terms of subd 2 of the above statute unless otherwise explicitly agreed title passes to the buyer at the time at which the seller completes his performance with reference to the physical delivery of the goods. *Wickham v. Levine*, 47 Misc. 2d 1 (1965), aff'd, 24 A.D.2d 1035, 264 N.Y.S.2d 785 (3 Dep't 1965), aff'd, 23 N.Y.2d 923, 298 N.Y.S.2d 507, 246 N.E.2d 357 (1969).

Where seller issues invoices, delivers goods into purchaser's possession and allows them to remain there for a considerable period of time title passes to purchaser and seller cannot thereafter contend that goods were delivered "on approval." *Gantman v. Paul*, 203 Pa. Super. 158, 199 A.2d 519 (1964).

Title to chairs, game sets and a rug passed to the buyer, even though the seller had asserted a delivery on approval, where the seller had issued invoices and delivered the furniture and had not asserted a lien. *Gantman v. Paul*, 203 Pa. Super. 158, 199 A.2d 519 (1964).

10. —Delivery to buyer; motor vehicles.

Under the Uniform Commercial Code, title to goods passes at delivery, with only the reservation of a security interest by the seller permitted (Uniform Commercial Code, § 2-401, subd [1]); rules on chattel mortgages and conditional sales are now governed by article 9 of the code, and are considered as a single security device and, while under section 9-306 a security interest continues in any identifiable proceeds of collateral covered by the security agreement and a third party may be liable in conversion for paying those proceeds without satisfying the secured party's interest, there is no justification for extending the statute to include a cause of action within the meaning of identifiable proceeds. Accordingly, in a negligence action by plaintiff bank against defendant driver of a borrowed car in which the bank had a security interest, which car was destroyed in an accident, allegedly because of defendant's negligence, defendant was granted summary judgment since plaintiff failed

to state a cause of action. *Bank of N.Y. v. Margiotta*, 99 Misc. 2d 423 (1979).

Where automobile dealer entered into arrangement with motorists association under which association would obtain new cars for its customers at fleet discount prices, dealer would deliver cars to association's customers, customers on receiving cars would execute promissory note and security agreement in favor of association, pay association for car, and give association security interest therein, and where such notes and security agreements were assigned to bank which paid association by depositing funds into association's checking account with bank, (1) cars were validly sold under the Uniform Commercial Code to association's customers, since title to each car passed under UCC § 2-401(2) to customer on dealer's delivery of car to customer; (2) dealer's retention of manufacturer's statement of origin did not evidence clear agreement that title to cars was to remain in dealer until payment in full of dealer's invoice; and (3) since title to cars passed to customers on delivery, customers could grant security interest in cars to association that could be assigned by association to bank. *Wood Chevrolet Co. v. Bank of S.E.*, 352 So. 2d 1350 (Ala. 1977).

Under UCC § 2-401(2), where ownership of automobile passed from seller to buyer as part of consideration for purchase of real property, fact that buyer did not register title in his name did not divest him of ownership. *A.M. Knitwear Corp. v. All Am. Export-Import Corp.*, 50 A.D.2d 558 (2d Dep't 1975), *aff'd*, 41 N.Y.2d 14, 390 N.Y.S.2d 832, 359 N.E.2d 342 (1976).

Delivery of automobiles was sufficient to pass title to buyer in spite of seller's failure to provide certificates of title to automobiles. *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 32 Colo. App. 235, 511 P.2d 912 (1973), *aff'd*, 184 Colo. 166, 519 P.2d 354 (1974).

Although certificate of title was not transferred to buyer of automobile, but was retained by seller as security for balance of purchase price, delivery of possession of car to buyer constituted transfer of its ownership to him. *Waggoner v. Wilson*, 31 Colo. App. 518, 507 P.2d 482 (1972).

Sale of truck took place when buyer took possession of truck from seller, and title effectively passed to buyer, even though buyer did not have possession of certificate of title. *Bunch v. Signal Oil & Gas Co.*, 505 P.2d 41 (Colo. Ct. App. 1972).

Time of passage of title is matter of intention between the parties; trier of fact may consider UCC § 2-401 along with other evidence in case in making this determination; here, transfer of ownership of auto took place on day plaintiff paid for auto and took delivery of it by driving it off; presumption of ownership of auto arising from registration may be rebutted by proof of transfer, as here. *Pugh v. Hartford Ins. Group*, 68 Misc. 2d 1014 (1972).

Title to auto passed at time and place of delivery by seller to buyer, regardless of fact that title papers had not yet been delivered. *Hicks v. Kentucky Farm Bureau Mut. Ins. Co.*, 455 S.W.2d 52 (Ky. 1970).

In absence of express agreement between corporate auto dealer and purchaser re title, title passed to purchaser no later than time when unrestricted possession of auto was given to buyer. *Gross v. Powell*, 288 Minn. 386, 181 N.W.2d 113 (1970).

Title to auto cannot pass pursuant to UCC § 2-401 where there has not been compliance with pre-existing motor vehicle regulations and transfer statutes. *Nationwide Mut. Ins. Co. v. Hayes*, 276 N.C. 620, 174 S.E.2d 511 (1970).

Auto sold to dealer; held, title to auto passed when seller's agent delivered auto to dealer. *Marshall v. Universal C.I.T. Credit Corp.*, 121 Ga. App. 751, 175 S.E.2d 84 (1970).

Where buyer and automobile dealer had agreed on a "trade" buyer had turned over his old car to the dealer and had in turn received absolute and unconditional possession of the new vehicle, and nothing remained except for the title papers to be processed and the delivery to seller of a check for the cash payment, title to the new car passed to buyer at time of its delivery; and when the car was wrecked on the night the trade was made, buyer's rather than seller's insurer was liable. *Motors Ins. Corp. v. Safeco Ins. Co. of Am.*, 412 S.W.2d 584 (Ky. 1967).

It is a question of fact for the jury to determine whether an automobile belongs to a particular automobile salesman or to the dealer where no type of certificate was issued to the salesman but a car was supplied to him as a demonstrator, he paid for it monthly, he was authorized to resell the car and keep any profit and bore any loss arising on resale, he procured insurance on the car although he drove it with the dealer's tags and if the car was still owned by the dealer it was covered by the latter's floor plan insurance. *Knotts v. Safeco Ins. Co. of Am.*, 78 N.M. 395, 432 P.2d 106 (1967).

Irrespective of the various provisions of the Motor Vehicle Law requiring certificates of title to be issued under certain circumstances, the rights of the buyer and seller of a motor vehicle under the Uniform Commercial Code do not depend upon title. *Park County Implement Co. v. Craig*, 397 P.2d 800 (Wyo. 1964).

Title passed to automobile where the owner, after some negotiation, agreed to sell the vehicle to the buyer and sometime later took the automobile to the buyer's place of employment at a time when the buyer was there, the buyer paid the owner the remainder of the purchase price, and the owner surrendered the keys to the car to the buyer. This constituted physical delivery which would pass title under subsection (2). The fact that the owner did not take an affidavit to the assignment of a title certificate as required by the Pennsylvania Vehicle Code did not prevent the actual transfer of the vehicle. *Semple v. State Farm Mut. Auto. Ins. Co.*, 215 F. Supp. 645 (E.D. Pa. 1963).

11. —Delivery to buyer; building materials.

Under UCC § 2-401, title to ceiling tiles passed on delivery at job site, even though tiles were not yet installed. *Owens-Corning Fiberglas Co. v. Holland Tile Co.*, 38 Mich. App. 690, 197 N.W.2d 80 (1972).

A contractor had the right to refuse to return to plaintiff-seller a quantity of ceiling tile delivered to job site for which subcontractor had refused to pay plaintiff where subcontractor failed to complete job, the title issue being resolved in favor of contractor in seller's claim and delivery action against contractor and subcontractor.

Owens-Corning Fiberglas Co. v. Holland Tile Co., 38 Mich. App. 690, 197 N.W.2d 80 (1972).

Title passed to subcontractor on delivery of goods to him, and supplier of goods cannot look, after delivery, to contractor for payment. *Apex Glass & Sash, Inc. v. City of Seattle*, 5 Wash. App. 794, 490 P.2d 885 (1971).

Where materials were sold and title passed to subcontractor, as evidenced by judgment against him, seller of materials could not get judgment against prime contractor for some materials. *Apex Glass & Sash, Inc. v. City of Seattle*, 5 Wash. App. 794, 490 P.2d 885 (1971).

12. —Delivery without moving goods.

Seller's delivery of registered titles to antique cars was sufficient to pass title to buyer, although document of title to vehicles had not been formally transferred into buyer's name, and physical location of vehicles had not changed after transfer. *Crawford v. Welch*, 8 Wash. App. 663, 508 P.2d 1039 (1973), review denied, 82 Wash. 2d 1009 (1973).

Where defendant, purchaser of a boat, trailer, and motor, delivered a check in full payment to the seller and received in exchange a bill of sale for the articles, both parties then informed the person with whom the boat and trailer were stored of the sale, and the purchaser arranged to pick up the articles on the following day, title had passed to the purchaser under subsec. (3)(a), and the purchaser could not avoid the sale when he found that the trailer had disappeared when he went to move it. *Whately v. Tetrault*, 29 Mass. App. Dec. 112 (1964).

13. —Documents of title.

Automobile certificates of title generally have not been accorded the legal status of documents of title, as that term is used in the Uniform Commercial Code, because vehicle certification statutes based on the Uniform Motor Vehicle Certificate of Title and Anti-Theft Act do not recognize a pledge of the certificate as effective to perfect a security interest. Since the Wisconsin vehicle certification statutes conform to this doctrine, unless otherwise agreed or required by law, title to property which is the subject of a sale within the

scope of the Uniform Commercial Code passes, under UCC § 2-401(2), to the buyer at the time physical possession of the property is transferred. *National Exch. Bank v. Mann*, 81 Wis. 2d 352, 260 N.W.2d 716 (1978).

In replevin action by buyer against seller to obtain possession of Ferrari sports car of limited availability ordered for buyer from another dealer, where order form and bill of sale identified car by name, year of manufacture, model number, and serial number, and stated that car was "used" car and that buyer had made \$15,000 deposit on purchase price of \$17,500; where half of such deposit was paid by buyer's personal check (on which was written name of car, year of manufacture, and serial number) and other half by cashier's check issued by bank making loan to buyer, which check was made payable to joint order of both buyer and seller and which contained restrictive indorsement requiring "payee" to record first lien on car in bank's favor; where car, when received by seller from other dealer, proved to be virtually new racing vehicle, not intended for highway use, that seller wished to retain for himself; and where seller informed buyer that he would try to locate another Ferrari for him, sale was governed by UCC Art 2 and buyer was entitled to maintain replevin action, despite seller's contention that since car was "new" it was not what buyer had ordered, since (1) under UCC § 2-209, parties had modified their prior oral agreement concerning sale of "used" car by entering into written agreement, evidenced by purchase order and bill of sale prepared by seller, which identified said car by make, year of manufacture, model number, and serial number; (2) parties' modification of prior oral agreement also was evidenced by seller's acceptance of buyer's personal check and by negotiation by both seller and buyer of bank cashier's check bearing restrictive indorsement; (3) under UCC § 2-106(2), car delivered to seller conformed to modified contract; (4) buyer had right under UCC § 2-601(b) and § 2-606(1)(a) to accept car that did not conform to purchase order, had delivery been tendered by seller; and (5) since car was identified to contract by purchase

order and bill of sale which were in buyer's possession, title to car passed to buyer under UCC § 2-401(3)(a), even though seller retained vehicle. *Tatum v. Richter*, 280 Md. 332, 373 A.2d 923 (1977).

Despite wording of consignment contract between executors of estate of expressionist painter and art dealer, to effect that title would pass when paintings were invoiced to customer by art dealer, sales of paintings took place upon delivery of paintings to purchasers, not on execution of sales invoices, and court injunction against sale of paintings was thus violated when delivery of paintings took place after injunction became effective, even though invoices were executed before such date. *In re Estate of Rothko*, 84 Misc. 2d 830 (1975), modified, 56 A.D.2d 499, 392 N.Y.S.2d 870 (1st Dep't 1977), aff'd, 43 N.Y.2d 305, 401 N.Y.S.2d 449, 372 N.E.2d 291 (1977), on remand, 95 Misc. 2d 492, 407 N.Y.S.2d 954 (1978).

In action by manufacturer of mobile home against dealer and purchaser of unit arising when dealer failed to pay manufacturer purchase price, mobile home fell within definition of "goods" under UCC § 2-105 and purchaser was entitled to protection from manufacturer's claim under UCC § 9-307(a) where purchaser, who took title from merchant entrusted with goods under UCC §§ 2-401 and 2-403, qualified as buyer in ordinary course of business under UCC § 1-201(9), notwithstanding purchaser's failure to request certificate of title of purchase. *Apeco Corp. v. Bishop Mobile Homes, Inc.*, 506 S.W.2d 711 (Tex. Civ. App. 1974), writ ref'd n.r.e., (June 12, 1974).

Where truck dealer ordered two trucks from manufacturer, trucks were delivered under "floor plan" arrangement with manufacturer whereby dealer executed note and security agreement covering trucks which was assigned to credit company, where purchaser executed two security agreements and notes for purchase of trucks which were assigned by dealer to purchaser's finance company, but where delivery of trucks to purchaser was delayed and, in fact, purchaser never made cash down payment and never actually took possession of trucks there was, nonetheless, sale of trucks when purchaser

executed security agreements and notes; thus, security interest obtained by purchaser's lender took priority over security interest in trucks held by dealers credit company. *International Harvester Credit Corp. v. Associates Fin. Servs. Co.*, 133 Ga. App. 488, 211 S.E.2d 430 (1974).

14. —Execution of contract.

UCC § 2-401 governed passage of title in connection with sale of tugboat and barge were to be delivered at boatyard where they were moored and title passed under UCC § 2-401(3)(b) at time when contract for sale was made. *Puamier v. Barge BT 1793*, 395 F. Supp. 1019 (E.D. Va. 1974).

Title to a roadside diner, regarded by the parties as personal property rather than a part of the leased realty upon which it was situated, passed to the buyer when the conditional sales contract was executed, subject to security interest in the seller, and thereafter the risk of loss was on the buyer. The subsequent total destruction of the diner by fire did not relieve the buyer of his obligations under the contract. *Conte v. Styli*, 26 Mass. App. Dec. 73 (1963).

15. Conflicts of law; where title passes.

Where (1) five shipments of nylon yarn shipped from the Netherlands were delivered to and accepted by buyer in South Carolina on or before August 23, 1976, (2) buyer, after failing to pay major part of purchase price, filed petition in bankruptcy on August 31, 1976, and seller in adversary proceeding against bankruptcy trustee sought to reclaim goods or recover balance due thereon, (3) contract between seller and buyer provided that notwithstanding delivery of goods, title thereto remained in seller until full payment by buyer, that all disputes arising out of the contract were to be governed by English law, and that buyer accepted jurisdiction of any courts in England or elsewhere that seller might designate, (4) seller claimed (a) that under UCC § 2-401(1), such title-retention clause created security interest in seller's favor that must be deemed to have been perfected with regard to either the Netherlands or England because law of such countries did not provide for per-

fecting security interests by notice filing, (b) that as a result, seller had benefit of four-month-continuation-of-perfection provision set forth in UCC § 9-103(3), and (c) that because yarn had arrived at buyer's plant in South Carolina within four months of August 31, 1976 (date on which buyer's bankruptcy petition was filed and bankruptcy trustee's lien arose), seller's perfected security interest was superior to trustee's lien, court held (1) that because seller relied on UCC § 2-401(1) to validate its security interest, court would conclude that seller had security interest in goods, (2) that under the Uniform Commercial Code, a consensual security interest that arises by virtue of UCC § 2-401(1) is subject to perfection and priority provisions of Article 9, as provided by UCC § 9-113, as long as the debtor lawfully has possession of goods, (3) that since buyer in present case had possession of goods, seller should have filed financing statement to perfect its security interest and thus render it superior to bankruptcy trustee's lien, and (4) that since no such financing statement was filed, either before delivery of goods or before August 31, 1976, seller's security interest had never been perfected and could not prevail over trustee's lien under UCC § 9-301(1)(b), which provides that unperfected security interest is subordinate to rights of person who becomes lien creditor without knowledge of the security interest and before it is perfected. *In re Duplan Corp.*, 1978, 455 F. Supp. 926 *In re Duplan Corp.*, 455 F. Supp. 926 (S.D.N.Y. 1978).

Transfer of title to fuel oil occurred at time it was delivered to towboats, so that where delivery of the fuel oil was on the Missouri side of the main channel of the Mississippi River, the sale was in Missouri; where the delivery was on the Illinois side of the main channel, the sale was in Illinois. *Sinclair Ref. Co. v. Department of Revenue*, 50 Ill. 2d 201, 277 N.E.2d 858 (1971).

An Illinois florist who receives interstate telegraphic orders for retail sales of flowers in Illinois is a seller, his sales are present sales made in the state whether the contract is unilateral or bilateral, and title to the flowers passes in Illinois, and the sale is not one for resale which would

be true if the seller were the out-of-state florist who telegraphs the order, and the Illinois florist is subject to that state's retailers' occupational tax on such sales. *O'Brien v. Isaacs*, 32 Ill. 2d 105, 203 N.E.2d 890 (1965).

16. Rejection or revocation by buyer.

Where buyer revoked acceptance of non-conforming goods by letter to seller requesting credit for defective goods, buyer's revocation of acceptance under UCC § 2-401(4) revested title to goods in seller and did not constitute a "sale" of the goods. *Shelby Intern., Inc. v. Wiener*, 563 S.W.2d 324 (Tex. Civ. App. 1978).

Where a contractor declared its subcontractor in default and terminated its contract and treated materials fabricated by the subcontractor as the subcontractor's property, it thereby rejected such material and title was revested in the subcontractor by operation of law. *John H. Knox, Inc. v. Continental Cas. Co.*, 32 A.D.2d 607 (4th Dep't 1969).

The burden of proof is upon the buyer to show that his revocation of an acceptance is justified. *Tennessee-Virginia Constr. Co. v. Willingham*, 117 Ga. App. 290, 160 S.E.2d 444 (1968).

Evidence that the goods were "unsatisfactory" is not sufficient to justify revocation of acceptance because this may refer to "anything from color to performance." *Tennessee-Virginia Constr. Co. v. Willingham*, 117 Ga. App. 290, 160 S.E.2d 444 (1968).

The seller improperly breaches his obligation to sell on credit by shipping the goods and then presenting bills of lading with sight drafts attached and insisting that the sight drafts be paid before the bills of lading will be surrendered. The buyer in such case may reject the shipment and exercise his rights for the breach of the contract, including rescission of the contract and proceeding to cover. *United States ex rel. Industrial Instrument Corp. v. Paul Hardeman, Inc.*, 202 F. Supp. 124 (N.D. Tex. 1962), *aff'd*, 320 F.2d 115 (5th Cir. Tex. 1963).

17. Revesting.

In action by common carrier of crude oil against bankrupt buyer of crude oil, title to oil revested in oil producing sellers

under UCC § 2-401(4) when buyer refused to accept tender of crude oil from pipeline company conditioned upon buyer's payment of common carrier lien; notice given by seller, prior to buyer's refusal of tender, to stop delivery to buyer based on previous dishonor of buyer's checks for insufficient funds was timely exercise of seller's rights of stoppage under UCC §§ 2-702(1), (2) and 2-705(1) and sellers could reclaim oil upon demand and notice as given. *Amoco Pipeline Co. v. Admiral Crude Oil Corp.*, 490 F.2d 114 (10th Cir. N.M. 1974).

Absent reservation of security interest in agreement for sale of tractor, title to machine vested in buyer; but title revested in seller when buyer executed repossession authorization. *Olson v. Penrod*, 493 S.W.2d 673 (Mo. Ct. App. 1973).

"Title" is with purchaser of goods from self-service shelves when he removes goods with intent to pay for them, even though he still has right to return them if he changes his mind; it is only when this right to return is exercised by replacing item on shelf that "title" revests in seller. *Gillispie v. Great Atl. & Pac. Tea Co.*, 14 N.C. App. 1, 187 S.E.2d 441 (1972).

Where plaintiff declared subcontractor in default and terminated contract with subcontractor, thereafter treating materials fabricated by subcontractor as property of subcontractor, plaintiff thereby rejected such materials and title thereto was thereupon revested in subcontractor by operation of law. *John H. Knox, Inc. v. Continental Cas. Co.*, 32 A.D.2d 607 (4th Dep't 1969).

The buyer revests title in the seller by a rejection of the goods upon delivery, whether or not the rejection was justified, or by a subsequent revocation of acceptance provided it is justified. *Tennessee-Virginia Constr. Co. v. Willingham*, 117 Ga. App. 290, 160 S.E.2d 444 (1968).

18. Tax consequences.

Buyer of undocumented vessel at public auction was not liable for annual property tax against boat where, at time of assessment, title had not yet passed to buyer under UCC § 2-401. In re *Western States Wire Corp.*, 490 F.2d 1065 (9th Cir. Cal. 1974).

Where contract for sale of future goods was executed before effective date of sales tax statute, but where goods were delivered after that effective date, sales tax was properly imposed; for purposes of sales tax statute, sale of future goods takes place when title passes and, unless otherwise explicitly agreed upon, title passes at time and place at which seller completes his performance with respect to physical delivery of goods. *Crown Iron Works Co. v. Commissioner of Taxation*, 298 Minn. 213, 214 N.W.2d 462 (1974).

State law controlled on the question of whether and to what extent the taxpayer-conditional vendee had property and rights to property in certain personal property to which the federal tax lien could attach. *L.B. Smith, Inc. v. Foley*, 341 F. Supp. 810 (W.D.N.Y. 1972).

In *Lakeside Truck Rental, Inc. v. Bowers* (1962) 173 Ohio St 108, 18 Ohio Ops 2d 357, 180 N.E.2d 140, the Code provision was cited in determining whether a transaction was a sale for tax purposes. *Lakeside Truck Rental, Inc. v. Bowers*, 173 Ohio St. 108, 180 N.E.2d 140 (1962).

19. Risk of loss; insurance consequences.

Where vehicle was modified to suit prospective purchaser's desires, retail sales

order was signed, trade-in and down payment was made, and possession of vehicle was given to prospective purchaser, prospective purchaser did not constitute permissive user of vehicle within meaning of automobile dealer's liability insurance policy, notwithstanding purchaser failed to make payments due on vehicle and dealer subsequently reacquired possession of vehicle. *Sentry Ins. v. Longacre*, 403 F. Supp. 1264 (W.D. Okla. 1975).

Where written memorandum of contract of sale for business and contents of building authorized buyer to take possession of business and contents and where buyer agreed to carry contents insurance acceptable to seller, contract resulted in change of ownership of property, reserving in seller security interest only, even though contract contained a provision to effect that title and ownership of property did not pass from seller to buyer until note given in consideration therefore was paid. *Fidelity & Cas. Co. v. Jefferies*, 545 S.W.2d 881 (Tex. Civ. App. 1976), writ ref'd n.r.e., (May 18, 1977).

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Commercial Code §§ 5-8.

21 Am. Jur. 2d, Crops § 68.

67 Am. Jur. 2d, Sales §§ 387, 390, 401 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:431 et seq. (Passing of Title; Reservation of Security Interest).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1121 et seq. (Passing of title; reservation for security).

CJS. 77 C.J.S., Sales §§ 214 et seq.

Law Reviews. Boss, *Panacea or Nightmare?* Leases in Article 2. 64 B U L Rev, January, 1984.

§ 75-2-402. Rights of seller's creditors against sold goods.

(1) Except as provided in subsections (2) and (3), rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's rights to recover the goods under this chapter (Sections 2-502 and 2-716) [Sections 75-2-502 and 75-2-716].

(2) A creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent under any rule of law of the state where the goods are situated, except that retention of possession in good faith and current course of

trade by a merchant-seller for a commercially reasonable time after a sale or identification is not fraudulent.

(3) Nothing in this chapter shall be deemed to impair the rights of creditors of the seller

(a) under the provisions of the chapter on Secured Transactions (Chapter 9); or

(b) where identification to the contract or delivery is made not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security or the like and is made under circumstances which under any rule of law of the state where the goods are situated would apart from this chapter constitute the transaction a fraudulent transfer or voidable preference.

SOURCES: Codes, 1942, § 41A:2-402; Laws, 1966, ch. 316, § 2-402, eff March 31, 1968.

Cross References — Creditors' suits to set aside fraudulent transfers, see § 11-5-75.

Fraudulent transfers and rights of creditors, see §§ 15-3-3, 15-3-5.

Seller's insolvency as affecting buyer's rights with respect to goods not shipped but paid for in whole or in part, see § 75-2-502.

Buyer's right to replevin for goods identified to contract, see § 75-2-716.

When bulk transfer deemed fraudulent, see § 75-6-105.

Secured transactions, see §§ 75-9-101 et seq.

JUDICIAL DECISIONS

1. In general.

Where cotton farmer entered into contract with cotton merchants to sell cotton crop to be produced on 800 acres, where farmer was obligated by terms of lease to pay one-fourth of his cotton crop as rent, and where as result of flood conditions farmer was only able to plant 717 acres rather than expected 1066 acres, cotton merchants were entitled to whole crop and lessor's remedies, if any, were against lessee; when read together UCC §§ 2-102, 2-105 and 2-107 indicated that forward contracts for sale of yet to be grown cotton fell within § 2-402(1) which subordinates rights of seller's unsecured creditors in subject matter to those of buyer. *Ralli-Coney, Inc. v. Gates*, 528 F.2d 572 (5th Cir. 1976).

It was not necessary to record sale of citrus fruit in order to provide construc-

tive notice to others of nature of buyer's interest in crop; sale constituted constructive severance of crops from land, and creditor was not entitled to position of secured creditor as against buyer where he did not rely on public records in extending credit to seller. *Exchange Nat'l Bank v. Alturas Packing Co.*, 269 So. 2d 733 (Fla. App. 1972).

UCC § 2-402 relating to rights of seller's creditors against sold goods specifically leaves the validity of sales where the seller retains possession of goods sold to determination under existing state laws, except in cases involving retention by a merchant seller in the course of trade. *Blumenstein v. Phillips Ins. Ctr., Inc.*, 490 P.2d 1213 (Alaska 1971).

RESEARCH REFERENCES

Am Jur. 37 Am. Jur. 2d, Fraudulent Conveyances and Transfers §§ 104 et seq.
 6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:452 et seq. (Rights of seller's creditors against goods sold).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:521 et seq. (Notice; demand of goods from receiver of seller).

§ 75-2-403. Power to transfer; good faith purchase of goods; "entrusting".

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
 - (b) the delivery was in exchange for a check which is later dishonored,
- or
- (c) it was agreed that the transaction was to be a "cash sale," or
 - (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the chapters on Secured Transactions (Chapter 9), Bulk Transfers (Chapter 6) and Documents of Title (Chapter 7).

SOURCES: Codes, 1942, § 41A:2-403; Laws, 1966, ch. 316, § 2-403, eff March 31, 1968.

Cross References — Purposes of Code and rules of construction, see § 75-1-102.

Law relative to fraud as supplementing Code provisions, see § 75-1-103.

Warranty of title, see § 75-2-312.

Rights of seller's unsecured creditors with respect to goods identified to contract, see § 75-2-402.

Effect of payment by check subsequently dishonored, see § 75-2-512.

Person in the position of a seller, see § 75-2-707.

Bulk transfers, see §§ 75-6-101 et seq.

Documents of title, see §§ 75-7-101 et seq.

Buyer's rights with respect to fungible goods sold and delivered by warehouseman, see § 75-7-205.

Secured transaction, see §§ 75-9-101 et seq.

Larceny, generally, see § 97-17-41 et seq.

Obtaining property by false pretenses, see § 97-19-39.

Sale of property previously sold or encumbered, see § 97-19-51.

JUDICIAL DECISIONS

1. In general.
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20. —Secured party.
21. —Chattel mortgagee.
22. —True owner.

1. In general.

Under § 75-2-403, neither a trespasser nor one engaged by him to cut, convert, and steal timber had no power to transfer title in and to this timber to a third party; accordingly, the true owner of the timber had a right to recover the timber or its value from the third party. *Bay Springs Forest Prods., Inc. v. Wade*, 435 So. 2d 690 (Miss. 1983).

UCC § 2-403 was intended to determine the priorities between two innocent parties, namely, the original owner, who parted with his goods through the fraudulent conduct of another, and an innocent third party who gave value for the goods to the perpetrator of the fraud without knowledge thereof. By favoring the innocent third party, the Uniform Commercial Code endeavors to promote the flow of commerce by placing the burden of ascertaining and preventing fraudulent transactions on the one in the best position to prevent them, namely, the original seller.

McDonald's Chevrolet, Inc. v. Johnson, 176 Ind. App. 399, 376 N.E.2d 106 (1978).

UCC § 2-403 is intended to protect persons who buy out of inventory from merchants. *Northwestern Nat'l Bank v. Maher*, 258 N.W.2d 623 (Minn. 1977).

Where officer of corporation signed note for loan to corporation in blank designated "Co-Maker," and also signed "Co-Maker's/Guarantor's Statement" which clearly stated that he was personally liable on such note, officer did not sign note in corporate capacity and was liable on note following default by corporation. *Citibank E. v. Minbirole*, 50 A.D.2d 1052 (3d Dep't 1975).

The law regarding the sale of personal property by one having a voidable title is set forth in the instant section. *Hertz Corp. v. Hardy*, 197 Pa. Super. 466, 178 A.2d 833 (1962).

2. Construction with other laws.

Entrustment statute did not take precedence over title statute where owner and holder of certificate of title of truck never entrusted to merchant within § 75-2-403(2) and purchaser of truck did not acquire truck from merchant. *Hicks v. Thomas*, 516 So. 2d 1344 (Miss. 1987).

It was not necessary for a purchaser to receive the certificate of origin at the time of delivery of a vehicle before title could pass to him, and thus the sale was complete upon delivery, since § 75-2-403(2), providing that the entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business, would prevail over § 63-21-31, providing that transfer of a vehicle is not effective unless at the time of the delivery of the vehicle the owner executes an assignment and warranty of title to the transferee. *Atwood Chevrolet-Olds., Inc. v. Aberdeen Mun. Sch. Dist.*, 431 So. 2d 926 (Miss. 1983).

One who acquires a mobile home in the ordinary course of business from a mer-

chant entrusted with the mobile home receives title to the motor home under UCC § 2-403(2), notwithstanding that there was no receipt of certificate of title under Motor Vehicle Certification of Title Act which includes mobile homes within its provisions. *Rockwin Corp. v. Kincaid*, 124 Ga. App. 570, 184 S.E.2d 509 (1971).

Transferor-transferee relationship arising out of judicial sale is governed by Article 9 on secured transactions and not by "shelter" provision of Code § 2-403(1). In *re Dennis Mitchell Indus., Inc.*, 280 F. Supp. 433 (E.D. Pa. 1968), *rev'd* on other grounds, 419 F.2d 349 (3d Cir. Pa. 1969).

Rejecting the contention of a buyer of an automobile from a dealer without notice of a prior security interest that UCC § 2-403(1) provided an escape from the prior security interest, the court held that UCC § 9-306(2) which provides for the continuation of the security interest except when "this Article" provides otherwise limited any exceptions to those contained in Article 9. The court also noted that UCC § 2-403 provided the rights of "lien creditors are governed by the Articles on Secured Transactions." *National Shawmut Bank v. Jones*, 108 N.H. 386, 236 A.2d 484 (1967).

Since, under Pennsylvania law, the seller's right of rescission is not an absolute right but is subject to the right of a lien creditor who extended credit subsequent to the sale, and by virtue of § 70, sub c of the Bankruptcy Act, the trustee in bankruptcy has rights of lien creditor, the trustee in bankruptcy has superior rights to the proceeds from the sale of seller's goods, even if the sale of goods on credit has been induced by positive misrepresentation by the bankrupts, and the seller had attempted to rescind the sale. In *re Kravitz*, 278 F.2d 820 (3d Cir. Pa. 1960).

3. Persons protected.

Under UCC § 2-403(1)(d), good-faith purchaser of automobile for value took good title from one who had procured the vehicle by a fraudulent purchase. *Paschal v. Hamilton*, 363 So. 2d 1360 (Miss. 1978).

This section, if it were applicable, would seem to require a holding that a finance company repossessing an automobile was liable in conversion to one who had purchased it from a dealer on whose lot it was

placed after repossession from a former purchaser who had defaulted, where the second purchaser had not defaulted, and the finance company through a course of conduct had cloaked the dealer with authority to sell the car, as far as the public was concerned, even though the conditional sale agreement with the first purchaser had been recorded. *Budget Plan, Inc. v. Savoy*, 336 Mass. 322, 145 N.E.2d 710 (1957).

4. —Good faith purchaser.

In action by unpaid credit seller of oil supplies to debtor against bank, which held perfected security interest in debtor's oil inventory, for lack of good faith in disposing of part of such inventory, court held (1) that under UCC § 2-702(3), plaintiff's right to reclaim oil supplies sold to debtor was subject to bank's right to dispose of such supplies, which were collateral for bank's loan to debtor, as good-faith purchaser for value under UCC § 2-403(1); (2) that under UCC § 1-201(44)(b), bank had given value for debtor's oil inventory which bank obtained under after-acquired property clause in debtor's security agreement; (3) that UCC definition of good-faith purchaser did not, expressly or impliedly, include as element of such definition lack of knowledge of third-party claims, since good faith is merely defined in UCC § 1-201(19) as "honesty in fact in transaction concerned"; and (4) that under circumstances of case, bank's knowledge that plaintiff was unpaid credit seller to debtor did not impair bank's good faith in disposing of debtor's oil inventory (collateral) to satisfy debtor's obligation to bank. *Shell Oil Co. v. Mills Oil Co.*, 717 F.2d 208 (5th Cir. 1983).

In interpleader action by bailee of zinc, where evidence showed (1) that bailor, who had stored 300 tons of zinc with bailee, ordered bailee to release all of it to bailor's purchaser, (2) that bailor's purchaser then sold such zinc to alleged bona-fide subpurchaser and ordered bailee to release zinc to subpurchaser, (3) that after bailee had delivered 40 tons to subpurchaser, bailor learned of original purchaser's insolvency and ordered bailee to stop delivery to original purchaser, and (4) that on the same day, subpurchaser also ordered bailee to deliver remainder of

such zinc (260 tons) to it, district court denied bailor's motion for summary judgment on its alleged right under UCC §§ 7-504(4) and § 2-705(1) and (2) to stop delivery of zinc, since (1) bailor failed to show, within meaning of UCC § 2-705(2)(b), that bailee had not acknowledged that it was holding the zinc for the subpurchaser, and (2) bailor also had failed to show, within meaning of UCC § 2-705(2)(d), that there had been no negotiation to subpurchaser of any negotiable document of title covering the zinc (applying Ill UCC; also holding that subpurchaser's claim of bonafide purchase was not available to it under UCC § 2-702(3) or § 2-403(1)). *Ceres Inc. v. ACLI Metal & Ore Co.*, 451 F. Supp. 921 (N.D. Ill. 1978).

Where (1) lessor entered into oral lease-purchase agreement with lessee for lease of truck scales under which lessee had option, at end of lease period, to purchase scales for one dollar, (2) lessee, after obtaining possession of scales, sold them to one of the defendants who, in turn, resold them two days later to his codefendant, (3) both defendants, before buying scales, made check of county records which showed no lien or other encumbrance on scales, and (4) both defendants were not aware that lessee did not own scales, court held (1) that "transaction of purchase" within meaning of UCC § 2-403(1) occurred when lessee sold scales to first defendant, and (2) under circumstances of case, both defendants were good-faith purchasers for value and thus acquired, as against lessor, good title to scales under UCC § 2-403(1), dealing with power of person with voidable title (lessee) to transfer good title to good-faith purchaser for value. *United Rd. Mach. Co. v. Jasper*, 568 S.W.2d 242 (Ky Ct. App. 1978).

Under UCC § 2-403(1)(d), where title to property is obtained by fraud from a deceived owner, in a case where the deceived owner actually intended to transfer possession of the property to the one who committed the fraud, and the one who committed the fraud later sells the property to a third party who has no notice, either actual or constructive, of the true owner's interest in the property, the title of the innocent third party, and of those

who purchased from him, is paramount to the title of the true owner. *Arena Auto Auction v. Schmerler Ford, Inc.*, 60 Ill. App. 3d 484, 377 N.E.2d 43 (1st Dist. 1978).

In action for seller's breach of warranty of good title to motor home purchased by plaintiff, where (1) original owner of home rented it for 13 days to thief who "drove off into the sunset" and was never again seen by owner, (2) thief thereafter obtained Alabama registration for home, and also Nebraska and Indiana certificates of title therefor, before trading it in to defendant dealer in Indiana as part payment for truck and trailer, (3) plaintiff purchased home from defendants, who gave plaintiff certificate of title thereto, (4) Indiana state police seized home from plaintiff and surrendered it to original owner's insurer, (5) home's serial number proved to have been stolen and (6) such false identification number appeared on all documents respecting home that thief had obtained in Alabama, Nebraska, and Indiana, court held (1) that rental transaction between original owner and thief constituted a "purchase" under UCC §§ 2-403(1) and § 1-201(32), since thief had acquired possessory interest in home by renting it, (2) thief did not transfer good title to defendant, as good-faith purchaser for value, since thief's title to home was void and not voidable under UCC § 2-403(1); (4) since defendant had no good title to convey to plaintiff, defendant breached its warranty of title under UCC § 2-31 and (5) evidence supported damages awarded plaintiff under UCC § 2-714(2) and (3). *McDonald's Chevrolet, Inc. v. Johnson*, 176 Ind. App. 399, 376 N.E.2d 106 (1978).

Although seller of automobile, who was ostensibly individual in automobile business and who sold automobile to good faith purchaser, had facially valid Mississippi title, ultimately based upon Alabama tag receipt issued pursuant to forged bill of sale, seller did not have "voidable title" such that he could transfer good title to good faith purchaser under UCC § 2-403(1); title remained in insurance company that obtained valid title subsequent to paying Florida dealer's loss. *Allstate Ins. Co. v. Estes*, 345 So. 2d 265 (Miss. 1977).

Defendant was properly convicted of receiving stolen goods, notwithstanding defendant's claim that third party, who acquired television set by fraud, passed valid title to him as good faith purchaser for value under UCC § 2-403(1), where there was evidence that defendant had conspired with third party to defraud merchant in acquiring television set and, thus, defendant was not good faith purchaser. *Sacks v. State*, 172 Ind. App. 185, 360 N.E.2d 21 (1977), reh'g denied, 172 Ind. App. 185, 361 N.E.2d 190 (1977).

At common law, if sale of goods was on credit, all incidents of ownership passed to buyer, and seller merely had claim for purchase price against buyer but no rights to goods sold. However, if sale was for cash, title to goods did not pass until purchase price was paid, and since buyer did not have title until goods were paid for, he could not pass title to third party, and lienholder or attaching creditor obtained no interest in goods. The Uniform Commercial Code in UCC § 2-403(1), has changed this rule by favoring good-faith purchaser over aggrieved seller, and defaulting buyer under UCC § 2-507(2) has power to transfer title to good-faith purchaser, even though buyer lacks right to do so. *GECC v. Tidwell Indus., Inc.*, 115 Ariz. 362, 565 P.2d 868 (1977).

Notwithstanding subsequent purchaser did not know that intermediate seller's title was voidable due to intermediate seller's obtaining truck on basis of check which was dishonored, subsequent purchaser did not have good title against original seller by status of "good faith purchaser for value" under UCC §§ 1-201(19), 1-201(44) and 2-403, where subsequent purchaser knew that intermediate seller was sophisticated about value of automotive equipment, subsequent purchaser had just received three dishonored checks from intermediate seller, subsequent purchaser had no reason to believe that intermediate seller would give equipment worth \$13,500 or more to settle debt of \$9,100, and subsequent purchaser let intermediate seller retain possession of truck. *Graves Motors, Inc. v. Docar Sales, Inc.*, 414 F. Supp. 717 (E.D. La. 1976).

In action by seller to recover possession of racing vehicle from third party after

seller delivered vehicle to buyer and bank refused to honor "certified draft" which seller received from buyer as payment for vehicle, although buyer had power to transfer vehicle to "good faith purchaser for value" under UCC § 2-403, third party had burden of proving that he was such purchaser and trial court erred in granting summary judgment where there was issued of fact as to third party's status as "good faith purchaser for value." *Landrum v. Armbruster*, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

Judgment debtor, who, prior to levy of execution, sold mobile home to mobile home dealer, who in turn sold to bona fide purchaser for value who had financed purchase through a Federal Credit Union, held at least "voidable title", and thus under UCC § 2-403, purchaser received title which was immune from attack by later levy. *Flemming v. Thompson*, 343 A.2d 599 (Del. 1975).

In determining whether art objects held on consignment by art gallery were part of the gallery's "stock-in-trade" subject to personal property tax, fact that gallery could pass legal title to consigned items sold could not be regarded as incident of ownership since, as one entrusted with goods, it must of necessity pass legal title to good faith purchasers under UCC § 2-403(2). *District of Columbia v. Powers Gallery, Inc.*, 335 A.2d 244 (D.C. 1975).

Under UCC § 9-105(1)(i), a secured party under Article 9 is a "purchaser" within meaning of UCC § 1-201(33); thus, where credit corporation had prior valid security interest in automobile dealer's inventory, where automobile wholesaler sold and delivered used cars and trucks to dealer with unencumbered certificates of title, but where dealer's checks in payment for vehicles were dishonored, under UCC § 2-403, dealer could transfer good title to "good faith purchaser for value," despite fact dealer tendered, for purchase of vehicles, checks which were subsequently dishonored, and, hence, credit corporations' security interest in automobiles delivered to dealer was superior to wholesaler's interest. *Swets Motor Sales, Inc. v. Praisner*, 236 N.W.2d 299 (Iowa 1975).

Where at time contract for purchase and sale of airplane was executed, buyer

received bill of sale executed by plaintiff, plaintiff placed buyer in position where he could pass title to good faith purchaser, even though bill of sale was to be used by buyer to obtain money or credit to release another plane from lien of security agreement. *J.C. Equip., Inc. v. Sky Aviation, Inc.*, 498 S.W.2d 73 (Mo. Ct. App. 1973).

Consignor who had entrusted mobile home to mobile home seller converted mobile home when he repossessed home which consignee had sold to good faith purchaser in ordinary course of business. *Williams v. Western Sur. Co.*, 6 Wash. App. 300, 492 P.2d 596 (1972), review denied, 80 Wash. 2d 1007 (1972).

A buyer who acquires property from one who has avoidable title must show that he was a "good faith purchaser for value", which requires "honesty in fact and the observance of reasonable commercial standards of fair dealing". *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

A licensed automobile wrecker and junk dealer who purchased a two-year-old station wagon from a thief for \$900 by placing \$300 down, and who sold the vehicle for \$1200 that same day, although he never obtained a bill of sale or registration certificate, was liable to the two owners, since the car had not been entrusted to a merchant who dealt in used cars and the defendant had not demonstrated that he was a "buyer in ordinary course of business" or that he was a "good faith purchaser for value". *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

Where the owner of a truck delivered it to a used car dealer to be sold and the dealer sold it to a bona fide purchaser for value and converted the purchase price, the owner is not entitled, to recover either the vehicle or its value from the purchaser, notwithstanding the latter never received license plates or a certificate of title, since under the circumstances he gave the dealer the power to transfer all of his rights to a buyer in the ordinary course of business within the purview of § 2-403, subsections (2) and (3) of the Uniform Commercial Code. *Gricar v. Bairhalter*, 11 Pa. D. & C.2d 723 (1958).

5. —Good faith purchaser: factors considered.

In an action by the owners of a valuable painting to recover the painting or its value, the defense of statutory estoppel (Uniform Commercial Code, § 2-403, subd [2], which provides that any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business) is not available to an art dealer who purchased the painting from a delicatessen employee who was not the owner of the painting and had no authority from the owner to dispose of it although he had obtained the painting from a person who rightfully had possession of it, since the art dealer was not a buyer in the ordinary course of business, defined as a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind (Uniform Commercial Code, § 1-201, subd [9]), inasmuch as the person from whom the dealer bought the painting was not an art dealer and never held himself out to be one and the dealer was not a person in good faith because he made no effort to verify whether the seller was the owner or authorized by the owner to sell the painting. *Porter v. Wertz*, 68 A.D.2d 141 (1st Dep't 1979), aff'd, 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981).

In an action by the owner of a valuable painting to recover the painting or its value, the defense of equitable estoppel, which provides that an owner may be estopped from setting up his own title and the lack of title in the vendor as against a bona fide purchaser for value where the owner has clothed the vendor with possession and other indicia of title, is not available to an art dealer who purchased the painting from a delicatessen employee who was not the owner and had no authority to dispose of it although he had obtained the painting from a person who rightfully had possession of it pursuant to an agreement with the true owner since the owner had consigned the painting for

display only and conferred no other indicia of ownership; moreover, the owner's conduct did not in any way contribute to the deception practiced on the purchaser, and the purchaser was not a purchaser in good faith since he made no inquiry or investigation as to the true ownership of the painting. *Porter v. Wertz*, 68 A.D.2d 141 (1st Dep't 1979), *aff'd*, 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981).

Purchaser who bought manufacturing equipment from lessee could not invoke protections of UCC § 2-403(2) in action by owner to recover possession or reasonable value of machinery, although purchaser acted in good faith in that he purchased equipment only after reasonable assurances of title and in belief that lessee owned equipment, where seller, by reason of this isolated transaction, did not meet standards of "merchant dealing in goods of this kind," and where purchaser's failure to request additional proof of ownership was not "commercially reasonable" approach to transaction (holding, however, that owner was estopped under common law to assert his title). *Tumber v. Automation Design & Mfg. Corp.*, 130 N.J. Super. 5, 324 A.2d 602 (L. Div. 1974).

Where automobile dealer obtained automobiles from auctioneer in exchange for two uncollectible checks issued by auctioneer to dealer, dealer was "purchaser for value" in exchanging previously issued check for cars in question, but had not acted in "good faith" and was not entitled, as against auctioneer's transferor, to retain possession of cars, since dealer knew or should have known that auctioneer was not true owner of automobiles in question. *National Car Rental v. Fox*, 18 Ariz. App. 160, 500 P.2d 1148 (1972).

Purchaser did not buy boat in good faith within UCC § 2-403 where he paid very low price therefor and where seller had nothing to indicate that he was owner of boat, where purchaser did not know seller and made no attempt to verify that he was owner. *Lane v. Honeycutt*, 14 N.C. App. 436, 188 S.E.2d 604 (1972), *cert. denied*, 281 N.C. 622, 190 S.E.2d 466 (1972).

A person can get good title from one with voidable title only if former is "good faith purchaser" under UCC § 2-403, and evidence was sufficient to support finding

that buyer was not acting in good faith when he "bought" boat with awareness that party with voidable title had signed name of purported owner on transfer of ownership papers. *Lane v. Honeycutt*, 14 N.C. App. 436, 188 S.E.2d 604 (1972), *cert. denied*, 281 N.C. 622, 190 S.E.2d 466 (1972).

Under "shelter principle" of Code § 2-403(1), good title of transferor rebounds to purchaser regardless of latter's good faith. *Linwood Harvestore, Inc. v. Cannon*, 427 Pa. 434, 235 A.2d 377 (1967).

Where the person purchasing goods with a bad check resells to third persons, the original vendor may prove that the transferee did not purchase in good faith as is evidenced by the fact that the goods thus resold appeared to be new but were sold at one half the regular price and the buyer making such resale did not have a bill of sale. *Hollis v. Chamberlin*, 243 Ark. 201, 419 S.W.2d 116 (1967).

A purchaser is not a buyer in good faith where he purchases camping equipment knowing it to be new and worth at least \$1,000 for a price of \$500, the purchase was made from strangers, the stranger had no bill of sale although he gave the purchaser a bill of sale and the purchaser did not ask any questions. *Hollis v. Chamberlin*, 243 Ark. 201, 419 S.W.2d 116 (1967).

One who employed another to purchase a car for him and who was present during the negotiations between the latter and a used car dealer for a certain automobile was not an innocent purchaser in good faith of the car from the person whom he had employed, where the latter had no paper title to the car and the purchaser made no inquiry as to whom the title belonged, and hence the purchaser's rights were no greater than those of his immediate transferor. *Kovatch v. Hyde*, 47 Luz. Legal Reg. Rep. 13 (Pa. 1957).

6. —Buyer in ordinary course.

In an action by the owners of a valuable painting to recover the painting or its value, the defense of statutory estoppel (Uniform Commercial Code, § 2-403, subd [2], which provides that any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the

entruster to a buyer in the ordinary course of business) is not available to an art dealer who purchased the painting from a delicatessen employee who was not the owner of the painting and had no authority from the owner to dispose of it although he had obtained the painting from a person who rightfully had possession of it, since the art dealer was not a buyer in the ordinary course of business, defined as a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind (Uniform Commercial Code, § 1-201, subd [9]), inasmuch as the person from whom the dealer bought the painting was not an art dealer and never held himself out to be one and the dealer was not a person in good faith because he made no effort to verify whether the seller was the owner or authorized by the owner to sell the painting. *Porter v. Wertz*, 68 A.D.2d 141 (1st Dep't 1979), *aff'd*, 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981).

In action involving seller's petition to reclaim furniture sold to insolvent buyer, where (1) seller sold furniture to buyer which buyer accepted, (2) at time of delivery, seller did not know that buyer was insolvent, (3) two days after learning of buyer's insolvency, seller sent telegram to buyer demanding rescission under UCC § 2-702 and, after receiver was appointed for buyer, filed petition to reclaim goods, (4) bankruptcy court denied petition on ground that bankruptcy trustee was entitled to goods under § 70(c) of Bankruptcy Act and that UCC § 2-702 conflicted with §§ 64 and 67(c) of Bankruptcy Act, and (5) district court affirmed bankruptcy court's ruling, court held (1) that issue was whether seller could reclaim under UCC § 2-702(2) when seller's demand followed filing of bankruptcy petition, (2) that under § 70(c) of Bankruptcy Act, bankruptcy trustee acquired rights of hypothetical lien creditor, (3) that buyer was insolvent when it received goods from seller, (4) that seller had discovered such fact and made demand for reclamation within ten days after buyer received goods, as required by UCC § 2-702(2), (5)

that state law controlled rights of bankruptcy trustee as hypothetical lien creditor, (6) that reference in UCC § 2-702(3) to rights of lien creditors directs that those rights be found exclusively in UCC Article 2 or in articles to which Article 2 refers, (7) that lien creditor was not "purchaser for value" under UCC § 2-403 and that bankruptcy trustee acquired no rights under UCC § 2-403 as against reclaiming seller, (8) that under facts of case, bankruptcy trustee also acquired no rights under UCC §§ 2-326 or 9-301, and no lien creditor could cut off seller's right to reclaim under UCC § 2-702(2), (9) that by same token, § 70(c) of Bankruptcy Act did not give trustee right to cut off seller's right to reclaim, (10) that UCC § 2-702(2) created something other than a security interest, (11) that UCC § 2-702(2) was not an unlawful priority that conflicted with § 64 of Bankruptcy Act, (12) that UCC § 2-702(2) was not lien subject to invalidation as statutory lien under § 67(c) of Bankruptcy Act, and (13) that reclamation under UCC § 2-702(2) in instant case did not constitute invalid preferential transfer under § 60 of Bankruptcy Act. *Bassett Furn. Indus., Inc. v. Wear*, 583 F.2d 992 (8th Cir. Mo. 1978).

Where dealer assigned title to used car to salesman who used title as collateral to obtain bank loan; where bank perfected security interest in car by timely filing, but such lien, not being required by state law to be recorded on certificate of title in order to be perfected, was not so recorded; and where car was thereafter sold for cash to buyer who took possession of vehicle, in bank's replevin action to obtain possession of car, (1) buyer's claim that bank's perfected security interest was cut off by UCC § 2-403(2) could not be sustained, since bank was not owner of car and thus could not be its "entruster" under UCC § 2-403(2); but (2) since nothing in comments to UCC Art 9 requires "created by his seller" limitation in UCC § 9-307(1) to be insurmountable barrier to good faith acquisition of preencumbered property from dealer who was instrumental in creating encumbrance on, and conflict of rights to, such property, buyer's right to possession of car was protected by "created by his seller" provision in UCC § 9-307(1), on

theory that same entity (dealer) both created security interest in car and later sold car to "buyer in ordinary course of business," and bank's security interest in car therefore terminated on its sale to buyer. *Adams v. City Nat'l Bank & Trust Co.*, 565 P.2d 26 (Okla. 1977).

Where bank sued automobile dealer to recover on promissory notes given to bank by dealer and sought to impose constructive trust on dealer's assets to secure payment of notes, on theory that dealer had fraudulently obtained loans from bank and used funds therefrom to purchase such assets; where dealer's assets included automobile that dealer had sold to buyer in violation of court order prohibiting sale or transfer of such vehicle or any other assets of dealer; where buyer of automobile, while unaware of such restraining order, sold it to third person and then, after acquiring knowledge of restraining order, bought it back from such person to honor warranty of title to vehicle; and where such automobile was thereafter sold under court order and proceeds of sale were claimed by both bank and buyer, (1) buyer, on buying automobile from dealer, was purchaser in ordinary course of business under UCC § 2-403(2) and UCC § 2-403(3), since dealer at that time was engaged in business of buying and selling automobiles; (2) title to proceeds of court-ordered sale of such vehicle vested in buyer; (3) doctrine of *lis pendens* did not preclude buyer from asserting interest in such automobile superior to bank's interest therein, since *lis pendens* doctrine is not exception to Uniform Commercial Code; and (4) buyer's buying automobile back from third person with knowledge of bank's claim to such vehicle did not affect buyer's right to proceeds of court-ordered sale of vehicle, since vehicle was merely reacquired by buyer to make good his warranty of title thereto where such title was in question. *Riverside Nat'l Bank v. Law*, 564 P.2d 240 (Okla. 1977).

Where manufacturer of modular home, or house trailer, sold home to dealer who, in turn, resold it to defendant buyers, installed it on land owned by buyers, and then absconded with purchase money, and where manufacturer brought suit against

buyers claiming that it, as unpaid holder of certificate of title to home, had title to home as against claim of buyers, trial court properly ruled in favor of title claim of buyers since under UCC § 2-403(2), (1) dealer was merchant who dealt in goods of that kind, (2) defendants were buyers in ordinary course of business, and (3) manufacturer's entrusting of home to dealer gave dealer power to transfer all rights of manufacturer to buyers (holding that buyers were entitled to have their ownership interest in home evidenced by certificate of title). *Fuqua Homes, Inc. v. Evanston Bldg. & Loan Co.*, 52 Ohio App. 2d 399, 370 N.E.2d 780 (1977).

First buyer of wrecker truck entrusted truck to dealer under UCC § 2-403 so as to allow dealer to pass title to second buyer who was a "buyer in ordinary course of business" under UCC § 1-201 and who took possession of truck and extracted from dealer a transfer of registration and warranty of title, where first buyer left truck with dealer or dealer's apparent agent after paying for it without taking possession. *Simson v. Moon*, 137 Ga. App. 82, 222 S.E.2d 873 (1975), cause dismissed, 236 Ga. 786, 225 S.E.2d 314 (1976).

Under UCC §§ 2-403(1) and 2-403(2), where automobile dealer purchased stolen automobile for value from individual who had innocently purchased from thief, dealer did not purchase from dealer in ordinary course of business, did not obtain good title, and was therefore not entitled to recover automobile from police following impoundment; however, dealer could have transferred good title to an innocent bona fide purchaser for value by means of a completed sale. *Johnny Dell, Inc. v. New York State Police*, 84 Misc. 2d 360 (1975).

In action by manufacturer of mobile home against dealer and purchaser of unit arising when dealer failed to pay manufacturer purchase price, mobile home fell within definition of "goods" under UCC § 2-105 and purchaser was entitled to protection from manufacturer's claim under UCC § 9-307(a) where purchaser, who took title from merchant entrusted with goods under UCC §§ 2-401 and 2-403, qualified as buyer in ordinary course of business under UCC § 1-201(9), notwith-

standing purchaser's failure to request certificate of title of purchase. *Apeco Corp. v. Bishop Mobile Homes, Inc.*, 506 S.W.2d 711 (Tex. Civ. App. 1974), writ ref'd n.r.e., (June 12, 1974).

Evidence established that entruster entrusted possession of copying machine to merchant, now bankrupt, giving him power to transfer all rights of entruster to buyer in ordinary course of business under UCC § 2-403(2) and (3) and fact that price was not specified was of no consequence under UCC § 2-305(1). *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Where plaintiff purchased trailers from manufacturer, retained title and parked them on dealer's used car and truck lot, under arrangement that whenever dealer found buyer plaintiff was to bring in certificate of origin and indorse it over to buyer, under mistaken impression that dealer could not register title without such certificate, dealer sold trailers to buyers but failed to pay plaintiff, buyers financed purchases with defendant bank and bank foreclosed on its security interest in trailers after buyers defaulted, whether plaintiff could recover against bank for conversion depended on whether consignment of trailers was intended as security; if plaintiff's retention of title was limited to reservation of security interest, he could not prevail against bank since he did not retain possession of collateral nor did debtor sign security agreement describing collateral as required by UCC § 9-203(1); if consignment was not intended as security and if dealer was not "merchant who deals in goods of that kind" or if buyers were not "buyers in ordinary course of business" within meaning of UCC § 2-403(2) plaintiff would prevail against bank since buyers would not have obtained good title and could not have created security interest in bank. *Nauman v. First Nat'l Bank*, 50 Mich. App. 41, 212 N.W.2d 760 (1973).

Where dealer in new and used cars sold used automobiles to used car dealer but instructed him not to dispose of the cars until the latter's check had cleared the bank, such transaction constituted an entrustment within the meaning of the code and the seller's instructions did not effect

the rights of a buyer in the ordinary course of business without knowledge of the limitation. *Sherman v. Roger Kresge, Inc.*, 67 Misc. 2d 178 (1971), aff'd, 40 A.D.2d 766, 336 N.Y.S.2d 1015 (3d Dep't 1972).

When one purchases an auto from auto dealer's inventory in ordinary course of business without notice of trust security agreement between dealer and financial institution, purchaser acquires title free of bank's trust security lien. *Correria v. Orlando Bank & Trust Co.*, 235 So. 2d 20 (Fla. App. 1970).

Where person purchases automobile in good faith and without knowledge of any title defect or security interest of third party from used car dealer who has been entrusted with its possession, he is a "buyer in the ordinary course of business," even though sale was made without transfer of certificate of title. *Medico Leasing Co. v. Smith*, 457 P.2d 548 (Okla. 1969), but see, *Mitchell Coach Mfg. Co. v. Stephens*, 19 F. Supp. 2d 1227 (N.D. Okla. 1998).

Buyer purchasing tractors from merchant-entrustee, without notice and in ordinary course of business, takes free from lien of prior-recorded chattel mortgage not only as to cash paid and trade-in allowance, but also as to that part of purchase price represented by merchant's cancellation of pre-existing debt to buyer. *GECC v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Or. 1969).

A "buyer in the ordinary course of business" of an automobile from a dealer takes title superior to that of the repossessing lien creditor who had stored the automobile with the dealer, since the Code § 2-403 relating to entrustment of possession is most applicable to a repossessing lienholder with right of sale. *Commercial Credit Corp. v. Associates Disct. Corp.*, 246 Ark. 118, 436 S.W.2d 809 (1969).

The code provision defining "entrusting" and providing that any entrusting of goods to a merchant who deals in goods of that kind gives him the power to transfer all the rights of the entruster to a buyer in the ordinary course of business is applicable to sales between merchants. The purpose of Code § 2-403 affording this protection is to protect a person from a

third-party interest in goods purchased from the general inventory of a merchant regardless of that merchant's actual authority to sell these goods. Therefore, the section was not expressly or by implication restricted to the sale by a merchant to a member of the consumer public. However, the court held that one merchant purchasing automobiles from another merchant was not a buyer in the ordinary course of business where the purchasing merchant was chargeable with knowledge that there was a certificate of title registration law for the purchased automobiles. *Mattek v. Malofsky*, 42 Wis. 2d 16, 165 N.W.2d 406 (1969).

Where plaintiff bought truck from a merchant in the ordinary course of business, without knowledge of a security agreement entered into by the seller and later assigned to a bank, in repossessing the truck after the sale, bank was liable for conversion and damages. *Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338 (1968).

The purchaser of a truck was entitled to damages for conversion of his property when a bank "repossessed" the vehicle upon the seller's failure to meet the obligation for which the truck had been pledged as security. The court pointed out that plaintiff was a buyer in the ordinary course of business, that seller was a merchant under provisions of the Uniform Commercial Code, and that possession of the tractor by the truck company entitled it to transfer title in the ordinary course of its business. *Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338 (1968).

When the goods are delivered to a dealer as inventory, his sale is effective under § 2-403 to transfer title to a buyer in the ordinary course of business. *Humphrey Cadillac & Oldsmobile Co. v. Sinard*, 85 Ill. App. 2d 64, 229 N.E.2d 365, 4 U.C.C. Rep. Serv. 640 (1st Dist. 1967).

Once a buyer acquires title, by virtue of UCC § 2-403 subsequent purchasers from him benefit by his title without regard to whether they themselves would qualify as buyers in ordinary course of business. *Linwood Harvestore, Inc. v. Cannon*, 427 Pa. 434, 235 A.2d 377 (1967).

One who acquires property from a merchant who was entrusted with possession

of the goods must demonstrate that he was "a buyer in ordinary course of business", and this term as defined in UCC § 1-201(9) is more restrictive than the term "good faith purchaser for value". *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

The fact that an employee of an automobile distributor was instructed not to sell to a given dealer did not destroy the employee's power to do so nor preclude a buyer from the dealer from being a buyer in ordinary course. *Humphrey Cadillac & Oldsmobile Co. v. Sinard*, 85 Ill. App. 2d 64, 229 N.E.2d 365 (1st Dist. 1967).

Where a wholesaler entrusts a retail dealer in such property with furniture and appliances under a "floor-plan arrangement" and such property was subsequently purchased in the ordinary course of business from the retailer, the legal title and right or claim to such property had passed out of the wholesaler and into the purchasers at retail, and the wholesaler could not thereafter bring an action in trover against the retailer, alleging unlawful conversion. *Charles S. Martin Distrib. Co. v. Banks*, 111 Ga. App. 538, 142 S.E.2d 309 (1965).

An acceptance company which had made loans to a dealer was required to look to the dealer for repayment, rather than to a new automobile in possession of one who had purchased it from the dealer in the ordinary course of business, paying the full purchase price therefor, notwithstanding that the acceptance company had filed a blanket security agreement executed by the automobile dealer, who had also executed and delivered to the acceptance company a trust receipt agreement describing the automobile in question. *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961).

Recognized automobile dealer has power to transfer an automobile held in inventory in ordinary course of business free of any security interest. *Murphy v. Plymouth Nat'l Bank*, 22 Mass. App. Dec. 36 (1961).

Where notwithstanding that buyer who bought an automobile from the dealer out of inventory and in ordinary course of business had paid the full purchase price, the dealer thereafter fraudulently ex-

ecuted a collateral mortgage with the identical automobile as security in favor of a bank with whom dealer had an existing floor plan agreement, the transaction between the dealer and the bank was void as to the buyer. *Weisel v. McBride*, 191 Pa. Super. 411, 156 A.2d 613 (1959).

7. —Merchants.

In an action by the owners of a valuable painting to recover the painting or its value, the defense of statutory estoppel (Uniform Commercial Code, § 2-403, subd [2], which provides that any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business) is not available to an art dealer who purchased the painting from a delicatessen employee who was not the owner of the painting and had no authority from the owner to dispose of it although he had obtained the painting from a person who rightfully had possession of it, since the art dealer was not a buyer in the ordinary course of business, defined as a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind (Uniform Commercial Code, § 1-201, subd [9]), inasmuch as the person from whom the dealer bought the painting was not an art dealer and never held himself out to be one and the dealer was not a person in good faith because he made no effort to verify whether the seller was the owner or authorized by the owner to sell the painting. *Porter v. Wertz*, 68 A.D.2d 141 (1st Dep't 1979), *aff'd*, 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981).

Where bank sued automobile dealer to recover on promissory notes given to bank by dealer and sought to impose constructive trust on dealer's assets to secure payment of notes, on theory that dealer had fraudulently obtained loans from bank and used funds therefrom to purchase such assets; where dealer's assets included automobile that dealer had sold to buyer in violation of court order prohibiting sale or transfer of such vehicle or any other assets of dealer; where buyer of

automobile, while unaware of such restraining order, sold it to third person and then, after acquiring knowledge of restraining order, bought it back from such person to honor warranty of title to vehicle; and where such automobile was thereafter sold under court order and proceeds of sale were claimed by both bank and buyer, (1) buyer, on buying automobile from dealer, was purchaser in ordinary course of business under UCC § 2-403(2) and UCC § 2-403(3), since dealer at that time was engaged in business of buying and selling automobiles; (2) title to proceeds of court-ordered sale of such vehicle vested in buyer; (3) doctrine of *lis pendens* did not preclude buyer from asserting interest in such automobile superior to bank's interest therein, since *lis pendens* doctrine is not exception to Uniform Commercial Code; and (4) buyer's buying automobile back from third person with knowledge of bank's claim to such vehicle did not affect buyer's right to proceeds of court-ordered sale of vehicle, since vehicle was merely reacquired by buyer to make good his warranty of title thereto where such title was in question. *Riverside Nat'l Bank v. Law*, 564 P.2d 240 (Okla. 1977).

Where manufacturer of modular home, or house trailer, sold home to dealer who, in turn, resold it to defendant buyers, installed it on land owned by buyers, and then absconded with purchase money, and where manufacturer brought suit against buyers claiming that it, as unpaid holder of certificate of title to home, had title to home as against claim of buyers, trial court properly ruled in favor of title claim of buyers since under UCC § 2-403(2), (1) dealer was merchant who dealt in goods of that kind, (2) defendants were buyers in ordinary course of business, and (3) manufacturer's entrusting of home to dealer gave dealer power to transfer all rights of manufacturer to buyers (holding that buyers were entitled to have their ownership interest in home evidenced by certificate of title). *Fuqua Homes, Inc. v. Evanston Bldg. & Loan Co.*, 52 Ohio App. 2d 399, 370 N.E.2d 780 (1977).

UCC § 2-403 is intended to protect persons who buy out of inventory from merchants. *Northwestern Nat'l Bank v. Maher*, 258 N.W.2d 623 (Minn. 1977).

Under UCC §§ 2-703 and 2-705 seller's sale of appliances to buyer on credit empowered buyer to pass good title to third party by delivery of appliances, under UCC §§ 2-312, 2-401 and 2-403 buyer did not breach any implied warranty of title when appliances were delivered to third party, and under UCC §§ 2-401(2) and 2-703 third party had no obligation to pay seller or return appliances although buyer failed to pay seller. *Mamber v. Levin*, 4 Mass. App. Ct. 157, 344 N.E.2d 192 (1976).

Purchaser who bought manufacturing equipment from lessee could not invoke protections of UCC § 2-403(2) in action by owner to recover possession or reasonable value of machinery, although purchaser acted in good faith in that he purchased equipment only after reasonable assurances of title and in belief that lessee owned equipment, where seller, by reason of this isolated transaction, did not meet standards of "merchant dealing in goods of this kind," and where purchaser's failure to request additional proof of ownership was not "commercially reasonable" approach to transaction (holding, however, that owner was estopped under common law to assert his title). *Tumber v. Automation Design & Mfg. Corp.*, 130 N.J. Super. 5, 324 A.2d 602 (L. Div. 1974).

Where plaintiff purchased trailers from manufacturer, retained title and parked them on dealer's used car and truck lot, under arrangement that whenever dealer found buyer plaintiff was to bring in certificate of origin and indorse it over to buyer, under mistaken impression that dealer could not register title without such certificate, dealer sold trailers to buyers but failed to pay plaintiff, buyers financed purchases with defendant bank and bank foreclosed on its security interest in trailers after buyers defaulted, whether plaintiff could recover against bank for conversion depended on whether consignment of trailers was intended as security; if plaintiff's retention of title was limited to reservation of security interest, he could not prevail against bank since he did not retain possession of collateral nor did debtor sign security agreement describing collateral as required by UCC § 9-203(1); if consignment was not in-

tended as security and if dealer was not "merchant who deals in goods of that kind" or if buyers were not "buyers in ordinary course of business" within meaning of UCC § 2-403(2) plaintiff would prevail against bank since buyers would not have obtained good title and could not have created security interest in bank. *Nauman v. First Nat'l Bank*, 50 Mich. App. 41, 212 N.W.2d 760 (1973).

Where plaintiff automobile dealer sold car to second dealer who in turn sold car to defendant buyer, who 15 years previously had had experience as automobile dealer, transaction was not "between merchants" as contemplated by Code § 2-104(3), so as to charge buyer with "knowledge or skill of merchants"; and, although buyer accepted automobile without instrument of title as required by Motor Vehicle Title and Registration Law, and accepted new automobile from non-franchised dealer without receiving manufacturer's certificate of origin to that vehicle, buyer took title to car free from plaintiff dealer's claim, under Code § 2-403(2) and (3). *Couch v. Cockroft*, 490 S.W.2d 713 (Tenn. Ct. App. 1972).

8. Defects cured; mistake.

Goods were erroneously shipped by customs broker contrary to instructions of owner-importer; textile finisher received goods for processing on behalf of owner; held, there was no "entrusting" within UCC provision relating to powers of merchant to whom goods were entrusted. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. N.C. 1970).

9. —Bad check.

Where meat packer's operations were financed by secured creditor who had properly perfected security interest in meat packer's assets, including after-acquired property, where cattle sellers delivered cattle to meat packer on "grade and yield basis" (cattle were first slaughtered, chilled and then graded before purchase price was calculated), where checks were subsequently issued to sellers, but before checks were paid, secured party, believing itself to be insecure, refused to advance more funds to meat packer for operation of plant, and where meat packer then filed petition in bankruptcy and cattle sellers

sought to reclaim cattle or right to proceeds from sale of slaughtered meat: (1) course of conduct prescribed by Packers and Stockyards Act and regulations issued thereunder, coupled with undisputed intent of cattle sellers, compelled conclusion that sale of cattle was cash and not credit transaction; (2) strict application of ten-day limitation on right to reclaim cattle for some substantial period of time after filing of petition for bankruptcy was warranted inasmuch as such limitation is absolute; (3) however slight or tenuous or marginal was sellers' interest, it was necessarily great enough to permit attachment of secured party's lien; (4) even if evidence had established that secured party knew of meat packer's nonpayment its status as good faith purchaser would be unaffected; and (5) the perfected security interest was superior to the interest of the seller. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Notwithstanding subsequent purchaser did not know that intermediate seller's title was voidable due to intermediate seller's obtaining truck on basis of check which was dishonored, subsequent purchaser did not have good title against original seller by status of "good faith purchaser for value" under UCC §§ 1-201(19), 1-201(44) and 2-403, where subsequent purchaser knew that intermediate seller was sophisticated about value of automotive equipment, subsequent purchaser had just received three dishonored checks from intermediate seller, subsequent purchaser had no reason to believe that intermediate seller would give equipment worth \$13,500 or more to settle debt of \$9,100, and subsequent purchaser let intermediate seller retain possession of truck. *Graves Motors, Inc. v. Docar Sales, Inc.*, 414 F. Supp. 717 (E.D. La. 1976).

In action by seller to recover possession of racing vehicle from third party after seller delivered vehicle to buyer and bank refused to honor "certified draft" which seller received from buyer as payment for vehicle, although buyer had power to transfer vehicle to "good faith purchaser for value" under UCC § 2-403, third party had burden of proving that he was such

purchaser and trial court erred in granting summary judgment where there was issued of fact as to third party's status as "good faith purchaser for value." *Landrum v. Armbruster*, 28 N.C. App. 250, 220 S.E.2d 842 (1976).

Under UCC § 9-105(1)(i), a secured party under Article 9 is a "purchaser" within meaning of UCC § 1-201(33); thus, where credit corporation had prior valid security interest in automobile dealer's inventory, where automobile wholesaler sold and delivered used cars and trucks to dealer with unencumbered certificates of title, but where dealer's checks in payment for vehicles were dishonored, under UCC § 2-403, dealer could transfer good title to "good faith purchaser for value," despite fact dealer tendered, for purchase of vehicles, checks which were subsequently dishonored, and, hence, credit corporations' security interest in automobiles delivered to dealer was superior to wholesaler's interest. *Swets Motor Sales, Inc. v. Pruhsner*, 236 N.W.2d 299 (Iowa 1975).

If passage of title is dependent upon the performance of some condition subsequent, one in possession of an article has a voidable title which can be transferred to a bona fide purchaser for value even if the transferor was deceived as to the identity of the purchaser, the delivery was in exchange for a check later dishonored, or procured through a fraud punishable as larcenous under the criminal law. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

Where the person purchasing goods with a bad check resells to third persons, the original vendor may prove that the transferee did not purchase in good faith as is evidenced by the fact that the goods thus resold appeared to be new but were sold at one half the regular price and the buyer making such resale did not have a bill of sale. *Hollis v. Chamberlin*, 243 Ark. 201, 419 S.W.2d 116 (1967).

10. —Fraud.

In action by wholesale seller against retailer-buyer for conversion of carpeting, in which (1) seller's salesman validly sold buyer carpeting worth \$24,000 and buyer made payment with four checks, one of which was returned for insufficient funds, (2) salesman improperly obtained buyer's

returned check and one of buyer's four other checks, instructed buyer to issue two checks for \$10,000 to corporation that was salesman's alter ego, and appropriated proceeds of such checks, (3) salesman later diverted shipment of carpeting worth \$76,000 from party to whom wholesaler had sold it, delivered such shipment to buyer, and appropriated \$10,000 downpayment that buyer made on such shipment, (4) buyer eventually returned part of diverted shipment to wholesaler and sold remainder, which was worth \$30,000, and (5) wholesaler sought (a) \$5,000 spent to recover returned carpeting, (b) \$30,000 for carpeting that buyer had sold from diverted shipment, and (c) \$10,000 balance still due on carpeting that buyer had bought under valid contract with wholesaler's salesman, court held (1) that buyer, although misled by salesman into giving salesman two checks made out to corporation that was salesman's alter ego, nevertheless knew at that time that wholesaler was party to which buyer owed \$10,000 balance on buyer's valid carpet purchase from wholesaler, (2) that salesman had stolen diverted carpeting shipment from wholesaler, (3) that buyer had not acquired valid title to diverted carpeting, under UCC § 2-403(1)(d), since wholesaler had not dealt with its salesman in transaction of purchase, (4) that buyer also had not obtained valid title to diverted carpeting shipment, under entrustment provisions of UCC § 2-403(2) and (3), since wholesaler had not entrusted its salesman with such shipment, (5) that salesman's theft of diverted carpeting gave him void, instead of voidable, title to such carpeting which he could not pass on to even bona-fide purchaser, with result that wholesaler still had title to such carpeting, (6) that since buyer had converted part of diverted carpeting shipment by selling it, buyer was liable to wholesaler for such conversion, together with sum that wholesaler had spent to recover carpeting that buyer returned, and (7) that buyer's remedy, if any, was against salesman or his alter-ego corporation, in action under UCC § 2-312, for breach of implied warranty of title to carpeting in diverted shipment. *Textile Supplies, Inc. v. Garrett*, 687 F.2d 123 (5th Cir. 1982).

Where bank sued automobile dealer to recover on promissory notes given to bank by dealer and sought to impose constructive trust on dealer's assets to secure payment of notes, on theory that dealer had fraudulently obtained loans from bank and used funds therefrom to purchase such assets; where dealer's assets included automobile that dealer had sold to buyer in violation of court order prohibiting sale or transfer of such vehicle or any other assets of dealer; where buyer of automobile, while unaware of such restraining order, sold it to third person and then, after acquiring knowledge of restraining order, bought it back from such person to honor warranty of title to vehicle; and where such automobile was thereafter sold under court order and proceeds of sale were claimed by both bank and buyer, (1) buyer, on buying automobile from dealer, was purchaser in ordinary course of business under UCC § 2-403(2) and UCC § 2-403(3), since dealer at that time was engaged in business of buying and selling automobiles; (2) title to proceeds of court-ordered sale of such vehicle vested in buyer; (3) doctrine of *lis pendens* did not preclude buyer from asserting interest in such automobile superior to bank's interest therein, since *lis pendens* doctrine is not exception to Uniform Commercial Code; and (4) buyer's buying automobile back from third person with knowledge of bank's claim to such vehicle did not affect buyer's right to proceeds of court-ordered sale of vehicle, since vehicle was merely reacquired by buyer to make good his warranty of title thereto where such title was in question. *Riverside Nat'l Bank v. Law*, 564 P.2d 240 (Okla. 1977).

In cattle buyer's action against bank for fraudulently misrepresenting to buyer that seller of cattle owned them and that buyer would receive clear title thereto if he bought such cattle and left them in seller's feed lot for specified period to be fattened for market, when in fact defendant held mortgage on all of seller's cattle and was in position to know that seller did not have enough cattle to cover both plaintiff's purchase and also purchases made by other persons, defendant's contention that "entrusting of possession" provision

of UCC § 2-403(2) barred judgment for plaintiff was rejected because defendant, at time of making its fraudulent misrepresentations, knew that buyer intended to leave cattle with seller to be fattened for market. Thus, defendant's misrepresentations pertained not only to time of sale of cattle to buyer, but also to subsequent period of feeding out of cattle, and "entrusting of possession" provision of UCC § 2-403(2) did not, as matter of law, preclude plaintiff's action. *Forrester v. State Bank*, 52 Ill. App. 3d 34, 363 N.E.2d 904 (3d Dist. 1977).

Defendant was properly convicted of receiving stolen goods, notwithstanding defendant's claim that third party, who acquired television set by fraud, passed valid title to him as good faith purchaser for value under UCC § 2-403(1), where there was evidence that defendant had conspired with third party to defraud merchant in acquiring television set and, thus, defendant was not good faith purchaser. *Sacks v. State*, 172 Ind. App. 185, 360 N.E.2d 21 (1977), reh'g denied, 172 Ind. App. 185, 361 N.E.2d 190 (1977).

Where notwithstanding that buyer who bought an automobile from the dealer out of inventory and in ordinary course of business had paid the full purchase price, the dealer thereafter fraudulently executed a collateral mortgage with the identical automobile as security in favor of a bank with whom dealer had an existing floor plan agreement, the transaction between the dealer and the bank was void as to the buyer. *Weisel v. McBride*, 191 Pa. Super. 411, 156 A.2d 613 (1959).

11. —Larceny.

Although seller of automobile, who was ostensibly individual in automobile business and who sold automobile to good faith purchaser, had facially valid Mississippi title, ultimately based upon Alabama tag receipt issued pursuant to forged bill of sale, seller did not have "voidable title" such that he could transfer good title to good faith purchaser under UCC § 2-403(1); title remained in insurance company that obtained valid title subsequent to paying Florida dealer's loss. *Allstate Ins. Co. v. Estes*, 345 So. 2d 265 (Miss. 1977).

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Under UCC §§ 2-403(1) and 2-403(2), where automobile dealer purchased stolen automobile for value from individual who had innocently purchased from thief, dealer did not purchase from dealer in ordinary course of business, did not obtain good title, and was therefore not entitled to recover automobile from police following impoundment; however, dealer could have transferred good title to an innocent bona fide purchaser for value by means of a completed sale. *Johnny Dell, Inc. v. New York State Police*, 84 Misc. 2d 360 (1975).

If passage of title is dependent upon the performance of some condition subsequent, one in possession of an article has a voidable title which can be transferred to a bona fide purchaser for value even if the transferor was deceived as to the identity of the purchaser, the delivery was in exchange for a check later dishonored, or procured through a fraud punishable as larcenous under the criminal law. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

If the title of a thief or his receiver is voidable title, the vendee acquires good title if the transaction occurs before notice or avoidance is given. *Hartford Accident & Indem. Co. v. Walston & Co.*, 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

12. Curative devices.

Under "shelter principle" of Code § 2-403(1), good title of transferor rebounds to purchaser regardless of latter's good faith. *Linwood Harvestore, Inc. v. Cannon*, 427 Pa. 434, 235 A.2d 377 (1967).

13. —Voidable title.

A salesman of wholesale carpeting could not have passed valid title to a shipment

of carpet, even to a good faith purchaser, since the salesman acquired only "void title" when he stole the carpet from the wholesaler. *Textile Supplies, Inc. v. Garrett*, 687 F.2d 123 (5th Cir. 1982).

Although seller of automobile, who was ostensibly individual in automobile business and who sold automobile to good faith purchaser, had facially valid Mississippi title, ultimately based upon Alabama tag receipt issued pursuant to forged bill of sale, seller did not have "voidable title" such that he could transfer good title to good faith purchaser under UCC § 2-403(1); title remained in insurance company that obtained valid title subsequent to paying Florida dealer's loss. *Allstate Ins. Co. v. Estes*, 345 So. 2d 265 (Miss. 1977).

Notwithstanding subsequent purchaser did not know that intermediate seller's title was voidable due to intermediate seller's obtaining truck on basis of check which was dishonored, subsequent purchaser did not have good title against original seller by status of "good faith purchaser for value" under UCC §§ 1-201(19), 1-201(44) and 2-403, where subsequent purchaser knew that intermediate seller was sophisticated about value of automotive equipment, subsequent purchaser had just received three dishonored checks from intermediate seller, subsequent purchaser had no reason to believe that intermediate seller would give equipment worth \$13,500 or more to settle debt of \$9,100, and subsequent purchaser let intermediate seller retain possession of truck. *Graves Motors, Inc. v. Docar Sales, Inc.*, 414 F. Supp. 717 (E.D. La. 1976).

Judgment debtor, who, prior to levy of execution, sold mobile home to mobile home dealer, who in turn sold to bona fide purchaser for value who had financed purchase through a Federal Credit Union, held at least "voidable title", and thus under UCC § 2-403, purchaser received title which was immune from attack by later levy. *Flemming v. Thompson*, 343 A.2d 599 (Del. 1975).

A person can get good title from one with voidable title only if former is "good faith purchaser" under UCC § 2-403, and evidence was sufficient to support finding that buyer was not acting in good faith

when he "bought" boat with awareness that party with voidable title had signed name of purported owner on transfer of ownership papers. *Lane v. Honeycutt*, 14 N.C. App. 436, 188 S.E.2d 604 (1972), cert. denied, 281 N.C. 622, 190 S.E.2d 466 (1972).

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If passage of title is dependent upon the performance of some condition subsequent, one in possession of an article has a voidable title which can be transferred to a bona fide purchaser for value even if the transferor was deceived as to the identity of the purchaser, the delivery was in exchange for a check later dishonored, or procured through a fraud punishable as larcenous under the criminal law. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

A buyer who acquires property from one who has avoidable title must show that he was a "good faith purchaser for value", which requires "honesty in fact and the observance of reasonable commercial standards of fair dealing". *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

14. —Delivery under purchase transaction.

Where meat packer's operations were financed by secured creditor who had properly perfected security interest in meat packer's assets, including after-acquired property, where cattle sellers delivered cattle to meat packer on "grade and yield basis" (cattle were first slaughtered, chilled and then graded before purchase price was calculated), where checks were subsequently issued to sellers, but before checks were paid, secured party, believing itself to be insecure, refused to advance more funds to meat packer for operation of plant, and where meat packer then filed petition in bankruptcy and cattle sellers sought to reclaim cattle or right to proceeds from sale of slaughtered meat: (1)

course of conduct prescribed by Packers and Stockyards Act and regulations issued thereunder, coupled with undisputed intent of cattle sellers, compelled conclusion that sale of cattle was cash and not credit transaction; (2) strict application of ten-day limitation on right to reclaim cattle for some substantial period of time after filing of petition for bankruptcy was warranted inasmuch as such limitation is absolute; (3) however slight or tenuous or marginal was sellers' interest, it was necessarily great enough to permit attachment of secured party's lien; (4) even if evidence had established that secured party knew of meat packer's nonpayment its status as good faith purchaser would be unaffected; and (5) the perfected security interest was superior to the interest of the seller. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Under UCC §§ 2-703 and 2-705 seller's sale of appliances to buyer on credit empowered buyer to pass good title to third party by delivery of appliances, under UCC §§ 2-312, 2-401 and 2-403 buyer did not breach any implied warranty of title when appliances were delivered to third party, and under UCC §§ 2-401(2) and 2-703 third party had no obligation to pay seller or return appliances although buyer failed to pay seller. *Mamber v. Levin*, 4 Mass. App. Ct. 157, 344 N.E.2d 192 (1976).

15. —Entrusting.

In an action by the owner of a valuable painting to recover the painting or its value, the defense of equitable estoppel, which provides that an owner may be estopped from setting up his own title and the lack of title in the vendor as against a bona fide purchaser for value where the owner has clothed the vendor with possession and other indicia of title, is not available to an art dealer who purchased the painting from a delicatessen employee who was not the owner and had no authority to dispose of it although he had obtained the painting from a person who rightfully had possession of it pursuant to an agreement with the true owner since the owner had consigned the painting for display only and conferred no other indi-

cia of ownership; moreover, the owner's conduct did not in any way contribute to the deception practiced on the purchaser, and the purchaser was not a purchaser in good faith since he made no inquiry or investigation as to the true ownership of the painting. *Porter v. Wertz*, 68 A.D.2d 141 (1st Dep't 1979), aff'd, 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981).

Contract for sale of citrus fruit prior to harvest did not fail for indefiniteness pursuant to UCC § 2-403(3), even though terms as to price, harvesting date and harvesting and delivery charges were left open and no deposit by buyer was paid; contract operated to constructively sever citrus crop from mortgage on underlying citrus grove to the benefit of mortgagor in mortgage foreclosure action. *Bornstein v. Somerson*, 341 So. 2d 1043 (Fla. App. 1977), cert. denied, 348 So. 2d 944 (Fla. 1977).

Where dealer assigned title to used car to salesman who used title as collateral to obtain bank loan; where bank perfected security interest in car by timely filing, but such lien, not being required by state law to be recorded on certificate of title in order to be perfected, was not so recorded; and where car was thereafter sold for cash to buyer who took possession of vehicle, in bank's replevin action to obtain possession of car, (1) buyer's claim that bank's perfected security interest was cut off by UCC § 2-403(2) could not be sustained, since bank was not owner of car and thus could not be its "entruster" under UCC § 2-403(2); but (2) since nothing in comments to UCC Art 9 requires "created by his seller" limitation in UCC § 9-307(1) to be insurmountable barrier to good faith acquisition of preencumbered property from dealer who was instrumental in creating encumbrance on, and conflict of rights to, such property, buyer's right to possession of car was protected by "created by his seller" provision in UCC § 9-307(1), on theory that same entity (dealer) both created security interest in car and later sold car to "buyer in ordinary course of business," and bank's security interest in car therefore terminated on its sale to buyer. *Adams v. City Nat'l Bank & Trust Co.*, 565 P.2d 26 (Okla. 1977).

In cattle buyer's action against bank for fraudulently misrepresenting to buyer

that seller of cattle owned them and that buyer would receive clear title thereto if he bought such cattle and left them in seller's feed lot for specified period to be fattened for market, when in fact defendant held mortgage on all of seller's cattle and was in position to know that seller did not have enough cattle to cover both plaintiff's purchase and also purchases made by other persons, defendant's contention that "entrusting of possession" provision of UCC § 2-403(2) barred judgment for plaintiff was rejected because defendant, at time of making its fraudulent misrepresentations, knew that buyer intended to leave cattle with seller to be fattened for market. Thus, defendant's misrepresentations pertained not only to time of sale of cattle to buyer, but also to subsequent period of feeding out of cattle, and "entrusting of possession" provision of UCC § 2-403(2) did not, as matter of law, preclude plaintiff's action. *Forrester v. State Bank*, 52 Ill. App. 3d 34, 363 N.E.2d 904 (3d Dist. 1977).

Where entruster filed financing statement, incorporating security agreement, one year before other claimant of bankrupt's equipment, entruster's interest had priority over other claimant with respect to office machines entrusted. *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Where plaintiff purchased trailers from manufacturer, retained title and parked them on dealer's used car and truck lot, under arrangement that whenever dealer found buyer plaintiff was to bring in certificate of origin and indorse it over to buyer, under mistaken impression that dealer could not register title without such certificate, dealer sold trailers to buyers but failed to pay plaintiff, buyers financed purchases with defendant bank and bank foreclosed on its security interest in trailers after buyers defaulted, whether plaintiff could recover against bank for conversion depended on whether consignment of trailers was intended as security; if plaintiff's retention of title was limited to reservation of security interest, he could not prevail against bank since he did not retain possession of collateral nor did debtor sign security agreement describing collateral as required by UCC

§ 9-203(1); if consignment was not intended as security and if dealer was not "merchant who deals in goods of that kind" or if buyers were not "buyers in ordinary course of business" within meaning of UCC § 2-403(2) plaintiff would prevail against bank since buyers would not have obtained good title and could not have created security interest in bank. *Nauman v. First Nat'l Bank*, 50 Mich. App. 41, 212 N.W.2d 760 (1973).

16. —Entrusting: "merchant".

In replevin action, where (1) plaintiff truck dealer "dropshipped" two of its trucks to another dealer for purpose of resale, (2) second dealer sold trucks to defendant cartage company but failed to give defendant full set of title papers, and (3) second dealer thereafter went out of business without paying plaintiff for trucks, plaintiff was not entitled to replevy trucks from defendant, who was buyer in ordinary course of business under UCC § 1-201(9) and § 2-403(2), since it was plaintiff which placed trucks into stream of commerce, being well aware that second dealer intended to sell them, and waited two and a half months before attempting to collect payment from second dealer (holding that under circumstances of case, defendant consumer should not bear loss, even though defendant was commercial corporation). *Coffman Truck Sales v. Sackley Cartage Co.*, 58 Ill. App. 3d 68, 373 N.E.2d 1026 (2d Dist. 1978).

In criminal prosecution for copyright infringement of motion-picture films in violation of 17 USCS § 104, requested defense instruction based on UCC § 2-403 which stated that "any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entrustor to a buyer in ordinary course of business" was properly refused, since mere possession is insufficient to invoke "first-sale" doctrine of 17 USCS § 27 under which transfer by copyright proprietor to another of title to copyrighted work gives transferee right to sell such work. *United States v. Drebin*, 557 F.2d 1316, 195 U.S.P.Q. 619 (9th Cir. Cal. 1977), reh'g denied, 572 F.2d 215 (9th Cir. Cal. 1978), cert. denied, 436 U.S. 904, 98 S. Ct. 2232, 56 L. Ed. 2d 401 (1978),

reh'g denied, 438 U.S. 908, 98 S. Ct. 3127, 57 L. Ed. 2d 1150 (1978).

Where manufacturer of modular home, or house trailer, sold home to dealer who, in turn, resold it to defendant buyers, installed it on land owned by buyers, and then absconded with purchase money, and where manufacturer brought suit against buyers claiming that it, as unpaid holder of certificate of title to home, had title to home as against claim of buyers, trial court properly ruled in favor of title claim of buyers since under UCC § 2-403(2), (1) dealer was merchant who dealt in goods of that kind, (2) defendants were buyers in ordinary course of business, and (3) manufacturer's entrusting of home to dealer gave dealer power to transfer all rights of manufacturer to buyers (holding that buyers were entitled to have their ownership interest in home evidenced by certificate of title). *Fuqua Homes, Inc. v. Evanston Bldg. & Loan Co.*, 52 Ohio App. 2d 399, 370 N.E.2d 780 (1977).

Under UCC §§ 2-703 and 2-705 seller's sale of appliances to buyer on credit empowered buyer to pass good title to third party by delivery of appliances, under UCC §§ 2-312, 2-401 and 2-403 buyer did not breach any implied warranty of title when appliances were delivered to third party, and under UCC §§ 2-401(2) and 2-703 third party had no obligation to pay seller or return appliances although buyer failed to pay seller. *Mamber v. Levin*, 4 Mass. App. Ct. 157, 344 N.E.2d 192 (1976).

First buyer of wrecker truck entrusted truck to dealer under UCC § 2-403 so as to allow dealer to pass title to second buyer who was a "buyer in ordinary course of business" under UCC § 1-201 and who took possession of truck and extracted from dealer a transfer of registration and warranty of title, where first buyer left truck with dealer or dealer's apparent agent after paying for it without taking possession. *Simson v. Moon*, 137 Ga. App. 82, 222 S.E.2d 873 (1975), cause dismissed, 236 Ga. 786, 225 S.E.2d 314 (1976).

In determining whether art objects held on consignment by art gallery were part of the gallery's "stock-in-trade" subject to personal property tax, fact that gallery

could pass legal title to consigned items sold could not be regarded as incident of ownership since, as one entrusted with goods, it must of necessity pass legal title to good faith purchasers under UCC § 2-403(2). *District of Columbia v. Powers Gallery, Inc.*, 335 A.2d 244 (D.C. 1975).

In action by manufacturer of mobile home against dealer and purchaser of unit arising when dealer failed to pay manufacturer purchase price, mobile home fell within definition of "goods" under UCC § 2-105 and purchaser was entitled to protection from manufacturer's claim under UCC § 9-307(a) where purchaser, who took title from merchant entrusted with goods under UCC §§ 2-401 and 2-403, qualified as buyer in ordinary course of business under UCC § 1-201(9), notwithstanding purchaser's failure to request certificate of title of purchase. *Apeco Corp. v. Bishop Mobile Homes, Inc.*, 506 S.W.2d 711 (Tex. Civ. App. 1974), writ ref'd n.r.e., (June 12, 1974).

Purchaser who bought manufacturing equipment from lessee could not invoke protections of UCC § 2-403(2) in action by owner to recover possession or reasonable value of machinery, although purchaser acted in good faith in that he purchased equipment only after reasonable assurances of title and in belief that lessee owned equipment, where seller, by reason of this isolated transaction, did not meet standards of "merchant dealing in goods of this kind," and where purchaser's failure to request additional proof of ownership was not "commercially reasonable" approach to transaction (holding, however, that owner was estopped under common law to assert his title). *Tumber v. Automation Design & Mfg. Corp.*, 130 N.J. Super. 5, 324 A.2d 602 (L. Div. 1974).

Evidence established that entruster entrusted possession of copying machine to merchant, now bankrupt, giving him power to transfer all rights of entruster to buyer in ordinary course of business under UCC § 2-403(2) and (3) and fact that price was not specified was of no consequence under UCC § 2-305(1). *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Consignor who had entrusted mobile home to mobile home seller converted mo-

bile home when he repossessed home which consignee had sold to good faith purchaser in ordinary course of business. *Williams v. Western Sur. Co.*, 6 Wash. App. 300, 492 P.2d 596 (1972), review denied, 80 Wash. 2d 1007 (1972).

Where plaintiff automobile dealer sold car to second dealer who in turn sold car to defendant buyer, who 15 years previously had had experience as automobile dealer, transaction was not "between merchants" as contemplated by Code § 2-104(3), so as to charge buyer with "knowledge or skill of merchants"; and, although buyer accepted automobile without instrument of title as required by Motor Vehicle Title and Registration Law, and accepted new automobile from non-franchised dealer without receiving manufacturer's certificate of origin to that vehicle, buyer took title to car free from plaintiff dealer's claim, under Code § 2-403(2) and (3). *Couch v. Cockroft*, 490 S.W.2d 713 (Tenn. Ct. App. 1972).

Where borrowers had "entrusted" boat to dealer who sold it without informing buyers of bank's interest, and where bank repossessed boat, without giving buyers opportunity to protect their equity, the bank then turning over the boat to borrowers on their settlement with bank, bank and borrowers were jointly and severally liable to buyers for buyers' loss of equity. *Security Pac. Nat'l Bank v. Goodman*, 24 Cal. App. 3d 131 (2d Dist. 1972).

Material issues of fact as to whether seller was "merchant" to whom possession of machines had been entrusted precluded summary judgment in trover action to recover machines in possession of buyer. *Greater S. Distrib. Co. v. Usry*, 124 Ga. App. 525, 184 S.E.2d 486 (1971).

One who acquires a mobile home in the ordinary course of business from a merchant entrusted with the mobile home receives title to the motor home under UCC § 2-403(2), notwithstanding that there was no receipt of certificate of title under Motor Vehicle Certification of Title Act which includes mobile homes within its provisions. *Rockwin Corp. v. Kincaid*, 124 Ga. App. 570, 184 S.E.2d 509 (1971).

Where person purchases automobile in good faith and without knowledge of any

title defect or security interest of third party from used car dealer who has been entrusted with its possession, he is a "buyer in the ordinary course of business," even though sale was made without transfer of certificate of title. *Medico Leasing Co. v. Smith*, 457 P.2d 548 (Okla. 1969), but see, *Mitchell Coach Mfg. Co. v. Stephens*, 19 F. Supp. 2d 1227 (N.D. Okla. 1998).

A "buyer in the ordinary course of business" of an automobile from a dealer takes title superior to that of the repossessing lien creditor who had stored the automobile with the dealer, since the Code § 2-403 relating to entrustment of possession is most applicable to a repossessing lienholder with right of sale. *Commercial Credit Corp. v. Associates Dist. Corp.*, 246 Ark. 118, 436 S.W.2d 809 (1969).

The code provision defining "entrusting" and providing that any entrusting of goods to a merchant who deals in goods of that kind gives him the power to transfer all the rights of the entruster to a buyer in the ordinary course of business is applicable to sales between merchants. The purpose of Code § 2-403 affording this protection is to protect a person from a third-party interest in goods purchased from the general inventory of a merchant regardless of that merchant's actual authority to sell these goods. Therefore, the section was not expressly or by implication restricted to the sale by a merchant to a member of the consumer public. However, the court held that one merchant purchasing automobiles from another merchant was not a buyer in the ordinary course of business where the purchasing merchant was chargeable with knowledge that there was a certificate of title registration law for the purchased automobiles. *Mattek v. Malofsky*, 42 Wis. 2d 16, 165 N.W.2d 406 (1969).

A floor-plan security agreement did not cover any cars owned by third persons which were merely in the temporary possession of the dealer, as an agent, for sale purposes in which the dealer's only interest was in a commission in the event that a sale was consummated. *Cosgriff v. Liberty Nat'l Bank & Trust Co.*, 58 Misc. 2d 884 (1968).

One who acquires property from a merchant who was entrusted with possession

of the goods must demonstrate that he was “a buyer in ordinary course of business”, and this term as defined in UCC § 1-201(9) is more restrictive than the term “good faith purchaser for value”. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

That an auto rental company seeking to sell a car had placed it in the hands of a prospective buyer for a test run, after rejecting the prospective purchaser's uncertified check was not competent evidence to show the entrusting of the car to a “merchant who deals in goods of that kind,” and the offer by one who purchased the car from the prospective buyer of an invoice indicating the buyer was such a merchant was not sufficient to establish the fact of entrusting. In order that the “entrusting” provisions of this section apply, it must appear that the original owner and the ultimate purchaser be aware of the status of the merchant as a dealer in goods of the kind in dispute. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

Where a wholesaler entrusts a retail dealer in such property with furniture and appliances under a “floor-plan arrangement” and such property was subsequently purchased in the ordinary course of business from the retailer, the legal title and right or claim to such property had passed out of the wholesaler and into the purchasers at retail, and the wholesaler could not thereafter bring an action in trover against the retailer, alleging unlawful conversion. *Charles S. Martin Distrib. Co. v. Banks*, 111 Ga. App. 538, 142 S.E.2d 309 (1965).

Where the owner of a truck delivered it to a used car dealer to be sold and the dealer sold it to a bona fide purchaser for value and converted the purchase price, the owner is not entitled, to recover either the vehicle or its value from the purchaser, notwithstanding the latter never received license plates or a certificate of title, since under the circumstances he gave the dealer the power to transfer all of his rights to a buyer in the ordinary course of business within the purview of § 2-403, subsections (2) and (3) of the Uniform Commercial Code. *Gricar v. Bairhalter*, 11 Pa. D. & C.2d 723 (1958).

17. —Entrusting: found.

A county was entitled to summary judgment in an action to determine the legal title to two fire trucks where (1) the defendant supplied the truck chassis to a third party, which then converted them into fire trucks for the county pursuant to contract, (2) the defendant delivered the chassis to the third party without any formal attempt to limit the third party's authority to complete the fire trucks and deliver them to the county, and (3) the county was unaware of any legal impediment to the third party's authority to deliver the completed fire trucks to it. *Genesis Indem. Ins. Co. v. Bolivar County*, 793 So. 2d 683 (Miss. Ct. App. 2001).

Evidence established that entruster entrusted possession of copying machine to merchant, now bankrupt, giving him power to transfer all rights of entruster to buyer in ordinary course of business under UCC § 2-403(2) and (3) and fact that price was not specified was of no consequence under UCC § 2-305(1). *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Where dealer in new and used cars sold used automobiles to used car dealer but instructed him not to dispose of the cars until the latter's check had cleared the bank, such transaction constituted an entrustment within the meaning of the code and the seller's instructions did not effect the rights of a buyer in the ordinary course of business without knowledge of the limitation. *Sherman v. Roger Kresge, Inc.*, 67 Misc. 2d 178 (1971), *aff'd*, 40 A.D.2d 766, 336 N.Y.S.2d 1015 (3d Dep't 1972).

18. —Entrusting: not found.

A retailer buyer did not acquire valid title to carpet under Code § 75-2-403(1)(d), (2), and (3), there being no evidence that the wholesaler ever entrusted its salesman with the subject shipment of carpet, where the salesman stole invoices from the company to which the subject carpet was intended for shipment from the wholesaler, where the salesman then forged the name and address of his own alter ego corporation on the invoices as consignee and diverted the carpet shipment to such corporation and then to the retailer buyer, where the wholesaler never

dealt with the salesman on the shipment, where the salesman did not obtain the carpet through a "transaction of purchase" and where the wholesaler never intended the retailer buyer to become owner of the carpet. *Textile Supplies, Inc. v. Garrett*, 687 F.2d 123 (5th Cir. 1982).

Where owners of pleasure motor boat rented stall at marina, and marina operator's business of renting stalls for vessels was separate and apart from his business as boat repairer and boat merchant, owners did not entrust vessel to marina operator as merchant within meaning of UCC section providing that any entrusting of possession of goods to merchant who deals in goods of that kind gives him power to transfer all rights of entruster to buyer in ordinary course of business. *Gallagher v. Unenrolled Motor Vessel River Queen* (Hull No. A-681 84), 475 F.2d 117 (5th Cir. Tex. 1973).

Goods were erroneously shipped by customs broker contrary to instructions of owner-importer; textile finisher received goods for processing on behalf of owner; held, there was no "entrusting" within UCC provision relating to powers of merchant to whom goods were entrusted. *Toyomenka, Inc. v. Mount Hope Finishing Co.*, 432 F.2d 722 (4th Cir. N.C. 1970).

A licensed automobile wrecker and junk dealer who purchased a two-year-old station wagon from a thief for \$900 by placing \$300 down, and who sold the vehicle for \$1200 that same day, although he never obtained a bill of sale or registration certificate, was liable to the two owners, since the car had not been entrusted to a merchant who dealt in used cars and the defendant had not demonstrated that he was a "buyer in ordinary course of business" or that he was a "good faith purchaser for value". *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

That an auto rental company seeking to sell a car had placed it in the hands of a prospective buyer for a test run, after rejecting the prospective purchaser's uncertified check was not competent evidence to show the entrusting of the car to a "merchant who deals in goods of that kind," and the offer by one who purchased the car from the prospective buyer of an invoice indicating the buyer was such a

merchant was not sufficient to establish the fact of entrusting. In order that the "entrusting" provisions of this section apply, it must appear that the original owner and the ultimate purchaser be aware of the status of the merchant as a dealer in goods of the kind in dispute. *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

The entrustment provision of the Code does not apply where the goods had not been entrusted to the seller and he merely agreed to obtain the goods if the buyer would pay him in advance, with the consequence that the seller's conduct did not pass title and when the true owner, from whom the seller obtained the goods specified that title should not pass until payment was made, such condition was effective and where the check given in payment was not honored by the drawee bank the owner was entitled to recover the goods. *DePaulo v. Williams Chevrolet-Cadillac, Inc.*, 10 Lehigh C.L.J. 465 (1965), exceptions dismissed, 11 Lehigh C.L.J. 70.

19. Priorities.

Contract for sale of citrus fruit prior to harvest did not fail for indefiniteness pursuant to UCC § 2-403(3), even though terms as to price, harvesting date and harvesting and delivery charges were left open and no deposit by buyer was paid; contract operated to constructively sever citrus crop from mortgage on underlying citrus grove to the benefit of mortgagor in mortgage foreclosure action. *Bornstein v. Somerson*, 341 So. 2d 1043 (Fla. App. 1977), cert. denied, 348 So. 2d 944 (Fla. 1977).

Where bank sued automobile dealer to recover on promissory notes given to bank by dealer and sought to impose constructive trust on dealer's assets to secure payment of notes, on theory that dealer had fraudulently obtained loans from bank and used funds therefrom to purchase such assets; where dealer's assets included automobile that dealer had sold to buyer in violation of court order prohibiting sale or transfer of such vehicle or any other assets of dealer; where buyer of automobile, while unaware of such restraining order, sold it to third person and then, after acquiring knowledge of re-

straining order, bought it back from such person to honor warranty of title to vehicle; and where such automobile was thereafter sold under court order and proceeds of sale were claimed by both bank and buyer, (1) buyer, on buying automobile from dealer, was purchaser in ordinary course of business under UCC § 2-403(2) and UCC § 2-403(3), since dealer at that time was engaged in business of buying and selling automobiles; (2) title to proceeds of court-ordered sale of such vehicle vested in buyer; (3) doctrine of *lis pendens* did not preclude buyer from asserting interest in such automobile superior to bank's interest therein, since *lis pendens* doctrine is not exception to Uniform Commercial Code; and (4) buyer's buying automobile back from third person with knowledge of bank's claim to such vehicle did not affect buyer's right to proceeds of court-ordered sale of vehicle, since vehicle was merely reacquired by buyer to make good his warranty of title thereto where such title was in question. *Riverside Nat'l Bank v. Law*, 564 P.2d 240 (Okla. 1977).

Under UCC §§ 2-703 and 2-705 seller's sale of appliances to buyer on credit empowered buyer to pass good title to third party by delivery of appliances, under UCC §§ 2-312, 2-401 and 2-403 buyer did not breach any implied warranty of title when appliances were delivered to third party, and under UCC §§ 2-401(2) and 2-703 third party had no obligation to pay seller or return appliances although buyer failed to pay seller. *Mamber v. Levin*, 4 Mass. App. Ct. 157, 344 N.E.2d 192 (1976).

Where borrowers had "entrusted" boat to dealer who sold it without informing buyers of bank's interest, and where bank repossessed boat, without giving buyers opportunity to protect their equity, the bank then turning over the boat to borrowers on their settlement with bank, bank and borrowers were jointly and severally liable to buyers for buyers' loss of equity. *Security Pac. Nat'l Bank v. Goodman*, 24 Cal. App. 3d 131 (2d Dist. 1972).

The purchaser of a truck was entitled to damages for conversion of his property when a bank "repossessed" the vehicle

upon the seller's failure to meet the obligation for which the truck had been pledged as security. The court pointed out that plaintiff was a buyer in the ordinary course of business, that seller was a merchant under provisions of the Uniform Commercial Code, and that possession of the tractor by the truck company entitled it to transfer title in the ordinary course of its business. *Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338 (1968).

Recognized automobile dealer has power to transfer an automobile held in inventory in ordinary course of business free of any security interest. *Murphy v. Plymouth Nat'l Bank*, 22 Mass. App. Dec. 36 (1961).

Since, under Pennsylvania law, the seller's right of rescission is not an absolute right but is subject to the right of a lien creditor who extended credit subsequent to the sale, and by virtue of § 70, sub c of the Bankruptcy Act, the trustee in bankruptcy has rights of lien creditor, the trustee in bankruptcy has superior rights to the proceeds from the sale of seller's goods, even if the sale of goods on credit has been induced by positive misrepresentation by the bankrupts, and the seller had attempted to rescind the sale. In re *Kravitz*, 278 F.2d 820 (3d Cir. Pa. 1960).

20. —Secured party.

Where dealer assigned title to used car to salesman who used title as collateral to obtain bank loan; where bank perfected security interest in car by timely filing, but such lien, not being required by state law to be recorded on certificate of title in order to be perfected, was not so recorded; and where car was thereafter sold for cash to buyer who took possession of vehicle, in bank's replevin action to obtain possession of car, (1) buyer's claim that bank's perfected security interest was cut off by UCC § 2-403(2) could not be sustained, since bank was not owner of car and thus could not be its "entruster" under UCC § 2-403(2); but (2) since nothing in comments to UCC Art 9 requires "created by his seller" limitation in UCC § 9-307(1) to be insurmountable barrier to good faith acquisition of preencumbered property from dealer who was instrumental in creating encumbrance on, and conflict of rights to, such property, buyer's right to possession

of car was protected by "created by his seller" provision in UCC § 9-307(1), on theory that same entity (dealer) both created security interest in car and later sold car to "buyer in ordinary course of business," and bank's security interest in car therefore terminated on its sale to buyer. *Adams v. City Nat'l Bank & Trust Co.*, 565 P.2d 26 (Okla. 1977).

Where meat packer's operations were financed by secured creditor who had properly perfected security interest in meat packer's assets, including after-acquired property, where cattle sellers delivered cattle to meat packer on "grade and yield basis" (cattle were first slaughtered, chilled and then graded before purchase price was calculated), where checks were subsequently issued to sellers, but before checks were paid, secured party, believing itself to be insecure, refused to advance more funds to meat packer for operation of plant, and where meat packer then filed petition in bankruptcy and cattle sellers sought to reclaim cattle or right to proceeds from sale of slaughtered meat: (1) course of conduct prescribed by Packers and Stockyards Act and regulations issued thereunder, coupled with undisputed intent of cattle sellers, compelled conclusion that sale of cattle was cash and not credit transaction; (2) strict application of ten-day limitation on right to reclaim cattle for some substantial period of time after filing of petition for bankruptcy was warranted inasmuch as such limitation is absolute; (3) however slight or tenuous or marginal was sellers' interest, it was necessarily great enough to permit attachment of secured party's lien; (4) even if evidence had established that secured party knew of meat packer's nonpayment its status as good faith purchaser would be unaffected; and (5) the perfected security interest was superior to the interest of the seller. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Under UCC § 9-105(1)(i), a secured party under Article 9 is a "purchaser" within meaning of UCC § 1-201(33); thus, where credit corporation had prior valid security interest in automobile dealer's inventory, where automobile wholesaler

sold and delivered used cars and trucks to dealer with unencumbered certificates of title, but where dealer's checks in payment for vehicles were dishonored, under UCC § 2-403, dealer could transfer good title to "good faith purchaser for value," despite fact dealer tendered, for purchase of vehicles, checks which were subsequently dishonored, and, hence, credit corporations' security interest in automobiles delivered to dealer was superior to wholesaler's interest. *Swets Motor Sales, Inc. v. Pruhsner*, 236 N.W.2d 299 (Iowa 1975).

Where entruster filed financing statement, incorporating security agreement, one year before other claimant of bankrupt's equipment, entruster's interest had priority over other claimant with respect to office machines entrusted. *First Nat'l Bank & Trust Co. v. Olivetti Corp. of Am.*, 130 Ga. App. 896, 204 S.E.2d 781 (1974).

Where plaintiff purchased trailers from manufacturer, retained title and parked them on dealer's used car and truck lot, under arrangement that whenever dealer found buyer plaintiff was to bring in certificate of origin and indorse it over to buyer, under mistaken impression that dealer could not register title without such certificate, dealer sold trailers to buyers but failed to pay plaintiff, buyers financed purchases with defendant bank and bank foreclosed on its security interest in trailers after buyers defaulted, whether plaintiff could recover against bank for conversion depended on whether consignment of trailers was intended as security; if plaintiff's retention of title was limited to reservation of security interest, he could not prevail against bank since he did not retain possession of collateral nor did debtor sign security agreement describing collateral as required by UCC § 9-203(1); if consignment was not intended as security and if dealer was not "merchant who deals in goods of that kind" or if buyers were not "buyers in ordinary course of business" within meaning of UCC § 2-403(2) plaintiff would prevail against bank since buyers would not have obtained good title and could not have created security interest in bank. *Nauman v. First Nat'l Bank*, 50 Mich. App. 41, 212 N.W.2d 760 (1973).

When one purchases an auto from auto dealer's inventory in ordinary course of

business without notice of trust security agreement between dealer and financial institution, purchaser acquires title free of bank's trust security lien. *Correria v. Orlando Bank & Trust Co.*, 235 So. 2d 20 (Fla. App. 1970).

A "buyer in the ordinary course of business" of an automobile from a dealer takes title superior to that of the repossessing lien creditor who had stored the automobile with the dealer, since the Code § 2-403 relating to entrustment of possession is most applicable to a repossessing lienholder with right of sale. *Commercial Credit Corp. v. Associates Dist. Corp.*, 246 Ark. 118, 436 S.W.2d 809 (1969).

A floor-plan security agreement did not cover any cars owned by third persons which were merely in the temporary possession of the dealer, as an agent, for sale purposes in which the dealer's only interest was in a commission in the event that a sale was consummated. *Cosgriff v. Liberty Nat'l Bank & Trust Co.*, 58 Misc. 2d 884 (1968).

Where plaintiff bought truck from a merchant in the ordinary course of business, without knowledge of a security agreement entered into by the seller and later assigned to a bank, in repossessing the truck after the sale, bank was liable for conversion and damages. *Makransky v. Long Island Reo Truck Co.*, 58 Misc. 2d 338 (1968).

Rejecting the contention of a buyer of an automobile from a dealer without notice of a prior security interest that UCC § 2-403(1) provided an escape from the prior security interest, the court held that UCC § 9-306(2) which provides for the continuation of the security interest except when "this Article" provides otherwise limited any exceptions to those contained in Article 9. The court also noted that UCC § 2-403 provided the rights "lien creditors are governed by the Articles on Secured Transactions." *National Shawmut Bank v. Jones*, 108 N.H. 386, 236 A.2d 484 (1967).

An acceptance company which had made loans to a dealer was required to look to the dealer for repayment, rather than to a new automobile in possession of one who had purchased it from the dealer in the ordinary course of business, paying the full purchase price therefor, notwith-

standing that the acceptance company had filed a blanket security agreement executed by the automobile dealer, who had also executed and delivered to the acceptance company a trust receipt agreement describing the automobile in question. *Sterling Acceptance Co. v. Grimes*, 194 Pa. Super. 503, 168 A.2d 600 (1961).

21. — Chattel mortgagee.

Buyer purchasing tractors from merchant-entrustee, without notice and in ordinary course of business, takes free from lien of prior-recorded chattel mortgage not only as to cash paid and trade-in allowance, but also as to that part of purchase price represented by merchant's cancellation of pre-existing debt to buyer. *GECC v. R.A. Heintz Constr. Co.*, 302 F. Supp. 958 (D. Or. 1969).

22. — True owner.

In an action by the owner of a valuable painting to recover the painting or its value, the defense of equitable estoppel, which provides that an owner may be estopped from setting up his own title and the lack of title in the vendor as against a bona fide purchaser for value where the owner has clothed the vendor with possession and other indicia of title, is not available to an art dealer who purchased the painting from a delicatessen employee who was not the owner and had no authority to dispose of it although he had obtained the painting from a person who rightfully had possession of it pursuant to an agreement with the true owner since the owner had consigned the painting for display only and conferred no other indicia of ownership; moreover, the owner's conduct did not in any way contribute to the deception practiced on the purchaser, and the purchaser was not a purchaser in good faith since he made no inquiry or investigation as to the true ownership of the painting. *Porter v. Wertz*, 68 A.D.2d 141 (1st Dep't 1979), *aff'd*, 53 N.Y.2d 696, 439 N.Y.S.2d 105, 421 N.E.2d 500 (1981).

Although seller of automobile, who was ostensibly individual in automobile business and who sold automobile to good faith purchaser, had facially valid Mississippi title, ultimately based upon Alabama tag receipt issued pursuant to forged bill of sale, seller did not have

"voidable title" such that he could transfer good title to good faith purchaser under UCC § 2-403(1); title remained in insurance company that obtained valid title subsequent to paying Florida dealer's loss. *Allstate Ins. Co. v. Estes*, 345 So. 2d 265 (Miss. 1977).

Where plaintiff purchased trailers from manufacturer, retained title and parked them on dealer's used car and truck lot, under arrangement that whenever dealer found buyer plaintiff was to bring in certificate of origin and indorse it over to buyer, under mistaken impression that dealer could not register title without such certificate, dealer sold trailers to buyers but failed to pay plaintiff, buyers financed purchases with defendant bank and bank foreclosed on its security interest in trailers after buyers defaulted, whether plaintiff could recover against bank for conversion depended on whether consignment of trailers was intended as security; if plaintiff's retention of title was limited to reservation of security interest, he could not prevail against bank since he did not retain possession of collateral nor did debtor sign security agreement describing collateral as required by UCC § 9-203(1); if consignment was not intended as security and if dealer was not "merchant who deals in goods of that kind" or if buyers were not "buyers in ordinary course of business" within meaning of UCC § 2-403(2) plaintiff would prevail against bank since buyers would not

have obtained good title and could not have created security interest in bank. *Nauman v. First Nat'l Bank*, 50 Mich. App. 41, 212 N.W.2d 760 (1973).

A licensed automobile wrecker and junk dealer who purchased a two-year-old station wagon from a thief for \$900 by placing \$300 down, and who sold the vehicle for \$1200 that same day, although he never obtained a bill of sale or registration certificate, was liable to the two owners, since the car had not been entrusted to a merchant who dealt in used cars and the defendant had not demonstrated that he was a "buyer in ordinary course of business" or that he was a "good faith purchaser for value". *Atlas Auto Rental Corp. v. Weisberg*, 54 Misc. 2d 168 (1967).

The entrustment provision of the Code does not apply where the goods had not been entrusted to the seller and he merely agreed to obtain the goods if the buyer would pay him in advance, with the consequence that the seller's conduct did not pass title and when the true owner, from whom the seller obtained the goods specified that title should not pass until payment was made, such condition was effective and where the check given in payment was not honored by the drawee bank the owner was entitled to recover the goods. *DePaulo v. Williams Chevrolet-Cadillac, Inc.*, 10 Lehigh C.L.J. 465 (1965), exceptions dismissed, 11 Lehigh C.L.J. 70.

RESEARCH REFERENCES

ALR. Construction of UCC § 9-307(3) providing that under certain conditions a buyer, other than a buyer in the ordinary course of business, takes free of a security interest securing "future advances". 35 A.L.R.4th 390.

What constitutes secured party's authorization to transfer collateral free of lien under UCC § 9-306(2). 37 A.L.R.4th 787.

Am Jur. 42 Am. Jur. 2d, Infants § 107.

67 Am. Jur. 2d, Sales §§ 432, 435 et seq., 441, 442, 447.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:461 et seq. (Power to transfer: Good faith purchase of goods: Entrusting).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1131 et seq. (Power to transfer; good faith purchaser of goods; "entrusting").

PART 5.

PERFORMANCE.

SEC.

- 75-2-501. Insurable interest in goods; manner of identification of goods.
75-2-502. Buyer's right to goods on seller's repudiation, failure to deliver, or insolvency.
75-2-503. Manner of seller's tender of delivery.
75-2-504. Shipment by seller.
75-2-505. Seller's shipment under reservation.
75-2-506. Rights of financing agency.
75-2-507. Effect of seller's tender; delivery on condition.
75-2-508. Cure by seller of improper tender or delivery; replacement.
75-2-509. Risk of loss in the absence of breach.
75-2-510. Effect of breach on risk of loss.
75-2-511. Tender of payment of buyer; payment by check.
75-2-512. Payment by buyer before inspection.
75-2-513. Buyer's right to inspection of goods.
75-2-514. When documents deliverable on acceptance; when on payment.
75-2-515. Preserving evidence of goods in dispute.

§ 75-2-501. Insurable interest in goods; manner of identification of goods.

(1) The buyer obtains a special property and an insurable interest in goods by identification of existing goods as goods to which the contract refers even though the goods so identified are nonconforming and he has an option to return or reject them. Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identification occurs

(a) when the contract is made if it is for the sale of goods already existing and identified;

(b) if the contract is for the sale of future goods other than those described in paragraph (c), when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the young are conceived if the contract is for the sale of unborn young to be born within twelve (12) months after contracting or for the sale of crops to be harvested within twelve (12) months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to or any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notification to the buyer that the identification is final substitute other goods for those identified.

(3) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

SOURCES: Codes, 1942, § 41A:2-501; Laws, 1966, ch. 316, § 2-501, eff March 31, 1968.

Cross References — Contract for sale of growing crops, see § 75-2-107(2).

Absence of specified place for delivery, see § 75-2-308.

Rights of seller's unsecured creditors with respect to goods identified to contract, see § 75-2-402.

Insolvency of seller as affecting buyer's rights with respect to goods not shipped but paid for in whole or in part, see § 75-2-502.

Manner of seller's tender of delivery, see § 75-2-503.

Risk of loss, see §§ 75-2-509, 75-2-510.

Seller's remedies generally, see § 75-2-703.

JUDICIAL DECISIONS

1. In general.

UCC applies to sales of natural gas, and therefore governs sales contract between oil company and royalty owners in certain Mississippi oil and gas leases; in action by royalty owners seeking unrecovered payments from oil company under leases, gas underground is future goods pursuant to § 75-2-105, and thus no particular gas is sold until it is identified or brought to surface; accordingly, under § 75-2-107(1), contracts are contracts to sell and only become effective as sales when gas is severed from land; where sales contract itself provides that title to gas passes when gas is delivered, gas was not sold until it was produced, and accordingly, basis of royalty should be market value at well at time of production and delivery. *Piney Woods Country Life Sch. v. Shell Oil Co.*, 726 F.2d 225 (5th Cir. 1984), reh'g denied, 750 F.2d 69 (5th Cir. 1984), cert. denied, 471 U.S. 1005, 105 S. Ct. 1868, 85 L. Ed. 2d 161 (1985).

A cattle buyer became vested with a special property interest within the meaning of § 75-2-501, where the seller contracted for the sale of cattle to the buyer and identified such cattle to the contract; accordingly, the seller was bound to deal with the animals without impairing or defeating the rights of the buyer. *Ross Cattle Co. v. Lewis*, 415 So. 2d 1029 (Miss. 1982).

Sugar in 100 pound bags fell within definition of fungible, UCC § 1-201(17); therefore, when delivery was tendered to warehousemen on behalf of buyer under UCC § 2-503(4), buyer acquired insurable interest in goods, title to goods, and at same time buyer bore risk of loss with respect to those goods, notwithstanding warehousemen's failure to segregate

sugar. *Henry Heide, Inc. v. Atlantic Mut. Ins. Co.*, 80 Misc. 2d 485 (1975).

Even if "bucket shop" act was formerly applicable to contracts for actual sale and delivery of commodities, contracts for sale of cotton to be grown in future were valid under UCC § 2-501, making valid contracts for sale of crops to be grown within 12 months or next normal harvest season even though not planted at date of contract, since UCC provision was later enactment than "bucket shop" act. *Mitchell-Huntley Cotton Co. v. Waldrep*, 377 F. Supp. 1215 (N.D. Ala. 1974).

Contract for sale of crop was not invalid merely because contract was executed before crop in question was planted. *Mitchell-Huntley Cotton Co. v. Lawson*, 377 F. Supp. 661 (M.D. Ga. 1973).

Under § 2-401 title cannot pass before identification of goods; but while § 2-501 does provide that identification may be made at any time and in any manner explicitly agreed to by parties, this does not mean that parties may delay passage of title by simple expedient of agreeing that goods are not yet identified to contract when, in fact, they have already been delivered to buyer. *First Nat'l Bank v. Smoker*, 153 Ind. App. 71, 286 N.E.2d 203 (1972), reh'g denied, 153 Ind. App. 89, 287 N.E.2d 788 (1972).

Buyer has special property interest in tractor within Code § 2-501, where he was shown tractor on seller's store premises and told that it was buyer's, even though, at that time, tractor did not conform to sales contract provision for cab; where such property interest was free and clear of security interest of seller's reposessor, action for damages may be maintained by buyer against reposessor under Code § 2-722. *Draper v. Minneapolis-*

Moline, Inc., 100 Ill. App. 2d 324, 241 N.E.2d 342 (3d Dist. 1968).

This section states nothing as to passing of title, but only sets the manner in which identification of the goods in the

contract will be made, thus giving the buyer a "special property" and an insurable interest in the goods. *Silver v. Sloop Silver Cloud*, 259 F. Supp. 187 (S.D.N.Y. 1966).

RESEARCH REFERENCES

ALR. Right of seller taking mortgage on automobile to insure against theft. 48 A.L.R.2d 8.

Insurable interest of purchaser in motor vehicle as affected by failure to comply with statute as to sale thereof. 58 A.L.R.2d 1351.

Am Jur. 43 Am. Jur. 2d, Insurance §§ 962 et seq.

67 Am. Jur. 2d, Sales §§ 399 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:501 et seq. (Rights and obligations of buyer; insurable interest; manner of identifying goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1151 et seq. (Insurable interest in goods, manner of identification of goods).

CJS. 77 C.J.S., Sales §§ 152 et seq.

§ 75-2-502. Buyer's right to goods on seller's repudiation, failure to deliver, or insolvency.

(1) Subject to subsections (2) and (3) and even though the goods have not been shipped a buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of Section 75-2-501 may on making and keeping good a tender of any unpaid portion of their price recover them from the seller if:

(a) In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract; or

(b) In all cases, the seller becomes insolvent within ten (10) days after receipt of the first installment on their price.

(2) The buyer's right to recover the goods under subsection (1) (a) vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

(3) If the identification creating his special property has been made by the buyer he acquires the right to recover the goods only if they conform to the contract for sale.

SOURCES: Codes, 1942, § 41A:2-502; Laws, 1966, ch. 316, § 2-502, eff March 31, 1968; Laws, 2001, ch. 495, § 9, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, rewrote the section.

Cross References — Right of seller's creditors against goods sold, see § 75-2-402. Seller's remedies in case of buyer's insolvency, see § 75-2-702.

Secured transactions, see §§ 75-9-101 et seq.

JUDICIAL DECISIONS

1. In general.

Buyer is able to recover goods which remain in possession of seller after seller has become insolvent under UCC § 2-502 only if seller has become insolvent within 10 days after receipt of the first installment of the purchase price, and where insolvency of seller occurred prior to deliv-

ery of goods and not within 10 days after delivery buyer could not take advantage of this section. *First-Citizens Bank & Trust Co. v. Academic Archives, Inc.*, 10 N.C. App. 619, 179 S.E.2d 850 (1971), cert. denied, 278 N.C. 703, 181 S.E.2d 601 (1971).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 399 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:521 et seq. (Rights and obligations of buyer; rights on seller's insolvency).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:1161 et seq. (Rights of buyer to goods on insolvency of seller).

6 Am. Jur. Proof of Facts, Insolvency, Proof No. 2 (proof of inability to pay debts in the usual course of business).

43 Am. Jur. Proof of Facts 2d 523, Recovery for Part Performance of Contract.

CJS. 77 C.J.S., Sales §§ 471 et seq.

§ 75-2-503. Manner of seller's tender of delivery.

(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this chapter, and in particular

(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

(2) Where the case is within the Section 75-2-504 respecting shipment tender requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.

(4) Where goods are in the possession of a bailee and are to be delivered without being moved

(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but

(b) tender to the buyer of a nonnegotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction,

and a refusal by the bailee to honor the document or to obey the direction defeats the tender.

(5) Where the contract requires the seller to deliver documents

(a) he must tender all such documents in correct form, except as provided in this chapter with respect to bills of lading in a set (subsection (2) of Section 2-323) [Section 75-2-323(2)]; and

(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying the documents constitutes nonacceptance or rejection.

SOURCES: Codes, 1942, § 41A:2-503; Laws, 1966, ch. 316, § 2-503, eff March 31, 1968.

Cross References — General obligations of seller and buyer, see § 75-2-301.

Single delivery or in lots, see § 75-2-307.

Delivery of documents of title through banking channels, see § 75-2-308.

Time and place of payment, see § 75-2-310.

F. O. B. and F. A. S. shipments, see § 75-2-319.

Preliminary inspection under C. I. F. or C. & F. contracts, see § 75-2-321.

Overseas shipment, bill of lading in set of parts, see § 75-2-323.

Course of dealing; usage of trade, see § 75-2-501.

Shipment tender, see § 75-2-504.

Delivery on condition, see § 75-2-507.

Risk of loss, see §§ 75-2-509, 75-2-510.

Tender of payment, see § 75-2-511.

Buyer's right of inspection, see § 75-2-513.

Installment contract as requiring or authorizing delivery in separate lots, see § 75-2-612.

Substitute performance, see § 75-2-614.

Documents of title, see §§ 75-7-101 et seq.

JUDICIAL DECISIONS

1. In general.

Since the contract required the seller to deliver the encyclopedias to buyer's street address and the seller admitted both that the delivery team was part of the contract and that the UPS tracking slip revealed that the encyclopedias were shipped to buyer's post office box rather than its street address, the risk of loss remained with the seller, relieving buyer of responsibility for paying for the encyclopedias she never received. *Merchants Acceptance, Inc. v. Jamison*, 752 So. 2d 422 (Miss. Ct. App. 1999).

In a suit for replevin of personal property sold to the plaintiffs by defendant bank, the chancellor erred in granting the bank's demurrer where the complaint alleged two breaches of § 75-2-503 by the bank's alleged failure to put and hold the goods at the buyers' disposition and by the

bank's alleged failure to inform the buyers that there was a one-year time limitation in the real property owner's deed for removal of the property purchased by the plaintiffs. *Ward v. Merchants & Farmers Bank*, 394 So. 2d 1374 (Miss. 1981).

Under UCC § 2-503(1) and § 2-507(1), seller, as condition precedent to buyer's duty to accept and pay for the goods, must tender them by placing and holding conforming goods at buyer's disposal. *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1st Dist. 1978).

Ordinarily, under contracts for sale of goods contemplating transportation by a carrier, the seller is not obligated to deliver at a named destination unless he has specifically agreed to do so or the commercial understanding of the terms used by the parties contemplates such delivery (see UCC § 2-503, Official Comment 5).

Such an agreement is called a "destination contract," under which the seller's duty is to deliver conforming goods to the buyer at the named destination. On the other hand, the manner of delivery may be designated under what is called a "shipment contract." Under such a contract, the seller is required or authorized to ship the goods to the buyer, but is not required to deliver them at a particular destination (See UCC § 2-504, Official Comment 1). Both of these types of contracts usually employ mercantile terms or trade symbols that specify the requirements for delivery, such as "F.O.B. the place of shipment" (see UCC § 2-319(1)(a)) or "F.O.B. the place of destination" (See UCC § 2-319(1)(b)). Where no such term is employed and there has been no specific agreement to the contrary, a contract for the transportation of goods by carrier will be presumed to be a "shipment contract." *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 376 N.E.2d 548 (1978).

Where an anticipatory repudiation was amply demonstrated by a communication to plaintiff seller by an administrator and a purchasing agent of defendant nursing home that the leased television sets were no longer needed and that delivery would not be accepted, defendant buyer may not escape liability by asserting a failure to tender by the seller. *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 379 N.E.2d 1166 (1978).

In action for breach by seller of contract to repurchase Blonde D'Aquitaine heifers, where contract provided that buyer would buy 16 heifers from seller, that all would be fertile for breeding, that seller would "purchase same heifers" each guaranteed "safe in calf" to purebred Blonde D'Aquitaine bulls, and that contract would be "dissolved" if buyer should resell heifers to another person before July 31, 1974, and where buyer did not resell heifers to another person before such date, but sellers refused to repurchase heifers because of drastic drop in their market price, (1) seller's repurchase was not contingent on buyer's providing proof that heifers were pregnant before tender to seller; (2) buyer was not obligated to have all 16 heifers pregnant at end of period for seller's repurchase, and seller was obli-

gated to repurchase all that had become pregnant by that time; (3) buyer's allegation that seller was guilty of anticipatory repudiation of contract was not based on reasonable grounds within meaning of UCC § 2-609(1); (4) although buyer did not make tender at place agreed on, buyer's tender in telephone call of 11 pregnant heifers sufficiently complied with UCC § 2-503(1) in view of buyer's reasonable belief that seller would not accept heifers if buyer should transport them to place agreed on; and (5) on seller's breach of repurchase agreement, buyer's measure of damages was not difference between resale price and contract price under UCC § 2-706(1)-because of buyer's failure to effect commercially reasonable sale within meaning of UCC § 2-706(1) but was difference between contract price and market price under UCC § 2-708(1), plus incidental damages for sheltering and feeding rejected heifers. *Cole v. Melvin*, 441 F. Supp. 193 (D.S.D. 1977).

Where seller of tires sent shipment of new passenger car and truck tires by trucking company, as carrier, to oil company, as consignee, and carrier was instructed by consignee before delivery to deliver tires to specified destination on specified date (Friday); where driver of carrier's truck-trailer arrived at specified destination (consignee's premises) on specified date and was told by consignee's warehouse supervisor to drive truck into fenced enclosure (which was kept locked), back trailer up to consignee's loading dock, and await unloading of trailer on either that day (Friday) or following Monday; and where consignee decided to unload trailer on following Monday, but trailer and tires were stolen from consignee's premises during weekend, evidence was factually sufficient to establish sufficient tender of delivery of tires to consignee within meaning and for purposes of UCC § 2-503(1)(a), so as to shift risk of loss from seller to consignee pursuant to UCC § 2-509(1)(b). *Ada Oil Co. v. Dunlop Tire & Rubber Corp.*, 550 S.W.2d 129 (Tex. Civ. App. 1977).

Acceptance of delivery of foreign currency purchased from bank pursuant to futures contract and arrangements for delivery were responsibility of buyer under

UCC § 2-503(1)(b). *United Equities Co. v. First Nat'l City Bank*, 52 A.D.2d 154 (1st Dep't 1976), *aff'd*, 41 N.Y.2d 1032, 395 N.Y.S.2d 640, 363 N.E.2d 1385 (1977).

Seller neither tendered delivery nor delivered concrete forms to buyer pursuant to UCC §§ 1-201(14), 2-301 and 2-503(1), and seller breached express warranties under UCC § 2-313 that forms were free from incumbrance and that seller would warrant and defend against demands of all other persons, where third party claimed storage lien on forms, refused to allow buyer to take possession, and seller was unsuccessful in securing release from third party of his claimed lien. *Goosic Constr. Co. v. City Nat'l Bank*, 196 Neb. 86, 241 N.W.2d 521 (1976).

Where tractor which was to be traded in as part of purchase price to be paid for new tractor was damaged in accident while it was being driven to tractor dealer's premises by employee of company which was trading in tractor, and dealer had damaged tractor repaired at its own expense, paid lien balance owed on trade-in vehicle in accordance with contract terms, and did not seek any adjustment to contract for purchase of new tractor because of damage to trade-in vehicle, dealer by its own course of conduct placed its mark of approval on meaning of agreement of parties by completing its performance in manner consistent with transfer of ownership to it prior to accident in question. *Home Indem. Co. v. Twin City Fire Ins. Co.*, 474 F.2d 1081 (7th Cir. Ind. 1973).

In action by diamond wholesaler against purchaser under "sale or return" contract, shipper's insurance coverage, use of registered mail, and use of term "merchandise is delivered to you" established delivery contract under UCC § 2-503, and where diamonds were never delivered, risk of loss remained with wholesaler under UCC § 2-510.

Baumgold Bros. v. Allan M. Fox Co., 375 F. Supp. 807 (N.D. Ohio 1973).

Under UCC where goods are delivered to buyer under contract for sale and are physically received by him, they are in his possession. *North Platte State Bank v. Production Credit Ass'n*, 189 Neb. 44, 200 N.W.2d 1 (1972).

That consignee permitted carrier's driver to leave damaged boom section at its place of business "as an accommodation" to carrier did not alter fact that physical delivery occurred, and where bill of lading required written notice to carrier of claim for damage within 9 months after delivery, consignee's failure to give such notice within required time barred recovery. *Johnson & Dealaman, Inc. v. Wm. F. Hegarty, Inc.*, 93 N.J. Super. 14, 224 A.2d 510 (App. Div. 1966).

The cost of meals which an airline furnishes its passengers during flight being included in the cost of the ticket, a sale of the meals occurs when and where the ticket is purchased, and when the ticket is purchased in Georgia a sale occurs in that state, regardless of where the aircraft is when the meal is served. *Undercofler v. Eastern Air Lines*, 221 Ga. 824, 147 S.E.2d 436 (1966).

The fact that the actual delivery of meals furnished by an airline to its in-flight passengers does not occur until later does not prevent perfection of its sale of the meals at the time of the purchase of the passenger ticket, for the passenger at the time the ticket is purchased impliedly consents for delivery of the meal to be made during the flight. *Undercofler v. Eastern Air Lines*, 221 Ga. 824, 147 S.E.2d 436 (1966).

The acknowledgment by the person with whom a boat and trailer were stored of the buyer's right to possession was a good tender of delivery of the articles. *Whately v. Tetrault*, 29 Mass. App. Dec. 112 (1964).

RESEARCH REFERENCES

ALR. What amounts to acknowledgment by third person that he holds goods on buyer's behalf. 4 A.L.R.2d 213.

Delay in delivery placing goods at the risk of the party at fault under § 22(b) of Uniform Sales Act. 38 A.L.R.2d 658.

Am Jur. 13 Am. Jur. 2d, Carriers § 367.
 67 Am. Jur. 2d, Sales §§ 201 et seq.
 6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:591-2:598. (Rights and obligations of seller; tender of delivery of goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales §§ 253:1181 et seq. (Tender of delivery by seller).

§ 75-2-504. Shipment by seller.

Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must

(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment.

Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.

SOURCES: Codes, 1942, § 41A:2-504; Laws, 1966, ch. 316, § 2-504, eff March 31, 1968.

Cross References — Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

Options and co-operation respecting performance, see § 75-2-311.

F. O. B. place of shipment contracts, see § 75-2-319.

C. I. F. and C. & F. contracts, see § 75-2-320.

Bill of lading in set of parts in overseas shipment, see § 75-2-323.

Tender of delivery generally, see § 75-2-503.

Risk of loss with respect to delivery requirements, see § 75-2-509.

Buyer's options in case of nonconforming tender of delivery, see § 75-2-601.

Substitute performance, see § 75-2-614.

JUDICIAL DECISIONS

1. In general.

In action by account-assignee to recover money due on account receivable covering table-hockey games sold by assignor-seller to defendant buyer, where (1) in connection with purchase orders placed by defendant with assignor-seller, defendant and assignor-seller agreed in writing that defendant would be allowed \$22,000 to advertise goods purchased and that such sum could be deducted from any of seller's invoices, (2) defendant received goods worth \$28,517 that were covered by three invoices, but goods worth \$10,053 that

were covered by two other invoices were stolen, (3) defendant expended virtually all of its advertising allowance to promote sale of goods, (4) defendant, although not paying for any of the goods, reshipped some goods at assignor-seller's direction to third party, who paid seller \$7,300 therefore, and (5) defendant also re-shipped some goods to another third party after assignor-seller went out of business, and neither plaintiff account-assignee nor defendant were paid therefore, court held (1) that since assignor-seller had complied with requirements of UCC § 2-319(1)(a),

dealing with shipment of goods F.O.B. place of shipment, and UCC § 2-504, dealing with shipment of goods under "shipment" contract, plaintiff account-assignee was entitled to recover from defendant buyer invoice value of goods which were stolen, (2) defendant was also liable for value of unpaid-for goods that it shipped to third party after assignor had gone out of business, and (3) defendant was entitled to deduct from its total liability its \$22,000 advertising allowance (applying Mo Law; entering judgment for plaintiff for \$9,270, which represented award of \$31,270 for goods sold and delivered, less the \$22,000 advertising allowance). *United Nat'l Indus., Inc. v. Pool Mart, Inc.*, 449 F. Supp. 583 (E.D. Mo. 1978).

In buyer's suit for damages for loss in transit of shipment of pocket calculators, where parties intended that delivery be made to a carrier and delivery was made to United States post office, (1) request in buyer's letter to seller that goods be shipped to buyer's residence was mere shipping instruction that did not convert contract into one requiring delivery to a destination, instead of a carrier, and risk of loss therefore passed to buyer under UCC § 2-509(1)(a). However, since seller underinsured the goods, which were shipped in two cartons, and by mistake shipped one carton to another state, seller entered into improper transportation contract with carrier under UCC § 2-504(a) and thus became liable for buyer's loss. *La Casse v. Blaustein*, 93 Misc. 2d 572 (1978).

Ordinarily, under contracts for sale of goods contemplating transportation by a carrier, the seller is not obligated to deliver at a named destination unless he has specifically agreed to do so or the commercial understanding of the terms used by the parties contemplates such delivery (see UCC § 2-503, Official Comment 5). Such an agreement is called a "destination contract," under which the seller's duty is to deliver conforming goods to the buyer at the named destination. On the other hand, the manner of delivery may be designated under what is called a "shipment contract." Under such a contract, the seller is required or authorized to ship the goods to the buyer, but is not required to deliver them at a particular destination

(See UCC § 2-504, Official Comment 1). Both of these types of contracts usually employ mercantile terms or trade symbols that specify the requirements for delivery, such as "F.O.B. the place of shipment" (see UCC § 2-319(1)(a)) or "F.O.B. the place of destination" (See UCC § 2-319(1)(b)). Where no such term is employed and there has been no specific agreement to the contrary, a contract for the transportation of goods by carrier will be presumed to be a "shipment contract." *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 376 N.E.2d 548 (1978).

In action by Massachusetts buyer against Florida seller for breach of warranty in sale of two marine engines, where Massachusetts non-UCC statute conferred jurisdiction over defendant as to plaintiff's cause of action if breach of warranty alleged by plaintiff arose from defendant's "contracting to supply...things in this commonwealth," defendant's motion to dismiss was properly granted where agreement between parties was "shipment" contract under UCC § 2-504, under which defendant's only obligation was to arrange for shipment of engines to plaintiffs by carrier and to put engines in possession of carrier, which then had burden of "supplying" or delivering engines to plaintiffs in Massachusetts (holding that defendant did not contract "to supply...things in this commonwealth," so as to come under non-UCC jurisdiction statute in issue, and that defendant's responsibility for physical delivery of engines ended when it delivered them to carrier in Florida for shipment to Massachusetts). *Droukas v. Divers Training Academy, Inc.*, 375 Mass. 149, 376 N.E.2d 548 (1978).

Buyer breached contract for sale of steel by improperly and prematurely rejecting shipment, although contract called for shipment date of September-October, 1974 and steel was not shipped until November 14, 1974, where steel in question did arrive at destination on November 29, 1974, and where, under recognized trade usage, shipment term of September-October implied delivery by October-November and, thus, any delay in shipment was cured by timely delivery; contract in question included "C.I.F." shipping term, which rendered contract shipment, as op-

posed to destination, contract under UCC § 2-504(c), "material delay" was required before buyer could reject C.I.F. contract on basis of late shipment. *Harlow & Jones, Inc. v. Advance Steel Co.*, 424 F. Supp. 770 (E.D. Mich. 1976).

Seller's act of loading goods into container supplied by buyer and in notifying buyer of such loading did not operate to shift risk of loss to buyer in absence of contrary agreement. *A.M. Knitwear Corp. v. All Am. Export-Import Corp.*, 41 N.Y.2d 14, 359 N.E.2d 342 (1976).

Where seller was required to cut from younger sheep, bag, assemble, place in yard and load ewes for shipment to buyer to complete sale, risk of loss passed to buyer upon delivery to carrier for shipment, and not at time of payment by buyer or receipt of ewes by buyer. *S-Creek Ranch, Inc. v. Monier & Co.*, 509 P.2d 777 (1973).

The fact that the addresses are described as "ship to" does not overcome the presumption of the Code in favor of a shipment contract rather than a destina-

tion contract. *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F. Supp. 550 (D. Conn. 1968).

Where New York supplier agreed to pay shipping charges for finished products sent to it by Louisville manufacturer, and manufacturer agreed to pay common carrier charges for shipment to it of raw materials from New York, the agreement constituted a shipment contract, and delivery under it was at the point of departure. *Permalum Window & Awning Mfg. Co. v. Permalum Window Mfg. Corp.*, 412 S.W.2d 863 (Ky. 1967).

That consignee permitted carrier's driver to leave damaged boom section at its place of business "as an accommodation" to carrier did not alter fact that physical delivery occurred, and where bill of lading required written notice to carrier of claim for damage within 9 months after delivery, consignee's failure to give such notice within required time barred recovery. *Johnson & Dealaman, Inc. v. Wm. F. Hegarty, Inc.*, 93 N.J. Super. 14, 224 A.2d 510 (App. Div. 1966).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 552, 566 et seq., 617 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:611 et seq. (Rights and obligations of seller; manner of shipment of goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1201 et seq. (Shipment by seller).

§ 75-2-505. Seller's shipment under reservation.

(1) Where the seller has identified goods to the contract by or before shipment:

(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.

(b) a nonnegotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Section 2-507) [Section 75-2-507(2)] a nonnegotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for

transportation within Section 75-2-504 but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document.

SOURCES: Codes, 1942, § 41A:2-505; Laws, 1966, ch. 316, § 2-505, eff March 31, 1968.

Cross References — Seller's retention or reservation of title in goods shipped or delivered limited in effect to reservation of security interest, see §§ 75-1-201(37), 75-2-401.

Authority of seller to send goods to ship under reservation, see § 75-2-310(b).

Shipment F. O. B. vessel or F. A. S., payment against tender of required documents, see § 75-2-319.

C. I. F. or C. & F. contracts, payment against tender of required documents, see § 75-2-320.

Power to transfer title, see § 75-2-403.

Buyer's insurable interest, see § 75-2-501.

Buyer's rights after seller's insolvency with respect to goods not shipped but paid for in whole or in part, see § 75-2-502.

Shipment by seller, see § 75-2-504.

Conditional delivery, see § 75-2-507.

Risk of loss in absence of breach, see § 75-2-509.

Stoppage in transit, see § 75-2-705.

Buyer's right to replevin for goods identified to contract, see § 75-2-716.

Documents of title, see §§ 75-7-101 et seq.

Secured transactions, see §§ 75-9-101 et seq.

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 401-406, 546.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:615 et seq. (Rights and obligations of seller; manner of shipment of goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:11 et seq. (shipment by seller under reservation).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1211, 253:1212. (Shipment by seller under reservation).

CJS. 77A C.J.S., Sales §§ 311, 312.

§ 75-2-506. Rights of financing agency.

(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

SOURCES: Codes, 1942, § 41A:2-506; Laws, 1966, ch. 316, § 2-506, eff March 31, 1968.

Cross References — "Financing agency", see § 75-2-104.

Buyer's special property in goods identified to contract, see § 75-2-501.

Buyer's rights after seller's insolvency with respect to goods not shipped but paid for in whole or in part, see § 75-2-502.

Stoppage in transit, see § 75-2-705.

Collection of documentary drafts, see §§ 75-4-501 et seq.

Letters of credit, see §§ 75-5-101 et seq.

Documents of title, see §§ 75-7-101 et seq.

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 442, 443, 548.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:481. (Complaint, petition or decla-

ration; by financing agency; for reimbursement after honoring draft given by buyer in payment for goods).

§ 75-2-507. Effect of seller's tender; delivery on condition.

(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

SOURCES: Codes, 1942, § 41A:2-507; Laws, 1966, ch. 316, § 2-507, eff March 31, 1968.

Cross References — Implication arising from presence of words "unless otherwise agreed" in Code provision, see § 75-1-102.

Time and place of payment, see § 75-2-310.

Passing of title, see § 75-2-401.

Good faith purchasers from buyer, see § 75-2-403.

Requisites of tender, see § 75-2-503.

Tender of payment, see § 75-2-511.

Breach, repudiation, and excuse for nonperformance, see §§ 75-2-601 et seq.

Substitute performance, see § 75-2-614.

Seller's remedies on buyer's insolvency, see § 75-2-702.

Buyer's remedies in case of seller's breach, see §§ 75-2-711 et seq.

JUDICIAL DECISIONS

1. In general.

Since the contract required the seller to deliver the encyclopedias to buyer's street address and the seller admitted both that the delivery team was part of the contract and that the UPS tracking slip revealed that the encyclopedias were shipped to buyer's post office box rather than its street address, the risk of loss remained with the seller, relieving buyer of responsibility for paying for the encyclopedias she never received. *Merchants Accep-*

tance, Inc. v. Jamison, 752 So. 2d 422 (Miss. Ct. App. 1999).

Under UCC § 2-503(1) and § 2-507(1), seller, as condition precedent to buyer's duty to accept and pay for the goods, must tender them by placing and holding conforming goods at buyer's disposal. *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1st Dist. 1978).

In seller's action for buyer's breach of contract to buy specified quantity of potatoes suitable for processing into potato

chips, which potatoes were to be delivered to buyer "as needed," trial court correctly concluded (1) that contract, pursuant to UCC § 1-102(3), varied normal rules for tender contained in Uniform Commercial Code in that contract required buyer to request delivery of quantity of potatoes, which buyer at no time did, before seller would become obligated to tender delivery, and (2) that as a result, seller's failure to tender delivery of any potatoes at all during entire contract period did not relieve buyer of liability for payment under UCC § 2-301 and § 2-507(1) (also holding that even if potatoes in seller's warehouse were not suitable for buyer's use throughout entire contract period, buyer still breached contract by not requesting any deliveries at all during such period). *Halverson v. Pet, Inc.*, 261 N.W.2d 887 (N.D. 1978).

At common law, if sale of goods was on credit, all incidents of ownership passed to buyer, and seller merely had claim for purchase price against buyer but no rights to goods sold. However, if sale was for cash, title to goods did not pass until purchase price was paid, and since buyer did not have title until goods were paid for, he could not pass title to third party, and lienholder or attaching creditor obtained no interest in goods. The Uniform Commercial Code, in UCC § 2-403(1), has changed this rule by favoring good-faith purchaser over aggrieved seller, and defaulting buyer under UCC § 2-507(2) has power to transfer title to good-faith purchaser, even though buyer lacks right to do so. *GECC v. Tidwell Indus., Inc.*, 115 Ariz. 362, 565 P.2d 868 (1977).

Where meat packer's operations were financed by secured creditor who had properly perfected security interest in meat packer's assets, including after-acquired property, where cattle sellers delivered cattle to meat packer on "grade and yield basis," where checks were subsequently issued to sellers, but before checks were paid, secured party, believing itself to be insecure, refused to advance more funds to meat packer for operation of plant, and where meat packer then filed petition in bankruptcy, interest of unpaid seller was subordinate to interest of secured creditor, and seller who did not

attempt to reclaim cattle until year after filing petition for bankruptcy, was not entitled to either reclamation of cattle or proceeds from sale of slaughtered meat. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Where plaintiff, operator of livestock ring, sold cattle which it held on consignment to buyer, plaintiff then paid its consignor in full, buyer paid for cattle by check and plaintiff gave buyer purchase sheets for sale, where buyer then had cattle shipped to defendants' sales ring and later delivered to defendants purchase sheets given him by plaintiff, where plaintiff presented buyer's check for payment at drawee bank, but it was dishonored because of insufficient funds, and where plaintiff immediately contacted defendants and demanded return of livestock but defendants, instead, sold cattle: (1) plaintiff would be deemed "seller" under Uniform Commercial Code and was, thus, entitled to seller's remedies under Code; (2) under UCC §§ 2-507(2) and 2-511(3) when bank refused to honor buyer's check upon plaintiff's presentment, buyer no longer had right to retain or dispose of cattle, even though he retained title to them, and when defendants sold cattle on buyer's behalf, they acquired and then passed title, but since they acted with notice of plaintiff's claim to livestock, they did not acquire status of good faith purchaser and could not prevent plaintiff from asserting its right of reclamation and, thus, if they could not redeliver cattle they must deliver proceeds from sale thereof. *Ranchers & Farmers Livestock Auction Co. v. Honey*, 38 Colo. App. 69, 552 P.2d 313 (1976), cert. dismissed, 191 Colo. 503, 553 P.2d 799 (1976).

Removal of equipment, with keys in machines, to buyer's field near his home was such surrender of possession by seller to buyer as to constitute tender of delivery under UCC § 2-507. *Dehahn v. Innes*, 356 A.2d 711 (Me. 1976).

Under UCC § 9-301, security interest of cattle seller was subordinate to rights of garnishing lien creditor where debtor purchased cattle from seller and paid for them with check which was subsequently dishonored for insufficient funds, where

debtor shipped cattle to livestock auction company for resale and writ of garnishment was served on auction company, where seller and debtor subsequently executed security agreement and financing statement, back-dated, and properly describing cattle in question and where financing statement was filed within ten days after debtor purchased cattle from seller. Seller's right to reclaim under UCC § 2-702 was not security interest within purview of Article 9 on secured transactions and acceptance of check did not change cash sale into credit transaction. Since there was no security agreement between debtor and seller, either oral or written, at time writ of garnishment was served, security interest attached sometime later when security agreement was signed by debtor. *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App. 1975), *ref. n.r.e.* (Apr. 7, 1976).

Where seller never tendered delivery of automobile under installment sales contract, not only did risk of loss remain on seller under UCC § 2-509(3), but buyer had right to cancel contract. *Schleimer v. Googe*, 50 A.D.2d 944 (2d Dep't 1975).

Where buyer of automobile resold it to third party, received check in payment therefore, original seller took possession of automobile from third party and third party notified buyer he was canceling transaction, although ownership of car passed to third party at time payment was accepted and car was delivered, such payment was conditional under UCC § 2-511(3) and, although check was never presented for payment, third party in effect dishonored check and countermanded payment when he notified buyer he was canceling transaction; under UCC § 2-507(2), third party's right to retain or dispose of automobile was conditional upon his making payment due, and thus, when his check was dishonored, buyer had right to reclaim automobile by maintaining action in trover against original owner. *Lawrence v. Graham*, 29 Md. App. 422, 349 A.2d 271 (1975).

In action by creditor of bankrupt arising out of sale of bar equipment which was originally negotiated as cash sale with payment due on delivery, seller waived his

right to reclaim goods under UCC § 2-507(2) by failing to reclaim equipment until it had been in buyer's possession for over 4 months; nor did seller become "reclaiming seller" once transaction became credit sale since UCC § 2-702 requirement that demand for return of goods be made within 10 days of their receipt was not satisfied. Thereafter, actual retaking by seller did not, under UCC § 2-703(f), accomplish cancellation of the sale as a remedy and was not effective to prevent the retaking being a preference under Bankruptcy Act. In *re Colacci's of Am., Inc.*, 490 F.2d 1118 (10th Cir. Colo. 1974).

Tender of specially fabricated precast concrete products which conformed to contract was equivalent of delivery, and fixed duty to pay therefor, even though concrete products were never delivered because of lack of requested delivery instructions. *Aetna Ins. Co. v. Maryland Cast Stone Co.*, 254 Md. 109, 253 A.2d 872 (1969).

Where a check received in payment for a cash transaction was dishonored because of insufficient funds and more than ten days were permitted to elapse before a demand for a return of the goods sold was made, the seller's right to reclaim the goods had been waived and the seller's remedy was then on the instrument as well as for breach of contract and his rights were reduced to those of a general creditor. In *re Helms Veneer Corp.*, 287 F. Supp. 840 (W.D. Va. 1968).

Where the sellers of automobiles to a buyer who disposed of them through an auction company later found the checks received by them from the buyer in payment for the cars were dishonored because of the auction company's actions in stopping payments on checks previously delivered to the buyer and by withholding from him the proceeds derived from the sales of the sellers' cars, the sellers had a right of reclamation of their property had it remained in the buyer's hands either under § 2-702 or § 2-507 because the auction company's action had in effect rendered the car buyer insolvent, and although the cars had been resold at auction the sellers' rights survived the resale and, on equitable principles, attached to the proceeds of the sales in the hands of the auction company. *Greater Louisville Auto Auction*,

Inc. v. Ogle Buick, Inc., 387 S.W.2d 17 (Ky. 1965).

RESEARCH REFERENCES

ALR. Seller's right to retain down payment on buyer's unjustified refusal to accept goods. 11 A.L.R.2d 701.

Place, in absence of written provision in sales contract, where cash consideration for goods purchased is payable. 49 A.L.R.2d 1350.

Am Jur. 67 Am. Jur. 2d, Sales §§ 505, 524, 528, 529, 666.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:594. (Complaint in federal court; diversity of citizenship; to recover damages for refusal to accept and pay for goods after tender thereof; by seller).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:599. (Instruction to jury; tender of delivery as condition precedent to duty to accept and pay for goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1231, 253:1232. (Effect of tender by seller; delivery on condition).

43 Am. Jur. Proof of Facts 2d 523, Recovery for Part Performance of Contract.

CJS. 77A C.J.S., Sales §§ 208, 379.

§ 75-2-508. Cure by seller of improper tender or delivery; replacement.

(1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

SOURCES: Codes, 1942, § 41A:2-508; Laws, 1966, ch. 316, § 2-508, eff March 31, 1968.

Cross References — Course of dealing and usage of trade, see § 75-1-205.

Unconscionable contract or clause, see § 75-2-302.

Tender of payment by buyer, see § 75-2-511.

Effect of rejection or return of goods on claim for damages or other remedy, see § 75-2-721.

JUDICIAL DECISIONS

1. In general.

Mobile home purchasers' continued use of the mobile home after they notified the seller of their intention to revoke acceptance did not constitute a waiver of their right to revoke acceptance where they were financially unable to move elsewhere and they were repeatedly assured by the seller that the defects would be repaired; the purchasers were merely complying

with § 75-2-508, which requires a consumer who expresses an intention to revoke acceptance to provide a seller with a reasonable opportunity to attempt to cure the defect; moreover, any excessive or unreasonable use of the home by the purchasers could be remedied through quantum meruit recovery, not through an effectuation of revocation. North River Homes, Inc. v. Bosarge, 594 So. 2d 1153,

38 A.L.R.5th 869 (Miss. 1992).

A seller's right to cure before the buyer may revoke acceptance is not unlimited; there comes a time when "enough is enough" and a purchaser is entitled to seek revocation notwithstanding the seller's repeated good faith efforts. *Guerdon Indus., Inc. v. Gentry*, 531 So. 2d 1202 (Miss. 1988).

Since a buyer's acceptance of goods precludes any rejection thereof, and since buyer's rejection is prerequisite to seller's right under UCC § 2-508 to cure defects in such goods, mobile home buyer's acceptance of home under UCC § 2-606(1), despite knowledge of defects therein, deprived seller of right to cure such defects. *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

Where (1) seller sued to recover unpaid balance of purchase price of cinders purchased by buyer for installation in playground, (2) buyer counterclaimed for expenses incurred because seller delivered cinders of improper size, and (3) buyer also contended that seller had no right to "cure" the breach because situation involved a revocation of acceptance by buyer, court held (1) that while seller might not have right to cure nonconformity in revocation-of-acceptance situation, buyer by letter had expressly given seller opportunity to cure breach, (2) seller had not cured breach within meaning of UCC § 2-508(1) because seller refused to deduct cost of regrading replacement cinders from purchase price of cinders contracted for, and (3) buyer's counterclaim was erroneously denied by trial court on ground that seasonable demand by buyer for reimbursement was necessary in addition to notice of revocation of acceptance, since UCC §§ 2-607(3)(a) and 2-608(2) require only that buyer, on revoking acceptance, give notice of breach to seller which states that buyer is not accepting the goods. *Moulden & Sons v. Osaka Landscaping & Nursery, Inc.*, 21 Wash. App. 194, 584 P.2d 968 (1978).

In action against lessee of two refrigerator display cases for accelerated rent allegedly due lessor for lessee's breach of lease agreement, court held, on affirming judgment for lessee, (1) that transaction was sale within meaning of UCC § 2-

106(1), since shipping order executed simultaneously with alleged "lease" gave lessee option to obtain, at no further cost, title to refrigerator cases at end of lease, (2) that waiver of any warranties of merchantability or fitness for particular purpose in lease agreement was not conspicuous under UCC § 2-316(2) and thus was ineffective, and (3) that lessee did not lose right to rescind sale agreement by failure to give lessor adequate opportunity to "cure" under UCC § 2-508(1), since replacement refrigerator cases purchased elsewhere by lessee were not installed until more than one month after lessor's attempt to cure defective cases sold to lessee. *Transcontinental Refrigeration Co. v. Figgins*, 179 Mont. 12, 585 P.2d 1301 (1978).

With respect to seller's right to "cure" under UCC § 2-508(1), buyer is not required to allow seller to tinker indefinitely with defective article in hope that it ultimately may be made to comply with its warranty. *Transcontinental Refrigeration Co. v. Figgins*, 179 Mont. 12, 585 P.2d 1301 (1978).

In buyer's action for seller's breach of written and oral warranties in sale of marine diesel engine, (1) where terms of sale contract were contained in seller's letter to buyer, buyer's written purchase order, and manufacturer's written warranty which accompanied sale of engine; (2) where seller also orally warranted to buyer that engine would deliver specified standard of performance, that if it did not do so it could be removed from buyer's boat at seller's expense, and that it would be delivered in time to meet requirements of builder of buyer's boat; (3) where such oral warranties were breached and buyer, within six-months period provided in written engine warranty for manufacturer's repair or replacement of defective parts, refused to allow manufacturer's mechanic to inspect defective engine; (4) where buyer, more than six months after date engine was put into operation, notified seller that he had removed engine from his boat, tendered engine back to seller, and demanded return of purchase price; and (5) where such tender and demand were refused by seller, (1) trial court properly found that all terms of sale contract

had not been reduced to writing; (2) admission in evidence of oral warranties as part of sale contract did not violate parol evidence rule contained in UCC § 2-202; (3) such oral warranties did not constitute "sale or return" provision in contract under UCC § 2-326(1)(b), but were analogous to "sale on approval" provision under UCC § 2-326(1)(a) and thus were not required by UCC § 2-326(4) to be in writing; (4) buyer's failure to allow seller to exercise right under UCC § 2-508(1) to inspect and repair engine negated warranty provisions of sale contract; (5) buyer accepted engine under UCC § 2-327(1)(b) by not seasonably notifying seller of buyer's election to return engine; and (6) buyer's delay of nearly six months in informing seller of buyer's intention to revoke acceptance of engine was insufficient compliance with buyer's good faith obligation under UCC § 1-203 and did not revoke such acceptance under UCC § 2-608. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

In certain defined situations, seller under UCC § 2-508 has right to cure defective tender both within time fixed for performance and also after time for performance has expired. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

In action by buyer of new Lincoln Continental automobile against seller in which buyer alleged seller's breach of warranty and buyer's justifiable revocation of acceptance of vehicle, (1) where buyer, although he did not revoke acceptance until 14 months after sale, was in almost constant touch with seller concerning vehicle's condition and was relying on seller's continued assurances that vehicle would be satisfactorily repaired; (2) where buyer's unequivocal notification to seller that buyer was revoking acceptance of vehicle occurred only when it became apparent to buyer that repeated attempts at adjustment had failed; and (3) where circumstances of case involved almost continuous series of negotiations and repairs, buyer's delay in giving notice of revocation of acceptance did not prejudice seller and

was not unreasonable under UCC § 2-608(2). Although seller had right under UCC § 2-508 to attempt to cure vehicle's defects, this right did not last for indefinite period. Furthermore, since continued use of vehicle was inevitable while seller was attempting to repair vehicle's defects as they became apparent, such use did not defeat buyer's revocation of acceptance. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

Seller did not have right to repair and cure defects in accord with UCC § 2-508, notwithstanding buyer's notification of revocation of acceptance, where seller was unable to say how long it would have taken him to make all repairs necessary to get mobile home back into good condition. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

In buyer's action for breach of contract to deliver trailer house, UCC § 2-508, authorizing seller to cure non-conforming delivery under certain circumstances, was inapplicable since buyer never rejected trailer house as required by UCC § 2-508(1). *Boies v. Norton*, 526 S.W.2d 651 (Tex. Civ. App. 1975), writ ref'd n.r.e., (Nov. 26, 1975).

In action by tool and die maker to recover for breach of contract under which plaintiff was to custom make two molds—a lid and a cup—to be used in manufacturing plastic containers, defendant having rejected tender of non-conforming goods after plaintiff made several attempts to remedy defective product, evidence failed to disclose any compliance with UCC § 2-508(2), extending time for performance and "cure", and depriving defendant of his right to reject, where plaintiff failed to notify defendant of intent to cure and failed to affect cure within "further reasonable time" or at any time; after plaintiff's last attempt to put molds in working order, there was no showing of any tender to defendant, of any examination of mold by him or by anyone for him, or of any acceptance or rejection by him, or any evidence parts even then met necessary standards. *Hayes v. Hettinga*, 228 N.W.2d 181 (Iowa 1975).

Seller who delivered and installed defective carpet had right under UCC § 2-

508(1) to make conforming delivery at anytime before expiration of time for performance regardless of prior nonconforming delivery. *Meads v. Davis*, 22 N.C. App. 479, 206 S.E.2d 868 (1974).

Under contract for delivery and installation of pin spotter machines in bowling alley, where buyers did not reject defective, nonconforming pin spotters, but instead accepted them notwithstanding their defects, buyers were not required to give seller notice of particular defects as required by UCC § 2-605(1) in order to maintain action for breach of warranty, and letter from buyers' attorney to seller's sister, after seller's death, stating that pin spotters were not installed within meaning of contract, that pin spotters needed repairs although contract included guaranty as to quality and performance of equipment, and that buyers were keeping record of their expenses so that they could substantiate claim for any loss which might be sustained, was sufficient notice under UCC § 2-607(3) to preserve buyers' rights; furthermore, buyers did not waive their rights to warranty recovery by refusing to permit seller to cure defects in pin spotters under UCC § 2-508 since they did not reject nonconforming goods but accepted them. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. Iowa 1974).

Seller's breach of its express warranty with relation to sale of mobile home and its non-conforming delivery were not cured within meaning of UCC § 2-508, where record contained no pleading that seller seasonably notified buyers of its intention to cure defects complained of, or of fact that they were cured. *Mobile Hous., Inc. v. Stone*, 490 S.W.2d 611 (Tex. Civ. App. 1973).

Where original Christmas tree delivery date was December 9, but where buyer later informed seller that customers would have to have trees by weekend of December 16 at latest, tender of conforming delivery on December 14 was seasonable under UCC § 2508(1), giving seller valid right to cure previously nonconforming delivery. *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972).

Rescission of a contract of sale cannot be made by the buyer under UCC § 2-508,

where the defects relied on for the rescission are minor defects and an offer is made by or on behalf of the seller to repair all of the defects complained of and the buyer refuses to accept such offer. *Reece v. Yeager Ford Sales, Inc.*, 155 W. Va. 453, 184 S.E.2d 722 (1971).

Seller may cure defective tender through repair, replacement or price allowance, if seller reasonably notifies buyer of curative intention and, in effecting cure, makes timely conforming tender. *Graulich Caterer, Inc. v. Hans Holterbosch, Inc.*, 101 N.J. Super. 61, 243 A.2d 253 (App. Div. 1968).

Even where the contract period has expired and a buyer has revoked acceptance of nonconforming goods, the seller may cure the defect where he had originally believed nonconforming goods were acceptable because a new and improved version of what was ordered and seller notified buyer within a reasonable time of proposed proper tender and the buyer had not yet purchased substitute goods elsewhere. *Bartus v. Riccardi*, 55 Misc. 2d 3 (1967).

Even where contract period had expired and buyer has rejected a nonconforming tender or has revoked an acceptance, seller may substitute a conforming tender if he had reasonable grounds to believe that nonconforming tender would be accepted and if he seasonably notifies buyer of his intention to substitute a conforming tender. *Bartus v. Riccardi*, 55 Misc. 2d 3 (1967).

The seller of a malfunctioning color television receiver should be afforded the opportunity to cure the improper tender by making minor repairs or reasonable adjustments where he can do so without subjecting the buyer to any great inconvenience, risk or loss; and where the buyer adamantly refused to permit the removal of the television chassis to seller's place of business for a short period of time to determine the cause of the malfunction and extent of adjustment or correction needed to effect full operational efficiency he is not entitled to rescind the purchase and demand refund of the purchase price. *Wilson v. Scampoli*, 228 A.2d 848 (D.C. 1967).

RESEARCH REFERENCES

ALR. Seller's cure of improper tender or delivery under UCC § 2-508. 36 A.L.R.4th 544.

Am Jur. 67 Am. Jur. 2d, Sales §§ 487, 610, 651 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:600. (Instruction to jury; manner by which tender or delivery of nonconforming goods may be cured).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1241 et seq. (Cure by seller of improper tender or delivery; replacement).

Law Reviews. 1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss. L. J. 141, March 1983.

§ 75-2-509. Risk of loss in the absence of breach.

(1) Where the contract requires or authorizes the seller to ship the goods by carrier

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505) [Section 75-2-505]; but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a nonnegotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503 [Section 75-2-503(4)(b)].

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this chapter on sale on approval (Section 2-327) [Section 75-2-327] and on effect of breach on risk of loss (Section 2-510) [Section 75-2-510].

SOURCES: Codes, 1942, § 41A:2-509; Laws, 1966, ch. 316, § 2-509, eff March 31, 1968.

Cross References — Sale on approval, risk of loss, see § 75-2-327.

Passage of title, see § 75-2-401.

Manner of seller's tender of delivery, see § 75-2-503.

Shipment by seller, see § 75-2-504.

Effect of breach on risk of loss, see § 75-2-510.

Risk of loss with respect to identified goods, see § 75-2-613.

JUDICIAL DECISIONS

1. In general.
2. Shipment contract.
3. Destination contract.
4. Bailed goods.
5. Receipt of goods from merchant.
6. Tender of delivery.
7. Agreements and course of dealing.
8. Third party actions.

1. In general.

In action by assignee of account of buyer of carpeting for balance due on such account, where (1) buyer ordered carpeting from seller-assignor on discount terms specified by buyer, (2) invoice mailed after goods were shipped contained different discount terms, (3) buyer continued to hold goods, although claiming that it had rejected them, and (4) entire shipment of goods was later destroyed by fire at buyer's warehouse, court held (1) that under UCC § 2-206(1)(b), when seller-assignor shipped goods to buyer, it accepted buyer's offer to purchase goods, (2) that even if UCC § 2-207 superficially applied to alter terms of parties' contract, buyer properly objected under UCC § 2-207(2)(c) to different credit terms on seller-assignor's invoice and such terms did not apply, (3) that contract therefore was on buyer's own credit terms, (4) that there was nothing that buyer could reject as nonconforming, since goods were admittedly satisfactory, (5) that contract had not been breached by either party, (6) that since there had been no breach, risk of loss under UCC § 2-509(3) passed to buyer on his receipt of goods, and buyer thus had to bear loss of goods by fire, and (7) that under UCC § 2-210(2), assignment of buyer's account to plaintiff was valid. *Trust Co. Bank v. Barrett Distribs., Inc.*, 459 F. Supp. 959 (S.D. Ind. 1978).

Where (1) buyer paid for motorcycle in full, was given necessary registration and insurance papers, and registered machine and secured liability insurance for it prior to its theft from seller's premises, although its license plates were never affixed, (2) seller agreed to hold machine on seller's premises until buyer returned from vacation, and (3) machine was stolen from seller's premises without negligence

on seller's part, court held (1) that evidence showed that buyer had never exercised dominion or control over motorcycle, and (2) that in such situation, seller must bear risk of loss under UCC § 2-509(3), which provides that risk of loss passes to buyer on his receipt of goods if seller is merchant, and UCC § 2-103(1)(c), which provides that "receipt" of goods means taking physical possession of them. *Ramos v. Wheel Sports Ctr.*, 96 Misc. 2d 646 (1978).

Regardless of whether the contract involves delivery at the seller's place of business or at the situs of the goods, a merchant seller cannot transfer risk of loss and it remains on him, under UCC §§ 2-509(3) and 2-103(1)(c), until actual receipt by the buyer, even though full payment has been made and the buyer has been notified that the goods are at his disposal. The underlying theory is that a merchant who is to make physical delivery at his own place of business continues to control the goods in the meantime and can be expected to insure his interest in them. *Ramos v. Wheel Sports Ctr.*, 96 Misc. 2d 646 (1978).

Where part of shipment of seeds to be delivered by carrier to buyer without specification of particular destination was mistakenly delivered to person other than buyer, risk of loss as to such shipment under UCC § 2-509(1)(a) was clearly placed on buyer when shipment was delivered to carrier (holding that buyer's cause of action for misdelivery of seeds was against carrier). *Montana Seeds, Inc. v. Holliday*, 178 Mont. 119, 582 P.2d 1223 (1978).

Although risk of loss may pass to purchaser prior to time title passes, it is implicit under UCC § 2-509 that neither title nor risk of loss can pass prior to time there is a contract of sale. *Kiecker v. Pacific Indem. Co.*, 5 Wash. App. 871, 491 P.2d 244 (1971).

Where the seller retains a security interest in the goods, the risk of loss passes to the buyer so that he remains liable for the purchase price although the goods have been destroyed through no fault of the seller. *Conte v. Styli*, 26 Mass. App. Dec. 73 (1963).

2. Shipment contract.

In buyer's suit for damages for loss in transit of shipment of pocket calculators, where parties intended that delivery be made to a carrier and delivery was made to United States post office, (1) request in buyer's letter to seller that goods be shipped to buyer's residence was mere shipping instruction that did not convert contract into one requiring delivery to a destination, instead of a carrier, and risk of loss therefore passed to buyer under UCC § 2-509(1)(a). However, since seller underinsured the goods, which were shipped in two cartons, and by mistake shipped one carton to another state, seller entered into improper transportation contract with carrier under UCC § 2-504(a) and thus became liable for buyer's loss. *La Casse v. Blaustein*, 93 Misc. 2d 572 (1978).

In a contract for the sale of goods when the evidence suggests that the seller is to deliver the goods to a carrier rather than to a specific destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier (Uniform Commercial Code, § 2-509). *La Casse v. Blaustein*, 93 Misc. 2d 572 (1978).

Although goods are delivered to a carrier for shipment pursuant to contract, and risk of loss passes to the buyer upon such delivery (Uniform Commercial Code, § 2-509), where the goods are lost in transit and the evidence indicates that the seller insured the goods for an amount substantially less than their value and misaddressed the package, the buyer is entitled to recover, since the seller did not act reasonably in fulfilling his portion of the contract. *La Casse v. Blaustein*, 93 Misc. 2d 572 (1978).

Where shipping contract for sale of liquor contained no instructions as to where goods were to be delivered and liquor was allegedly hijacked while in possession of shipper, under UCC § 2-509, risk of loss passed to buyer when goods were duly delivered to the carrier. *Black Prince Distillery, Inc. v. Home Liquors*, 148 N.J. Super. 286, 372 A.2d 638 (App. Div. 1977).

Under UCC § 2-509 risk of loss was upon seller until goods were put into possession of carrier in absence of evidence that parties "otherwise agreed" or that there was "contrary agreement" with re-

spect to risk of loss. Thus, seller's act of loading goods into container supplied by buyer and in notifying buyer of such loading did not operate to shift risk of loss to buyer in absence of contrary agreement. *A.M. Knitwear Corp. v. All Am. Export-Import Corp.*, 41 N.Y.2d 14, 359 N.E.2d 342 (1976).

In action to recover for quantity of polyester yarn sold and delivered, summary judgment for defendant was entered where there was neither physical delivery of trailer which contained yarn to carrier in compliance with purchase agreement, nor delivery within meaning of UCC §§ 2-401(2) and 2-509(1)(a), and therefore, title to and responsibility for yarn remained with plaintiff. *A.M. Knitwear Corp. v. All Am. Export-Import Corp.*, 50 A.D.2d 558 (2d Dep't 1975), *aff'd*, 41 N.Y.2d 14, 390 N.Y.S.2d 832, 359 N.E.2d 342 (1976).

Contract for sale of goods which contained neither F.O.B. term nor term explicitly allocating risk of loss was "shipment contract," notwithstanding contract contained term that goods were to be shipped to a specified destination. Therefore, under UCC § 2-509(1)(a), risk of loss passed to buyer following seller's due delivery of goods to carrier. *Eberhard Mfg. Co. v. Brown*, 61 Mich. App. 268, 232 N.W.2d 378 (1975).

Ohio buyer was subject to jurisdiction of Illinois courts where, under UCC §§ 2-401(2)(a) and 2-509(1)(a), seller's obligation, title, and risk of loss in goods at issue ceased on delivery to carrier in Illinois. *Colony Press, Inc. v. Fleeman*, 17 Ill. App. 3d 14, 308 N.E.2d 78 (1st Dist. 1974).

Where seller was required to cut from younger sheep, bag, assemble, place in yard and load ewes for shipment to buyer to complete sale, risk of loss passed to buyer upon delivery to carrier for shipment, and not at time of payment by buyer or receipt of ewes by buyer. *S-Creek Ranch, Inc. v. Monier & Co.*, 509 P.2d 777 (1973).

3. Destination contract.

Under contract for sale of scrap metal which required delivery "FAS Steamer your berth Port Elizabeth, New Jersey," where delivery was made according to these terms, and barge was at buyer's berth at least 3 days before it capsized and

was for at least 2 days alongside vessel which was to receive scrap metal, title to scrap metal passed to buyer, and buyer was liable to seller for purchase price, in absence of any evidence that loss of cargo resulted from seller's negligence in selecting carrier or any evidence of improper loading of cargo. *Luria Bros. & Co. v. Associated Metals & Minerals Corp.*, 73 Misc. 2d 937 (1972).

4. Bailed goods.

Where person with whom a boat and trailer were stored was informed that they had been sold, and the buyer subsequently made arrangements with the bailee to pick them up, this was the same as acknowledgment by the bailee of the buyer's right to possession, and sufficiently cast upon the buyer the risk of loss while the articles were in the possession of the bailee. *Whately v. Tetrault*, 29 Mass. App. Dec. 112 (1964).

5. Receipt of goods from merchant.

Subdivision (3) of section 2-509 of the Uniform Commercial Code states that when the seller is a merchant the risk of loss passes to a buyer upon his taking physical possession of the goods; accordingly, the risk of loss remains with a merchant seller as to goods in his possession and stolen from him even though the buyer has made full payment and was notified that such goods were at his disposal. *Ramos v. Wheel Sports Ctr.*, 96 Misc. 2d 646 (1978).

Where seller of tires sent shipment of new passenger car and truck tires by trucking company, as carrier, to oil company, as consignee, and carrier was instructed by consignee before delivery to deliver tires to specified destination on specified date (Friday); where driver of carrier's truck-trailer arrived at specified destination (consignee's premises) on specified date and was told by consignee's warehouse supervisor to drive truck into fenced enclosure (which was kept locked), back trailer up to consignee's loading dock, and await unloading of trailer on either that day (Friday) or following Monday; and where consignee decided to unload trailer on following Monday, but trailer and tires were stolen from consignee's premises during weekend, evidence

was factually sufficient to establish sufficient tender of delivery of tires to consignee within meaning and for purposes of UCC § 2-503(1)(a), so as to shift risk of loss from seller to consignee pursuant to UCC § 2-509(1)(b). *Ada Oil Co. v. Dunlop Tire & Rubber Corp.*, 550 S.W.2d 129 (Tex. Civ. App. 1977).

Risk of loss remained with seller of mobile home under UCC § 2-509(3) where purchaser had not received mobile home, notwithstanding parties executed "Agency Rental Agreement" which provided, *inter alia*, that "at the owner's request" seller would store vehicle at seller's location without charge to owner and rent it to other parties on certain terms and conditions, there never having been any delivery to purchasers nor any redelivery to seller, and notwithstanding purchaser paid balance of purchase price, registered vehicle with state department of motor vehicles and secured policy insuring against certain risks, including comprehensive and collision coverage. *Galbraith v. American Motorhome Corp.*, 14 Wash. App. 754, 545 P.2d 561 (1976).

Where buyer and seller entered into contract for sale of housetrailer and subsequent to signing of sales contract and note, but prior to buyer's taking delivery, trailer was stolen from seller's place of business: (1) risk of loss did not pass to buyer under UCC § 2-509(2), since seller was not "bailee" within meaning of UCC; (2) furthermore, clause of sales contract providing that "no loss, damage or destruction of said motor vehicle shall release buyer from his obligation hereunder," was insufficient to constitute "contrary agreement" between parties pursuant to UCC § 2-509(4), thus shifting risk of loss to buyer; (3) risk of loss remained with seller pursuant to UCC § 2-509(3), since seller was a "merchant" and since buyer never received (i.e., took physical possession of) trailer. *Caudle v. Sherrard Motor Co.*, 525 S.W.2d 238 (Tex. Civ. App. 1975), writ ref'd n.r.e., (Oct. 15, 1975).

Where approximately 10 days after defendant received diamonds as part of "sale or return" transaction, diamonds were stolen from his jewelry store, plaintiff was entitled to contract price of diamonds,

regardless of binding effect of memorandum which accompanied shipment of diamonds and provided that jewels were delivered at defendant's risk from all hazards regardless of negligence. *Harold Klein & Co. v. Lopardo*, 113 N.H. 400, 308 A.2d 538, 66 A.L.R.3d 187 (1973).

Damage loss to television antenna system caused by lightning fell on antenna system buyer who had received system from seller-merchant under UCC § 2-509(3), where buyer had uninterrupted use of system from time of installation until lightning struck, notwithstanding fact that under conditional sales contract buyer was prohibited from moving system from his own premises. *Lair Distrib. Co. v. Crump*, 48 Ala. App. 72, 261 So. 2d 904 (Civ. App. 1972).

Risk of loss under UCC § 2-509(3) passed to buyer "on his receipt of the goods" despite (1) seller's retention of title under terms of conditional sales contract, and (2) contractual provision denying buyer right to move television from his own premises until it had been paid for. *Lair Distrib. Co. v. Crump*, 48 Ala. App. 72, 261 So. 2d 904 (Civ. App. 1972).

6. Tender of delivery.

Where seller never tendered delivery of automobile under installment sales contract, not only did risk of loss remain on seller under UCC § 2-509(3), but buyer had right to cancel contract. *Schleimer v. Gooze*, 50 A.D.2d 944 (2d Dep't 1975).

Where contract for sale of real estate included agreement for sale of personal property, risk of loss of such personal

property remained on the vendor pending delivery of possession to the purchaser and where a part of such personal property disappeared before completion of tender of possession, the risk of loss was on the seller. *Deitch v. Shamash*, 56 Misc. 2d 875 (1968).

7. Agreements and course of dealing.

In action by Maine paper manufacturer against Massachusetts newspaper publisher for breach of contract to purchase newsprint, defendant was subject to personal jurisdiction in Maine where parties had long history of prior dealing, contracts recited that they were executed in Maine and that Maine law should govern, and all shipments were F.O.B. from Maine and returnable cores were shipped freight prepaid from Massachusetts, thereby placing risk of loss on purchaser. *Georgia-Pacific Corp. v. WHDH Corp.*, 374 F. Supp. 1076 (D. Me. 1974).

In action by diamond wholesaler against retailer to recover price of goods shipped under "all-risk" memorandum, custom and usage of industry established liability of consignee for full memorandum price of merchandise stolen while in his possession. *Lipschutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375 (S.D. Tex. 1974).

8. Third party actions.

The fact that the risk of loss has passed to the buyer does not prevent suit by the seller against a third person causing the damage to the goods to which the contract relates. *Leist v. Schattie*, 197 Pa. Super. 456, 179 A.2d 277 (1962).

RESEARCH REFERENCES

ALR. Delay in delivery placing goods at the risk of the party at fault under § 22(b) of Uniform Sales Act. 38 A.L.R.2d 658.

Upon whom loss from theft or the like falls, where seller turns over goods at buyer's premises. 50 A.L.R.2d 330.

Presumption and burden of proof where subject of bailment is destroyed or damaged by windstorm or other meteorological phenomena. 43 A.L.R.3d 607.

Who bears risk of loss of goods under UCC §§ 2-509, 2-510. 66 A.L.R.3d 145.

Am Jur. 67 Am. Jur. 2d, Sales §§ 411, 419 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:67. (Instruction to jury; modification of contract without consideration; express agreement or course of conduct).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:631-2:640. (Risk of loss; in absence of breach).

2 Am. Jur. Legal Forms 2d, Animals § 20:41 (risk of loss of animals).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1251 et seq. (Risk of loss in absence of breach).

25 Am. Jur. Proof of Facts 2d, Risk of Loss; Damage to or Destruction of Goods, §§ 10 et seq. (proof that risk of loss of goods had not passed from seller to buyer at time goods were damaged or destroyed).

§ 75-2-510. Effect of breach on risk of loss.

(1) Where a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as having rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the contract for sale repudiates or is otherwise in breach before risk of their loss has passed to him, the seller may to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time.

SOURCES: Codes, 1942, § 41A:2-510; Laws, 1966, ch. 316, § 2-510, eff March 31, 1968.

Cross References -- Obligations of seller and buyer generally, see § 75-2-301.

Cure of nonconforming delivery, see § 75-2-508.

Risk of loss where no breach by seller, see § 75-2-509.

Buyer's options in case of nonconforming delivery, see § 75-2-601.

Rejection of goods, see § 75-2-602.

Revocation of acceptance, see § 75-2-608.

JUDICIAL DECISIONS

1. In general.

In action by seller-manufacturer against buyer for contract price of polystyrene plastic pellets which had been specially manufactured for buyer and destroyed by fire while stored in seller's plant: (1) buyer's failure to accept delivery of pellets according to contract term which provided buyer would accept delivery of 1,000 pounds per day, following seller's repeated tenders of delivery, constituted breach of contract; (2) seller did not intentionally waive its rights to sue for contract price, and was not estopped to seek such remedy; and (3) risk of loss of pellets was on buyer under UCC § 2-510(3), where buyer was in breach of contract, and where period from August 20 (date buyer breached contract by promising to issue release orders, which were never in fact issued) and September 22 (date of fire) was commercially reasonable period to treat risk of loss as resting on buyer.

Multiplastics, Inc. v. Arch Indus., Inc., 166 Conn. 280, 348 A.2d 618 (1974).

In action by seller-manufacturer against buyer for contract price of polystyrene plastic pellets which had been specially manufactured for buyer and destroyed by fire while stored in seller's plant, risk of loss of pellets was on buyer under UCC § 2-510(3), where buyer was in breach of contract, and where period from August 20 (date buyer breached contract by promising to issue release orders, which were never in fact issued) and September 22 (date of fire) was commercially reasonable period to treat risk of loss as resting on buyer. Multiplastics, Inc. v. Arch Indus., Inc., 166 Conn. 280, 348 A.2d 618 (1974).

In action by diamond wholesaler against purchaser under "sale or return" contract, shipper's insurance coverage, use of registered mail, and use of term "merchandise is delivered to you" estab-

lished delivery contract under UCC § 2-503, and where diamonds were never delivered, risk of loss remained with wholesaler under UCC § 2-510. *Baumgold Bros. v. Allan M. Fox Co.*, 375 F. Supp. 807 (N.D. Ohio 1973).

Even if it be held that buyer repudiated contract as to goods already identified to

it, seller may not treat risk of loss as resting on buyer to enable seller to recover deficiency in effective fire insurance coverage under Code § 2-510(3). *Portal Galleries, Inc. v. Tomar Prods., Inc.*, 60 Misc. 2d 523 (1969).

RESEARCH REFERENCES

ALR. Delay in delivery of placing goods at the risk of the party at fault under § 22 (b) of Uniform Sales Act. 38 A.L.R.2d 658.

Who bears risk of loss of goods under UCC §§ 2-509, 2-510. 66 A.L.R.3d 145.

Am Jur. 67 Am. Jur. 2d, Sales §§ 411, 419 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:651-2:656. (Risk of loss; effect of breach).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1261 et seq. (Effect of breach on risk of loss).

25 Am. Jur. Proof of Facts 2d, Risk of Loss; Damage to or Destruction of Goods, §§ 10 et seq. (proof that risk of loss of goods had not passed from seller to buyer at time goods were damaged or destroyed).

§ 75-2-511. Tender of payment of buyer; payment by check.

(1) Unless otherwise agreed tender of payment is a condition to the seller's duty to tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it.

(3) Subject to the provisions of this code on the effect of an instrument on an obligation (Section 75-3-310), payment by check is conditional and is defeated as between the parties by dishonor of the check on due presentment.

SOURCES: Codes, 1942, § 41A:2-511; Laws, 1966, ch. 316, § 2-511; Laws, 1992, ch. 420, § 71, eff from and after January 1, 1993.

Cross References — Single delivery or delivery in lots, see § 75-2-307.

Time and place of payment, see § 75-2-310.

Contracts F. O. B. vessel or F. A. S., payment against tender of required documents, see § 75-2-319.

Payment under C. I. F. or C. & F. contract, see § 75-2-320.

Delivery of goods "ex-ship", see § 75-2-322.

Delivery to seller of proper letter of credit, see § 75-2-325.

Transfer of title to bona fide purchaser by purchaser, effect of subsequent dishonor of purchaser's check on power to, see § 75-2-403.

Tender of delivery, manner, time and place, see § 75-2-503.

Where seller authorized or required to send goods to buyer, see § 75-2-504.

Effect of tender of delivery, see § 75-2-507.

Payment before inspection of goods, see § 75-2-512.

C. O. D. sales or agreements, see § 75-2-513.

Assurance of due performance, see § 75-2-609.

Substituted performance, see § 75-2-614.

Seller's remedies on insolvency of buyer, see § 75-2-702.

Commercial paper, see §§ 75-3-101 et seq.

"Check", see § 75-3-104.

Certification of check, see § 75-3-411.

JUDICIAL DECISIONS

1. In general.
2. Agreements and other factors obviating tender.
3. Means and manner of payment.
4. Check.
5. —Dishonor.
6. Acceptance of payment.
7. Seller's remedies.

1. In general.

In action by two subcontractors against owner of land and company which had leased restaurant that it was building on such land to enforce mechanic's lien claims for unpaid labor and materials employed in restaurant's construction, where evidence showed (1) that defendant lessee's procedure was to make progress payments to main contractor on receipt of labor and materials releases executed by all subcontractors working on project, (2) that plaintiffs had executed such releases to main contractor to cover all claims for labor and materials up through specified date, (3) that defendant lessee had then paid main contractor for all work done on project as of such date, and (4) that main contractor had thereafter paid plaintiffs by checks on which payment was subsequently stopped, plaintiffs could not successfully contend that because taking of seemingly solvent party's check is proper and normal commercial practice under UCC § 2-511(3) and UCC § 3-802, and because under such sections if check is dishonored, payee can either sue on check or on underlying obligation, such sections therefore made plaintiffs' lien claim releases conditional as to defendants, and defendants were not entitled to rely on releases as defense to plaintiffs' claims. In such situation, if releases were intended to be conditional, plaintiffs should have inserted in them language appropriate for such purpose (observing that as against main contractor, plaintiff lien claimants retained rights enumerated by UCC § 3-802). *Mountain Stone Co. v. H.W.*

Hammond Co., 39 Colo. App. 58, 564 P.2d 958 (1977).

Under UCC § 9-301, security interest of cattle seller was subordinate to rights of garnishing lien creditor where debtor purchased cattle from seller and paid for them with check which was subsequently dishonored for insufficient funds, where debtor shipped cattle to livestock auction company for resale and writ of garnishment was served on auction company, where seller and debtor subsequently executed security agreement and financing statement, back-dated, and properly describing cattle in question and where financing statement was filed within ten days after debtor purchased cattle from seller. Seller's right to reclaim under UCC § 2-702 was not security interest within purview of Article 9 on secured transactions and acceptance of check did not change cash sale into credit transaction. Since there was no security agreement between debtor and seller, either oral or written, at time writ of garnishment was served, security interest attached sometime later when security agreement was signed by debtor. *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App. 1975), *ref. n.r.e.* (Apr. 7, 1976).

2. Agreements and other factors obviating tender.

Buyer was not precluded by UCC § 2-511(1) from maintaining action for seller's breach of contract to deliver corn by fact that buyer did not tender payment, where price for such corn could not be determined until corn had been delivered by seller and inspected and graded by buyer. Until these events had taken place, buyer was under no obligation to tender payment (applying Iowa law; observing also that tender of payment is not required where it would be futile gesture, and that evidence indicated that seller would not have delivered corn even if buyer had

tendered payment). *Froning's, Inc. v. Johnston Feed Serv., Inc.*, 568 F.2d 108 (8th Cir. Iowa 1978).

In action for breach of oral contract to sell and deliver by end of 1973 10,000 bushels of corn to plaintiff grain dealer, who in reliance on such contract resold the corn for delivery on or before January 1, 1974, course of performance by parties justified finding that parties had agreed that tender of payment by plaintiff prior to delivery of corn, which would ordinarily be required under UCC § 2-511(1), was not condition precedent to defendant's duty to tender and complete deliveries of corn contracted for. Furthermore, even assuming that plaintiff could have treated defendant's silence, after delivering and receiving payment for 2,700 bushels of corn by March, 1973, as repudiation of contract, plaintiff's waiting until December 28, 1973 before considering contract breached was not unreasonable under UCC § 2-610(a) (noting that earliest date on which plaintiff could have learned of defendant's breach was August 14, 1973, and also holding that under UCC § 2-713(1), use of December 28, 1973 as date for determining, with respect to plaintiff's damages, market value of undelivered corn was proper). *Carson v. Mulnix*, 263 N.W.2d 701 (Iowa 1978).

Where owners of real property subject to vendor's lien entered into agreement with holder of vendor's lien note that bank would pay note upon presentation of necessary documents to enable bank to succeed to full rights of holder, where holder sent note and assignment of note and lien to bank but bank declined to complete transaction because no endorsement had been made upon note itself, and where, after papers were returned to holder, deed of trust on property was foreclosed, tender made by property owners qualified as legal tender under UCC § 2-511(2), unless holder was excused from his obligation to endorse note upon instrument itself. *Penny v. Kelley*, 528 S.W.2d 330 (Civ. App. 1975).

Tender of payment was not condition precedent to seller's duty of delivery where, if buyers' evidence was accepted as true, seller of mobile home agreed to install it before full payment was received.

Berube v. Mobile Homes Sales & Serv., 28 N.C. App. 160, 220 S.E.2d 636 (1975).

3. Means and manner of payment.

Where envelope drafts were frequently used in sales of aircraft, and vice president of bank in which buyer maintained line of credit for purchase of aircraft testified that envelope draft was only method in normal use for transfer of title to aircraft, envelope draft was means or manner of payment "current in ordinary course of business," despite seller's alleged ignorance of practices in business of selling aircraft. *Modern Aero Sales, Inc. v. Winzen Research, Inc.*, 486 S.W.2d 135 (Tex. Civ. App. 1972), *ref. n.r.e.* (Feb. 7, 1973).

Where declaration that retail instalment contract for purchase of automobile was in default and demand for entire balance due was not communicated to plaintiff until November 14, and on evening of November 12 defendant was demanding instalment payment due and not entire balance, plaintiff had right to tender payment due by any means or in any manner current in ordinary course of business, or was entitled to extension of time reasonably necessary to procure cash demanded by defendant. *Chrysler Credit Corp. v. Barnes*, 126 Ga. App. 444, 191 S.E.2d 121 (1972).

4. Check.

The acceptance of a check does not change a cash sale into a credit transaction, and the Uniform Commercial Code recognizes that payment by check is a commercially normal and proper method of payment. *In re Helms Veneer Corp.*, 287 F. Supp. 840 (W.D. Va. 1968).

The requirement that a check contained an unconditional promise to pay applies only to the matter of the form of a negotiable instrument, and as between the original parties payment by check is conditional. *Mansion Carpets, Inc. v. Marinoff*, 24 A.D.2d 947 (1st Dep't 1965).

That at the time the successful bidder at a public auction issued the city his personal check for the required deposit against his bid there were insufficient funds in his account to pay it did not invalidate the bid when the check was duly paid on presentation to the drawee

bank, for the check was not payment at the time of sale but merely a promise of future payment at the time of its presentation. *Kensil v. Ocean City*, 89 N.J. Super. 342, 215 A.2d 43 (App. Div. 1965).

A check can be a negotiable instrument without constituting immediate payment, and unless the parties agree otherwise, a check is not payment until presented and paid. *Kensil v. Ocean City*, 89 N.J. Super. 342, 215 A.2d 43 (App. Div. 1965).

5. —Dishonor.

Where buyer of automobile resold it to third party, received check in payment therefore, original seller took possession of automobile from third party and third party notified buyer he was canceling transaction, although ownership of car passed to third party at time payment was accepted and car was delivered, such payment was conditional under UCC § 2-511(3) and, although check was never presented for payment, third party in effect dishonored check and countermanded payment when he notified buyer he was canceling transaction; under UCC § 2-507(2), third party's right to retain or dispose of automobile was conditional upon his making payment due, and thus, when his check was dishonored, buyer had right to reclaim automobile by maintaining action in trover against original owner. *Lawrence v. Graham*, 29 Md. App. 422, 349 A.2d 271 (1975).

Between the original parties to a check payment is conditional, and if the instrument is dishonored, an action may be maintained on either the instrument or the underlying obligation. *Mansion Carpets, Inc. v. Marinoff*, 24 A.D.2d 947 (1st Dep't 1965).

6. Acceptance of payment.

In action by prospective buyer to enforce oral contract for sale of piece of construction equipment, question of fact was raised as to whether sellers had accepted payment, thus removing oral contract from statute of frauds under UCC § 2-201(3)(c) and precluding entry of summary judgment, where sellers received and retained buyer's check, in amount alleged to be full purchase price of equipment, for 30 days before check was re-

turned unendorsed to buyer. *Kaufman v. Solomon*, 524 F.2d 501 (3d Cir. Pa. 1975).

7. Seller's remedies.

Where meat packer's operations were financed by secured creditor who had properly perfected security interest in meat packer's assets, including after-acquired property, where cattle sellers delivered cattle to meat packer on "grade and yield basis," where checks were subsequently issued to sellers, but before checks were paid, secured party, believing itself to be insecure, refused to advance more funds to meat packer for operation of plant, and where meat packer then filed petition in bankruptcy, interest of unpaid seller was subordinate to interest of secured creditor, and seller who did not attempt to reclaim cattle until year after filing petition for bankruptcy, was not entitled to either reclamation of cattle or proceeds from sale or slaughtered meat. *Matter of Samuels & Co., Inc.*, C.A.5 (Tex.) 1976, 526 F.2d 1238, certiorari denied 97 S. Ct. 98, 429 U.S. 834, 50 L. Ed. 2d 99 *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Where plaintiff, operator of livestock ring, sold cattle which it held on consignment to buyer, plaintiff then paid its consignor in full, buyer paid for cattle by check and plaintiff gave buyer purchase sheets for sale, where buyer then had cattle shipped to defendants' sales ring and later delivered to defendants purchase sheets given him by plaintiff, where plaintiff presented buyer's check for payment at drawee bank, but it was dishonored because of insufficient funds, and where plaintiff immediately contacted defendants and demanded return of livestock but defendants, instead, sold cattle: (1) plaintiff would be deemed "seller" under Uniform Commercial Code and was, thus, entitled to seller's remedies under Code; (2) under UCC §§ 2-507(2) and 2-511(3) when bank refused to honor buyer's check upon plaintiff's presentment, buyer no longer had right to retain or dispose of cattle, even though he retained title to them, and when defendants sold cattle on buyer's behalf, they acquired and then passed title, but since they acted with notice of plaintiff's claim to livestock,

they did not acquire status of good faith purchaser and could not prevent plaintiff from asserting its right of reclamation and, thus, if they could not redeliver cattle they must deliver proceeds from sale thereof. *Ranchers & Farmers Livestock Auction Co. v. Honey*, 38 Colo. App. 69, 552 P.2d 313 (1976), cert. dismissed, 191 Colo. 503, 553 P.2d 799 (1976).

In action between lender who held unperfected security interest in automobiles and car dealer who sold collateral to debtor, seller's right to reclaim goods under UCC § 2-702(3), when buyer's check for purchase price was dishonored by

bank, did not have priority over lender's unperfected security interest in automobiles which arose when lender, who qualified as "purchaser" under UCC § 1-201, acquired certificates of title; under UCC § 2-403(1), once certificates of title were delivered, debtor acquired voidable title and could convey enforceable right in automobiles to lender as good faith purchaser for value, even though debtor's check to seller of automobiles was later dishonored. *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 184 Colo. 166, 519 P.2d 354 (1974).

RESEARCH REFERENCES

ALR. Seller's cure of improper tender or delivery under UCC § 2-508. 36 A.L.R.4th 544.

Sufficiency of tender of payment to effect defaulting vendee's redemption of rights in land purchased. 37 A.L.R.4th 286.

Am Jur. 67 Am. Jur. 2d, Sales §§ 666, 670 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:541-2:550. (Rights and obligations of buyer; tender of payment).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1271 et seq. (Tender of payment by buyer; payment by check).

43 Am. Jur. Proof of Facts 2d 523, Recovery for Part Performance of Contract.

CJS. 77 C.J.S., Sales §§ 208 et seq.

§ 75-2-512. Payment by buyer before inspection.

(1) Where the contract requires payment before inspection nonconformity of the goods does not excuse the buyer from so making payment unless:

(a) The nonconformity appears without inspection; or

(b) Despite tender of the required documents the circumstances would justify injunction against honor under Section 75-5-109(b).

(2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.

SOURCES: Codes, 1942, § 41A:2-512; Laws, 1966, ch. 316, § 2-512; Laws, 1996, ch. 460, § 20, eff from and after July 1, 1996.

Editor's Note — Laws, 1996, ch. 460, §§ 28, 29, provide as follows:

"SECTION 28. Applicability. The provisions of this act apply to a letter of credit that is issued on or after the effective date of this act. This act does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the effective date of this act.

"SECTION 29. Savings clause. A transaction arising out of or associated with a letter of credit that was issued before the effective date of this act and the rights, obligations, and interests flowing from that transaction are governed by any statute or other law amended or repealed by this act as if repeal or amendment had not occurred and may be terminated, completed, consummated, or enforced under that statute or other law."

Cross References — Performance or assent thereto by party in manner demanded by other party as not prejudicing rights reserved, see § 75-1-207.

When goods are conforming, see § 75-2-106.

Buyer's right to inspect goods before payment, generally, see § 75-2-513.

JUDICIAL DECISIONS

1. In general.

Buyer's down payment would not impair her right to inspect following delivery.

Performance Motors, Inc. v. Allen, 280 N.C. 385, 186 S.E.2d 161 (1972).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 610 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:561. (Complaint, petition, or declaration; to recover damages for delivery of nonconforming goods; payment made before inspection).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1281 et seq. (Payment by buyer before inspection).

3 Am. Jur. Proof of Facts, Credit, Proof No. 1 (proof of extension of credit).

CJS. 77 C.J.S., Sales §§ 208 et seq.

§ 75-2-513. Buyer's right to inspection of goods.

(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this chapter on C.I.F. contracts (subsection (3) of Section 2-321) [Section 75-2-321(3)], the buyer is not entitled to inspect the goods before payment of the price when the contract provides

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

SOURCES: Codes, 1942, § 41A:2-513; Laws, 1966, ch. 316, § 2-513, eff March 31, 1968.

Cross References — Implication from presence of words "unless otherwise agreed" in code provisions, see § 75-1-102.

Reasonable time, see § 75-1-204.

Time and place of payment, see § 75-2-310.

Preliminary inspection under C.I.F. or C. & F. contracts, see § 75-2-321.

Title to goods, see § 75-2-401.

Buyer's special property and insurable interest in goods identified to contract, see §§ 75-2-501, 75-2-502.

Risk of loss, see §§ 75-2-509, 75-2-510.

Payment before inspection, see § 75-2-512.

Acceptance not occurring until buyer has reasonable opportunity to inspect, see § 75-2-606.

Effect of buyer's acceptance, see § 75-2-607.

Revocation of acceptance, see § 75-2-608.

Incidental damages resulting from seller's breach as including expenses of inspection, see § 75-2-715.

JUDICIAL DECISIONS

1. In general.

Where delivery was not accomplished until seller of mobile home "blocked it up" on buyer's lot, seller cannot contend that buyer's inspection of mobile home at seller's place of business destroyed the implied warranty of fitness imposed by law upon the sale. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Where a ring did not live up to an express warranty that it would appraise for \$30,000, the buyer had a right to revoke her acceptance of the ring under Code §§ 2-711(1) and 2-608(1). However, a perhaps more accurate characterization of the facts in this case involved the right given to all buyers under Code § 2-513(1) to inspect goods before purchase. Inspec-

tion in a case involving valuable gems entails an appraisal by an expert. Therefore the court concluded that the sale in this case was made subject to the right of the buyer to have the ring appraised and that if the ring did not live up to expectation she had the right to revoke her acceptance under Code § 2-608(1)(b). *Lawner v. Engelbach*, 433 Pa. 311, 249 A.2d 295 (1969).

The fact that a race horse, sound at the time of its purchase, was soon afterward discovered to have a bowed tendon, afforded the purchaser no defense of a breach of an express warranty of soundness, for the condition of the animal subsequent to the time that title passed was immaterial. *Strauss v. West*, 100 R.I. 388, 216 A.2d 366 (1966).

RESEARCH REFERENCES

ALR. Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later instalments. 32 A.L.R.2d 1117.

Time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality. 52 A.L.R.2d 900.

Reasonableness of personal judgment of buyer as test where goods are sold subject to being satisfactory to the buyer. 86 A.L.R.2d 200.

Time, place and manner of buyer's inspection of goods under UCC § 2-513. 36 A.L.R.4th 726.

Am Jur. 67 Am. Jur. 2d, Sales §§ 610 et seq.

C.O.D. shipments, 5 Am. Jur. Pl & Pr Forms (Rev), Carriers, Forms 231, 232.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:571-2:578. (Rights and obligations of buyer; inspection of goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales §§ 253:1291 et seq. (Right of buyer to inspection of goods).

CJS. 77 C.J.S., Sales §§ 185 et seq.

§ 75-2-514. When documents deliverable on acceptance; when on payment.

Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three (3) days after presentment; otherwise, only on payment.

SOURCES: Codes, 1942, § 41A:2-514; Laws, 1966, ch. 316, § 2-514, eff March 31, 1968.

Cross References — Buyer's right to goods on seller's insolvency, see § 75-2-502.

Seller's shipment under reservation, see § 75-2-505.

Buyer's right to documents of title conditional on making payment, see § 75-2-507.

Contract requiring payment before inspection, see § 75-2-512.

Effect of acceptance, see § 75-2-607.

Delivery of documents on presentation or payment of draft, see § 75-4-503.

Honor or dishonor of documentary draft, see § 75-5-112.

RESEARCH REFERENCES

Am Jur. 13 Am. Jur. 2d, Carriers § 367.

67 Am. Jur. 2d, Sales § 382, 394.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:483, 2:484. (Performance; rights of financing agency).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1311 et seq. (When documents deliverable on acceptance; when on payment).

CJS. 77 C.J.S., Sales §§ 208 et seq.

§ 75-2-515. Preserving evidence of goods in dispute.

In furtherance of the adjustment of any claim or dispute

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

SOURCES: Codes, 1942, § 41A:2-515; Laws, 1966, ch. 316, § 2-515, eff March 31, 1968.

Cross References — Prima facie evidence of facts stated in document issued by third party, see § 75-1-202.

Performance or assent to performance under reservation of rights, see § 75-1-207.

Buyer's right to inspection of goods, see § 75-2-513.

Seller's resale including contract for resale, see § 75-2-706.

Buyer's remedies generally, see § 75-2-711.

Letters of credit, see §§ 75-5-101 et seq.

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 610 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:482 (complaint, petition, or declaration; allegation; refusal to permit inspection of goods).

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Form 2:485 (instruction to jury; right to

inspect, test, and sample goods in dispute and to preserve evidence).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1321 et seq. (preserving evidence of goods in dispute).

CJS. 77 C.J.S., Sales §§ 176, 185 et seq.

PART 6.

BREACH, REPUDIATION AND EXCUSE.

SEC.

- 75-2-601. Buyer's rights on improper delivery.
- 75-2-602. Manner and effect of rightful rejection.
- 75-2-603. Merchant buyer's duties as to rightfully rejected goods.
- 75-2-604. Buyer's options as to salvage of rightfully rejected goods.
- 75-2-605. Waiver of buyer's objections by failure to particularize.
- 75-2-606. What constitutes acceptance of goods.
- 75-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.
- 75-2-608. Revocation of acceptance in whole or in part.
- 75-2-609. Right to adequate assurance of performance.
- 75-2-610. Anticipatory repudiation.
- 75-2-611. Retraction of anticipatory repudiation.
- 75-2-612. "Installment contract"; breach.
- 75-2-613. Casualty to identified goods.
- 75-2-614. Substituted performance.
- 75-2-615. Excuse by failure of presupposed conditions.
- 75-2-616. Procedure on notice claiming excuse.
- 75-2-617. Force majeure.

§ 75-2-601. Buyer's rights on improper delivery.

Subject to the provisions of this chapter on breach in installment contracts (Section 2-612) [Section 75-2-612] and unless otherwise agreed under the sections on contractual limitations of remedy (Sections 2-718 and 2-719) [Sections 75-2-718 and 75-2-719], if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may

- (a) reject the whole; or
- (b) accept the whole; or
- (c) accept any commercial unit or units and reject the rest.

SOURCES: Codes, 1942, § 41A:2-601; Laws, 1966, ch. 316, § 2-601, eff March 31, 1968.

Cross References — Contractual limitations of remedy, see §§ 75-2-718, 75-2-719. Rejection of goods, see § 75-2-602. What constitutes acceptance of goods, see § 75-2-606. Installment contract, breach of, see § 75-2-612.

JUDICIAL DECISIONS

1. In general.
2. Grounds for rejection.
3. Time of rejection.
4. Loss of right to reject.

1. In general.

There is no provision under Mississippi Code § 75-2-601 for the allowance of attorney's fees. *Chrysler Corp. v. Evans*, 493 So. 2d 982 (Miss. 1986).

The Uniform Commercial Code incorporates, in UCC § 2-601, the "substantial performance" rule of the common law by giving the buyer the option of rejecting an entire shipment of goods if the goods fail in any respect to conform to the contract. In other words, even a technical breach of the contract will justify the buyer's rejection of the goods, with the result that perfection in performance on the part of the seller is required. However, in UCC §§ 2-606 and 2-607, the code makes it equally clear that if the buyer, instead of rejecting the goods, accepts them and thereafter fails to revoke his acceptance in accordance with the code's provisions, he must pay the purchase price of the goods, even though he may thereafter recover damages as provided in the code for breach of contract. *Envirex, Inc. v. Ecological Recovery Assocs.*, 454 F. Supp. 1329 (M.D. Pa. 1978), *aff'd*, 601 F.2d 574 (3d Cir. Pa. 1979).

The Uniform Commercial Code has replaced the pre-Code remedy of rescission with the concepts of rejection and revocation of acceptance, but UCC § 2-721, dealing with remedies for fraud, recognizes that such change of remedies does not affect a buyer's right to pursue non-Code remedies (applying Texas law; action by buyer for misrepresentation in horse trade). *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. Tex. 1978).

In action for breach by buyer of contract to purchase bank-building equipment, where buyer contended that it had properly rejected the entire contract pursuant to UCC § 2-601(a), and seller contended that under UCC § 2-609(1), it had right to refuse to render further performance until buyer had given adequate assurance that it would honor its contractual commit-

ments, evidence amply supported jury's findings that seller, pending appropriate assurance from buyer, had right to refuse full performance of the contract, and that this right did not constitute a breach of contract by the seller. *Financial Bldg. Consultants, Inc. v. St. Charles Mfg. Co.*, 145 Ga. App. 768, 244 S.E.2d 877 (1978).

Where (1) buyer purchased boat under contract of sale which expressly provided that sale would be void if boat did not perform to buyer's satisfaction, (2) boat never performed to buyer's satisfaction, although buyer tested it on weekends for eight days during month following sale, (3) seller refused to accept return of boat at end of such one-month period and repeatedly attempted to correct boat's problems, (4) seller three months later again refused to accept return of boat, and (5) trial court in seller's action for balance due entered judgment in favor of buyer, evidence supported two legal theories, either of which would sustain trial court's judgment. Under first theory, buyer never accepted boat within meaning of UCC § 2-601(a), § 2-602(1), and § 2-606(1), and his rejection of it one month after sale was effective under UCC § 2-602(1). Under second legal theory, buyer did accept boat but later validly revoked his acceptance of it under UCC § 2-608(1)(b), since his delay of over three months in revoking acceptance was reasonable under UCC § 2-608(2) in view of seller's repeated assurances that boat's problems, which were major, would be corrected. *Don's Marine, Inc. v. Haldeman*, 557 S.W.2d 826 (Tex. Civ. App. 1977), *writ ref'd n.r.e.*, (Mar. 8, 1978).

In replevin action by buyer against seller to obtain possession of Ferrari sports car of limited availability ordered for buyer from another dealer, where order form and bill of sale identified car by name, year of manufacture, model number, and serial number, and stated that car was "used" car and that buyer had made \$15,000 deposit on purchase price of \$17,500; where half of such deposit was paid by buyer's personal check (on which was written name of car, year of manufacture, and serial number) and other half by

cashier's check issued by bank making loan to buyer, which check was made payable to joint order of both buyer and seller and which contained restrictive indorsement requiring "payee" to record first lien on car in bank's favor; where car, when received by seller from other dealer, proved to be virtually new racing vehicle, not intended for highway use, that seller wished to retain for himself; and where seller informed buyer that he would try to locate another Ferrari for him, sale was governed by UCC Art 2 and buyer was entitled to maintain replevin action, despite seller's contention that since car was "new" it was not what buyer had ordered, since (1) under UCC § 2-209, parties had modified their prior oral agreement concerning sale of "used" car by entering into written agreement, evidenced by purchase order and bill of sale prepared by seller, which identified car sold by make, year of manufacture, model number, and serial number; (2) parties' modification of prior oral agreement also was evidenced by seller's acceptance of buyer's personal check and by negotiation by both seller and buyer of bank cashier's check bearing restrictive indorsement; (3) under UCC § 2-106(2), car delivered to seller conformed to modified contract; (4) buyer had right under UCC § 2-601(b) and § 2-606(1)(a) to accept car that did not conform to purchase order, had delivery been tendered by seller; and (5) since car was identified to contract by purchase order and bill of sale which were in buyer's possession, title to car passed to buyer under UCC § 2-401(3)(a), even though seller retained vehicle. *Tatum v. Richter*, 280 Md. 332, 373 A.2d 923 (1977).

Having elected to rescind purchase of stud horse, any actions by buyer in breeding the horse and collecting stud fees were, in effect, as trustee for seller; buyer was entitled to offset the expenses of maintenance and this net profit was to be deducted from the purchase price to be returned. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

Seller stated quasi-contract cause of action to recover from defaulting buyer the price quantum valebant of one knitting machine delivered under express contract for sale of 2 such machines. *Singer Co. v.*

Alka Knitting Mills, Inc., 41 A.D.2d 856 (2d Dep't 1973).

Buyer may accept or reject goods which fail to conform to contract in any respect under Code § 2-601. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

Under the language of § 2-608 and of this section, a buyer is relieved of his obligations under former law of rescission to tender back property previously received, and it is sufficient if he seasonably notifies seller of his revocation of acceptance. *Campbell v. Pollack*, 101 R.I. 223, 221 A.2d 615 (1966).

The UCC does not change the already established law of Pennsylvania as to the buyer's right to rescind and recover the purchase price where there has been a breach of an implied warranty of merchantability or fitness. *Sarnecki v. Al Johns Pontiac*, 56 Luz. Legal Reg. Rep. 293 (Pa. 1966).

A buyer of 16 automobiles under an "entire" contract of sale could reject seven of the automobiles and accept the rest, where the seller accepted the return of the rejected automobiles from the buyer. *Ofgant-Jackson Chevrolet, Inc. v. MacQuade*, 338 Mass. 144, 154 N.E.2d 344 (1958).

The Commercial Code leaves no doubt that a purchaser can accept any commercial unit or units and reject the rest if the goods fail in any respect to conform to the contract. *Paramount Paper Prods. Co. v. Lynch*, 182 Pa. Super. 504, 128 A.2d 157 (1956).

2. Grounds for rejection.

In breach-of-warranty action for damages by buyer of allegedly defective dump trailers against manufacturer-seller, court held (1) that buyer and its ultimate Mexican customers were "merchants" within meaning of UCC § 2-104(1); (2) that seller was "merchant" within meaning of both UCC § 2-104(1) and § 2-314(1); (3) that telephoned order for 20 additional trailers was not enforceable under statute of frauds in UCC § 2-201(1) because it did not come within exceptions to such statute contained in UCC § 2-201(3); (4) that "specially manufactured goods" exception in UCC § 2-201(3)(a) applies only when seller, rather than buyer, seeks to escape

statute-of-frauds defense; (5) that since three trailers purchased under valid written contract were put to improper use by buyer's Mexican customers, rather than being used for their "ordinary purposes," no breach of implied warranty of merchantability under UCC § 2-314(1) and (2)(c) occurred; (6) that use of trailers for improper purposes, rather than for their stated "particular purpose," prevented recovery under implied warranty of fitness in UCC § 2-315; (7) that buyer could not recover for breach of express warranty under UCC § 2-313(1)(a) because it failed to prove that it had relied on statements in manufacturer-seller's brochure either prior to or contemporaneously with making of parties' contract; and (8) that since buyer had no right under UCC § 2-601(a) to reject two unused and undamaged trailers, manufacturer-seller was not required to retake them or to refund their purchase price to buyer. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

Where 3 trailers of 5 purchased by buyer tipped over due to misuse and not existence of defect, rejection of remaining 2 trailers under 75-2-601 was improper, since seller was not required to retake possession of goods or refund purchase price for 2 unused trailers. *Global Truck & Equip. Co. v. Palmer Mach. Works, Inc.*, 628 F. Supp. 641 (N.D. Miss. 1986).

In *rem* action in admiralty involving counterclaims by seller and buyer arising from breaches of contract to sell flour, (1) seller breached implied warranty of merchantability created by UCC § 2-314(1) and (2)(c), and also federal adulterated-food statute, as to one cargo of flour which was infested with insects when it arrived at warehouse prior to being loaded on ship, (2) buyer had right under UCC § 2-601(a) to reject all of such cargo and therefore was not liable for its purchase price or any consequential damages, (3) seller also breached implied warranty of merchantability with respect to two other cargoes of flour, and since buyer had paid for such flour and had ultimately accepted it, buyer was entitled to damages under UCC § 2-606(1)(a), (4) buyer was not barred from claiming damages for such nonconforming cargoes by failure to give

notice of nonconformity by registered mail, since buyer's warning to seller of buyer's dissatisfaction with cargoes constituted adequate notice under UCC § 2-607(3)(a), and (5) under UCC § 2-714(2), although there was no evidence as to value of such cargoes at time and place of their acceptance (*Mobile, Alabama*), buyer was entitled to damages for difference between prices for good and infested flour in Bolivia, South America, plus damages for expenses incurred because of flour's infestation, since buyer had accepted such flour after it had been loaded on ships that transported it to Bolivia and had had no reasonable opportunity to inspect it before it was loaded. *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 449 F. Supp. 84 (S.D. Ala. 1976), *rev'd on other grounds*, 629 F.2d 338 (5th Cir. Ala. 1980), *reh'g denied*, 651 F.2d 779 (5th Cir. Ala. 1981).

In proceeding based on seller's alleged breach of contract to sell buyer 4,150 tons of Class I steel, which matter was ordered submitted to arbitration governed by Uniform Commercial Code, where arbitrators found that steel contracted for was nonconforming, that price adjustment for delivery of nonconforming steel was accepted trade usage, and that such remedy had failed because of seller's refusal to grant adjustment, declining price of Class II steel, and limited market for Class II steel, (1) trade usage of price adjustment was part of contract of sale and acted as limitation on buyer's rejection remedy under UCC § 2-601(a); but (2) since limited remedy of trade-usage price adjustment had failed in its essential purpose within meaning of UCC § 2-719(2), buyer was entitled under UCC § 2-601(a) to reject entire shipment of steel. *North Am. Steel Corp. v. Siderius, Inc.*, 75 Mich. App. 391, 254 N.W.2d 899 (1977).

In action arising out of auction sale of mare described in sales catalog as "barren," but which subsequently "slipped" a dead foal, buyer who effectively revoked sale had right under UCC §§ 2-601 and 2-608 to reject mare after acceptance and burden under UCC § 2-607 upon buyer to show breach did not apply. Since acceptance was revoked, burden was on seller to show mare's conformity with catalog description but seller did not meet that

burden where he failed to prove that mare was either barren or that, pursuant to usage of trade under UCC § 1-205, mare pronounced in foal and later found empty without evidence of abortion could be described as barren. *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976).

Right of buyer to rescind purchase of stud horse was to be determined at time election to rescind was properly exercised, i.e., when initial attempts at breeding did not meet with success and examination of sperm revealed that stallion was not acceptable as a breeder; fact that stallion subsequently was bred to 38 mares and produced 27 live foals did not negate claims that warranties as to stallion's capacity as a breeder were breached; not only was stallion warranted as being fit for stud purposes but parties agreed that semen samples had to be within normal acceptable limits. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

Question as to compliance with warranties is to be measured by the specifics that the parties agreed on, and not by a generalized conclusion as to whether there was an overall fitness for the purposes intended. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

Purchaser of mobile home who advised seller of numerous defects upon delivery of home, but took possession after seller advised buyer that downpayment would be forfeited and assured buyer that repairs would be made to home, was entitled to recover damages against seller for defects on basis of either: (1) theory of rejection of goods under UCC § 2-601, since evidence established that home did not comply with contract terms and seller had no right to threaten to forfeit downpayment; or (2) even if home was accepted, buyer was entitled to revoke acceptance under UCC § 2-608 after using home and discovering further numerous defects. Under either theory, use of mobile home as residence for over year after delivery was not sufficient to render rejection or revocation of acceptance ineffective since use of goods was direct result of oppressive conduct of seller in threatening to forfeit downpayment and further assurances of seller that defects would be repaired. *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976).

Buyer of garbage truck was justified in refusing to accept delivery of truck where it had such defects as to be unfit for use on public streets as garbage collection vehicle. *Stephenson Equip., Inc. v. Rinier*, 68 Pa. D. & C.2d 698 (1975).

Upon record showing five commercial units of valves shipped under a single order, buyer had right to accept four units which conformed to contract and to reject non-conforming unit, and where rejection was made within a reasonable time after delivery and seller was seasonably notified thereof, rejection was rightful and seller was not entitled to payment for non-conforming unit. *Perkins Pipe & Steel Co. v. Acme Valve & Fitting Co.*, 2 Ill. App. 3d 338, 276 N.E.2d 355 (1st Dist. 1971).

"Conformity" and "non-conformity" of goods sold applies not only to quantity and quality, for the goods are also required to conform to the obligations of the contract of sale; and where one of the obligations of the contract is warranty of title, seller's inability to deliver title to a portion of the goods sold constitutes "non-conformity" sufficient to support buyer's revocation of acceptance. *Campbell v. Pollack*, 101 R.I. 223, 221 A.2d 615 (1966).

The seller breaches his obligation to sell on credit by shipping the goods and then presenting bills of lading with sight drafts attached and insisting that the sight drafts be paid before the bills of lading will be surrendered. The buyer in such case may reject the shipment and exercise his rights for the breach of the contract, including rescission of the contract and proceeding to cover. *United States ex rel. Industrial Instrument Corp. v. Paul Hardeman, Inc.*, 202 F. Supp. 124 (N.D. Tex. 1962), *aff'd*, 320 F.2d 115 (5th Cir. Tex. 1963).

Whether the goods conform or not and whether any nonconformity substantially impairs the value of the goods is a question which ordinarily cannot be determined on the pleadings but must be determined at the trial. *Santai v. Seitzinger Bros.*, Ford, 58 Schuy. L. Rec. 42 (Pa. 1962).

The reasonableness of the rejection of the goods is ordinarily a question to be determined by the trier of fact and is not to be determined on the pleadings. *Santai*

v. Seitzinger Bros., Ford, 58 Schuyt. L. Rec. 42 (Pa. 1962).

3. Time of rejection.

Mere fact that because of seller's action the passing of title to stud horse was accelerated by some six months did not affect timing of obligation to inspect horse to determine its fitness for breeding purposes or decision to accept or reject the horse since, pursuant to agreement, it was only in the two-month period prior to stated date for passing of title and after end of racing season that seller was to have horse tested to determine his fitness for breeding purposes, actual inspection took place during such time and horse sustained no serious bodily injury during last months of racing; inspection and rejection in months before title would have passed absent acceleration was timely. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

Parties to an agreement of sale are entitled to get what they bargained for at the time they bargained for it; right of a buyer to rescind must be determined as of the time the election to rescind is properly exercised, and the party's rights are not to be determined by subsequent events. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

Buyer's use of a truck for five months during which time he failed to reject purchase contract amounted to an acceptance. *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964), but see, *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

Defective condition existed in new carpeting; continual complaints were made to seller; one month after purchase, buyer demanded that seller remove carpeting and refund purchase price; seller failed to take any action; held, plaintiff-buyer had made justifiable rejection within reasonable time and proper notification was given to seller; held, plaintiff-buyer was then permitted to retain carpet on his floor and in use awaiting removal, without prejudicing his right to have purchase price refunded. *Garfinkel v. Lehman Floor Covering Co.*, 60 Misc. 2d 72 (1969).

Where the buyer of a combine failed to reject the machine despite its alleged unsatisfactory performance until two

months after delivery when he was called upon to make payment the trial court was justified in holding the rejection was not within a reasonable time after delivery or discovery of the breach. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

Buyer who kept an automobile for more than 5 months and drove it more than 3,000 miles, and exercised dominion and control over it at all times during the period could not thereafter reject it. *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

4. Loss of right to reject.

In action by meat seller against buyer to recover for buyer's wrongful rejection of shipment of meat, where (1) neither confirmation of broker who arranged sale nor contract of sale itself called for any particular markings on the meat cartons, (2) buyer based its rejection on alleged failure of seller to tender "Richardson Production" meats, (3) evidence showed that meat cartons were marked "Tasmeats" instead of "Richardson Production", and (4) it was common knowledge in the trade that "Tasmeats" was equivalent of "Richardson Production," court affirmed district court's holding that buyer's rejection of meat shipment was wrongful under UCC § 2-601(a). *Intermeat, Inc. v. American Poultry Inc.*, 575 F.2d 1017 (2d Cir. N.Y. 1978).

Purchaser of nonconforming mobile home under installment sales contract rightfully rejected unit and notified seller of rejection within reasonable time under UCC §§ 2-601 and 2-602, but purchaser's security interest in goods under UCC § 2-711 did not give him right to continued use of goods until security interest was satisfied; and where purchaser, instead of storing, reshipping, or reselling goods as provided by UCC § 2-604, moved into unit and corrected deficiencies, he accepted goods under UCC § 2-606 and became obligated to pay contract price under UCC § 2-607, retaining only his rights for damages under UCC §§ 2-714 and 2-715; although exclusion of expressed and implied warranties in dark print which was underlined complied with UCC § 2-316, purchaser could nevertheless recover for breach of express warranty under UCC

§ 2-313 should trier of fact conclude that dealer made express warranties that mobile home would conform to sample or model shown purchaser on dealer's lot. *Bowen v. Young*, 507 S.W.2d 600, 67 A.L.R.3d 354 (Tex. Civ. App. 1974).

Where plaintiff-buyer told defendant-seller, when mobile home was being installed, "now this is not right and I do not want it," but nonetheless moved into mobile home, all the while complaining of numerous defects—some of which plaintiff attempted to correct—and made three monthly payments under the terms of the contract, there was insufficient evidence to support a finding that plaintiff rejected mobile home. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

Buyer did not reject machine for processing credit card purchases and rescind

contract therefor as required by UCC §§ 2-601, 2-602, 2-606 and was liable for contract price where evidence failed to support any improper operation of machine and any assurances by seller that it would remedy alleged defects, and where buyer did not use machine for 4 ½ months after delivery, and then for 2 months without rejecting or paying therefor. *Stephens Indus., Inc. v. American Express Co.*, 471 S.W.2d 501 (Mo. Ct. App. 1971).

Buyer who kept an automobile for more than 5 months and drove it more than 3,000 miles, and exercised dominion and control over it at all times during the period could not thereafter reject it. *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

RESEARCH REFERENCES

ALR. Acceptance of some "commercial units" of goods purchased under UCC § 2-601(c). 41 A.L.R.4th 396.

Am Jur. 67 Am. Jur. 2d, Sales §§ 74 et seq., 490 et seq., 503, 505, 528, 529, 535 et seq., 604, 605, 639.

67A Am. Jur. 2d, Sales §§ 1192, 1202, 1207, 1238.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:671-2:674. (Buyer's rights on improper delivery).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:1341 et seq. (Right of buyer on improper delivery).

26 Am. Jur. Proof of Facts 2d, Sales: Implied Warranty of Merchantability, §§ 33 et seq. (proof of seller's liability for breach of implied warranty of merchantability).

43 Am. Jur. Proof of Facts 2d 577, Wrongful Termination of Dealership.

50 Am. Jur. Proof of Facts 2d 563, Breach of Contract Resulting in Loss of Personal Publicity.

CJS. 77 C.J.S., Sales §§ 195, 196.

§ 75-2-602. Manner and effect of rightful rejection.

(1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two (2) following sections on rejected goods (Sections 2-603 and 2-604) [§§ 75-2-603 and 75-2-604],

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (subsection (3) of Section 2-711) [§ 75-2-711(3)], he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general (Section 2-703) [§ 75-2-703].

SOURCES: Codes, 1942, § 41A:2-602; Laws, 1966, ch. 316, § 2-602, eff March 31, 1968.

Cross References — When action is taken seasonably, see § 75-1-204.

Contract requiring payment before inspection, see § 75-2-512.

Buyer's right to inspection before payment or acceptance, see § 75-2-513.

Rejected goods, see §§ 75-2-603, 75-2-604.

Failure to make effective rejection, as acceptance, see § 75-2-606.

Seller's remedies on wrongful rejection by buyer, see § 75-2-703.

Buyer's security interest for payments on price and for expenses, see § 75-2-711.

JUDICIAL DECISIONS

1. In general.
2. Time for rejection, reasonable.
3. —Not reasonable.
4. —Agreement of parties.
5. Notice of rejection, sufficient.
6. —Insufficient.
7. Exercise of ownership.
8. —Motor vehicles.
9. —Mobile homes.
10. Care of goods in buyer's possession.
11. Seller's remedies.
12. Procedure.

1. In general.

Enactment of UCC §§ 9-503 and 9-504, providing for self-help repossession of mortgaged vehicle, did not constitute "state action" for purpose of determining constitutionality of procedure; nor did repossession of vehicle deprive buyer of any right of possession or ownership where buyer had voluntarily abandoned those rights by returning vehicle and rejecting it for alleged defect under UCC § 2-602. *Mayhugh v. Bill Allen Chevrolet*, 371 F. Supp. 1 (W.D. Mo. 1973), aff'd, 496 F.2d 16 (8th Cir. Mo. 1974), cert. denied, 419 U.S. 1006, 95 S. Ct. 328, 42 L. Ed. 2d 283 (1974).

Seller's false representation that used airplane had passed a 100-hour inspection by a licensed mechanic and was airworthy was a material one, and where buyer's acceptance of the plane was in reliance upon such misrepresentation he was en-

titled to rescind or cancel the contract. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

A seller who fails to reject goods in the manner provided in § 2-602 is held to have accepted them. *Julian C. Cohen Salvage Corp. v. Eastern Elec. Sales Co.*, 205 Pa. Super. 26, 206 A.2d 331 (1965).

Instalment buyers of automobile from salesman who unsuccessfully attempted to secure certificate of title to automobile from the dealer were entitled to rescind the contract and return the automobile, and where the buyers returned the automobile to the dealer only after unsuccessfully attempting for a period of many months to obtain the title certificate, and the dealer wanted the automobile back and accepted it without complaint, fact that the return of the automobile to the dealer was made against the wishes of the assignee of the instalment sales contract did not estop the buyers from asserting against such assignee defense available to them under the Pennsylvania Motor Vehicle Sales Financing Act. *Commonwealth Bank & Trust Co. v. Keech*, 201 Pa. Super. 285, 192 A.2d 133 (1963).

Under the Uniform Commercial Code, an offer by the buyer to return the goods after notice of rescission is given is no longer necessary. *Marks v. Lehigh Brickface, Inc.*, 19 Pa. D. & C.2d 666 (1960).

2. Time for rejection, reasonable.

Where (1) buyer purchased boat under contract of sale which expressly provided that sale would be void if boat did not perform to buyer's satisfaction, (2) boat never performed to buyer's satisfaction, although buyer tested it on weekends for eight days during month following sale, (3) seller refused to accept return of boat at end of such one-month period and repeatedly attempted to correct boat's problems, (4) seller three months later again refused to accept return of boat, and (5) trial court in seller's action for balance due entered judgment in favor of buyer, evidence supported two legal theories, either of which would sustain trial court's judgment. Under first theory, buyer never accepted boat within meaning of UCC § 2-601(a), § 2-602(1), and § 2-606(1), and his rejection of it one month after sale was effective under UCC § 2-602(1). Under second legal theory, buyer did accept boat but later validly revoked his acceptance of it under UCC § 2-608(1)(b), since his delay of over three months in revoking acceptance was reasonable under UCC § 2-608(2) in view of seller's repeated assurances that boat's problems, which were major, would be corrected. *Don's Marine, Inc. v. Haldeman*, 557 S.W.2d 826 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Mar. 8, 1978).

In proceeding based on seller's alleged breach of contract to sell buyer 4,150 tons of Class I steel, which matter was submitted to arbitration governed by Uniform Commercial Code, where arbitrators found that such steel was received for buyer's inspection on November 8, 1974, that buyer did not accept steel because it did not conform to contract of sale, and that buyer orally rejected steel on December 4, 1974, and gave seller written notice of such rejection on December 12, 1974, buyer's rejection was proper and seller received timely notification thereof under UCC § 2-602(1) and UCC § 1-204(2). *North Am. Steel Corp. v. Siderius, Inc.*, 75 Mich. App. 391, 254 N.W.2d 899 (1977).

Where buyer received automobile on December 16, 1972, where due to delay in delivery of title and in obtaining license plates, buyer's utilization of auto was minimal until about December 29 or 30,

and where automobile went into garage on January 1, 1973, and was still there on January 6, the date of buyer's letter to seller asking for return of purchase price, letter was attempted rejection; due to difficulty of discovering extent of defects, buyer's limited mechanical experience, and limited opportunities to discover defects, January 6 was reasonable time after delivery and, thus, buyer effectively rejected car as of that date. *Lloyd v. Classic Motor Coaches, Inc.*, 74 Ohio Op. 2d 493, 388 F. Supp. 785 (N.D. Ohio 1974).

Notification within 24 hours of delivery of rejection of Christmas trees was within a reasonable time under UCC § 2-602(1). *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972).

Buyers are under the burden to make a timely and unequivocal rejection if they do not intend to accept the goods delivered. *Woods v. Van Wallis Trailer Sales Co.*, 77 N.M. 121, 419 P.2d 964 (1966).

The purchasers of a race horse misrepresented to them by the seller have the same right to rescission as though they had rejected the goods in the first place provided their revocation of acceptance occurs within a reasonable time. *Grandi v. LeSage*, 74 N.M. 799, 399 P.2d 285 (1965).

Where, at the time of completion and for some time afterwards, plaintiffs had been satisfied with the job performed by the defendants in covering their house with artificial stone, but later the mortar began to crack and colors began to fade from the stones, plaintiffs were not precluded from maintaining their action by their failure to give notice of rescission until over two years after the contract had been completed. *Marks v. Lehigh Brickface, Inc.*, 19 Pa. D. & C.2d 666 (1960).

3. —Not reasonable.

Contract for sale of pyrenone was enforceable under statute of frauds where (1) pyrenone was "received and accepted" by buyer under UCC § 2-201(3)(c), and (2) buyer's attempt to reject pyrenone three months later was not effective under UCC § 2-606(1)(b) and § 2-602(1) (under circumstances of case, rejection three months after delivery was not attempted within reasonable time). *Pride Lab., Inc. v. Sentinel Butte Farmers Elevator Co.*, 268 N.W.2d 474 (N.D. 1978).

Where, pursuant to terms of contract of purchase, tender of coal screens was made by seller to buyer by written notification as to when and where screens could be picked up and buyer, although provided with opportunity to inspect screens, did not at any time give seller any indication that screens would not be accepted, buyer's failure to reject screens within reasonable time after their tender, as required by UCC § 2-602(1), resulted in acceptance of screens under UCC § 2-606(1)(b), so as to render buyer liable as matter of law for unpaid balance of purchase price. *Unlaub Co. v. Sexton*, 568 F.2d 72 (8th Cir. Ark. 1977).

Buyer was liable as matter of law for contract price of cast-iron pipes and other materials purchased for use in water-main construction project where buyer (1) accepted materials under UCC § 2-606(1)(c) by receiving them and installing them into the ground, (2) failed to reject materials within reasonable time after their delivery by seasonable notification to seller required by UCC § 2-602(1), (3) did not comply with duties under UCC § 2-603 as to any materials that buyer might rightfully have rejected, and (4) repaired all leaks in defective pipes shortly after their installation without requesting credit for such defects or revoking acceptance of such pipes under UCC § 2-608(2). *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

Where defendant, who was officer and stockholder of buyer-corporation, guaranteed payment of contract for sale of goods to corporation, corporation breached contract, and seller brought action against defendant on his guarantee, provisions of Uniform Commercial Code did not apply; however, assuming that Code was applicable, defendant could not avail himself of any of its remedies because of his admitted and undisputed failure to act seasonably to reject contract or seek its rescission as required by UCC § 2-602(1). *Unlaub Co. v. Sexton*, 427 F. Supp. 1360 (W.D. Ark. 1977), *aff'd*, 568 F.2d 72 (8th Cir. Ark. 1977).

Where buyer had machine in its possession for four and a half months before an attempt was made to operate it, buyer did not exercise right of rejection within a

reasonable time under UCC § 2-602. *Stephens Indus., Inc. v. American Express Co.*, 471 S.W.2d 501 (Mo. Ct. App. 1971).

Where the buyer of a race horse at an auction failed to inspect the animal on the day of the sale and attempted to reject the sale on the next day alleging the horse was unsound by reason of a fractured splint bone, which defect would have been readily ascertainable upon ordinary inspection, it was held the attempted rejection did not come within a reasonable time, that the buyer had the burden of establishing any breach of warranty, and that he had failed to do so. Consequently, a judgment in favor of the seller was affirmed. *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. N.Y. 1968).

Where goods were delivered to buyer on June 24, and buyer attempted to return same on July 29, lower court did not err in finding that buyer had failed to make effective rejection within reasonable time. *Beco, Inc. v. Minnechaug Golf Course, Inc.*, 5 Conn. Cir. Ct. 444, 256 A.2d 522 (1968).

Where the buyer of a combine failed to reject the machine despite its alleged unsatisfactory performance until two months after delivery when he was called upon to make payment, the trial court was justified in holding the rejection was not within a reasonable time after delivery or discovery of the breach. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

Buyer who kept an automobile for more than 5 months and drove it more than 3,000 miles, and exercised dominion and control over it at all times during the period could not thereafter reject it. *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

4. —Agreement of parties.

In action to rescind or revoke sale of silo and recover back purchase price as well as installation expense incurred under contract, UCC § 2-602 requiring buyer's rejection to be made within reasonable time was not applicable, since buyer here by contract had one year to determine if silo would be satisfactory for his purposes; but he would be expected to make good faith attempt to adapt it to those purposes.

Maas v. Scoboda, 188 Neb. 189, 195 N.W.2d 491 (1972).

Where instalment buyers who purchased automobile from salesman notified dealer and tried unsuccessfully for many months to obtain certificate of title to the vehicle from the dealer, and only returned automobile on becoming convinced that the title certificate would not be delivered to them, dealer, who wanted the automobile returned and accepted it without complaint, could not complain that the automobile was not returned within a reasonable time. *Commonwealth Bank & Trust Co. v. Keech*, 201 Pa. Super. 285, 192 A.2d 133 (1963).

5. Notice of rejection, sufficient.

Where delivered goods did not conform to contract and where buyer rejected goods, notified seller of rejection immediately and promised to return non-conforming goods, buyer's rejection was not rendered ineffective merely because non-conforming goods were not returned until 125 days after buyer's promise to do so; under UCC § 2-602(2) buyer had no obligation to return goods and, thus, buyer's promise was wholly gratuitous. *Presto Mfg. Co. v. Formetal Eng'g Co.*, 46 Ill. App. 3d 7, 360 N.E.2d 510 (1st Dist. 1977).

In proceeding based on seller's alleged breach of contract to sell buyer 4,150 tons of Class I steel, which matter was submitted to arbitration governed by Uniform Commercial Code, where arbitrators found that such steel was received for buyer's inspection on November 8, 1974, that buyer did not accept steel because it did not conform to contract of sale, and that buyer orally rejected steel on December 4, 1974, and gave seller written notice of such rejection on December 12, 1974, buyer's rejection was proper and seller received timely notification thereof under UCC § 2-602(1) and UCC § 1-204(2). *North Am. Steel Corp. v. Siderius, Inc.*, 75 Mich. App. 391, 254 N.W.2d 899 (1977).

Code provisions pertaining to manner and effect of rightful rejecting and acceptance of goods were inapplicable to action by seller of hog fence paneling to recover price of extra panels ordered by buyer who counterclaimed for damages for nonconformity between heavy-duty panels ordered and light-weight panels received,

although evidence raised fact issue, particularly as to panels first received, under Code section providing for revocation of acceptance. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

6. —Insufficient.

Where buyer of transformers admitted to making of oral contract with seller and where buyer accepted goods without giving reasonable notice of rejection as required by UCC § 2-602, oral contract for sale of goods was enforceable pursuant to UCC § 2-201(3)(b)(c). *Carolina Transformer Co. v. Anderson*, 341 So. 2d 1327 (Miss. 1977).

In action on contract for removal and replacement of fill material, where buyer permitted seller to deliver 141 loads of fill from April 3-5 without objection being made until April 8, and never advised seller in what particulars fill failed to meet specifications, buyer had not established rejection of goods under Code. *L.J. Robinson, Inc. v. Arber Constr. Co.*, 292 A.2d 809 (D.C. 1972).

Defense of breach of warranty is without merit where buyer provided seller with no notice of rejection or of receipt of alleged damaged paintings, except for single shipment for which acceptable adjustment was made for shortage and damage, and where buyer did not reject goods within reasonable time. *Portal Galleries, Inc. v. Tomar Prods., Inc.*, 60 Misc. 2d 523 (1969).

In the absence of a rejection in writing and any offer or attempt to return goods purchased there can be no rightful rejection of a purchase under this section. *Julian C. Cohen Salvage Corp. v. Eastern Elec. Sales Co.*, 205 Pa. Super. 26, 206 A.2d 331 (1965).

7. Exercise of ownership.

Applying UCC rules to a copier lease contract, after revocation of acceptance of the copier by the lessee any exercise by the lessee of dominion over it could be considered wrongful as against the lessor. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Under UCC § 2-602 where buyer properly elected to and did reship nonconforming goods to seller and, on failure of seller to accept such goods, buyer incurred addi-

tional expenses in storing and testing goods and in disposing of them at later time when goods had no value, such course of conduct on part of buyer did not constitute exercise of ownership and buyer was entitled to offset for costs incurred. *Askco Eng'g Corp. v. Mobil Chem. Corp.*, 535 S.W.2d 893 (Tex. Civ. App. 1976).

Purchaser of concrete pump waived its revocation of acceptance by resuming use of the pump. *Concrete Equip. Co. v. William A. Smith Contracting Co.*, 358 F. Supp. 1137 (E.D. Wis. 1973).

Buyers of an ice cream freezer and refrigeration compressor unit by using the compressor unit to operate an air conditioner exercised dominion inconsistent with the seller's ownership, and seller by entering judgment for the unpaid balance ratified the sale as represented by the instalment sales contract, and since the seller never accepted or agreed to a rescission by the buyers, the buyers were deemed to have accepted the goods and were precluded from unilaterally asserting a rescission of the sales contract. *F.W. Lang Co. v. Fleet*, 193 Pa. Super. 365, 165 A.2d 258 (1960).

Acceptance was made of a "Dearborn Beautydryer" where the buyers retained it for seven and one-half months before notifying the seller that it failed to operate properly, and offering to return it, and hence the buyers were deemed to have accepted the article and were liable for the agreed price thereof. *Dearborn Stove Co. v. Clark Appliance Co.*, 104 Pitts. Legal J. 403 (Pa. 1956).

8. —Motor vehicles.

The evidence was insufficient to show that purchasers of a used vehicle properly revoked acceptance of the vehicle in a manner sufficient to trigger damage entitlement pursuant to § 75-2-711, where the purchasers turned the vehicle over to the bank to which their financing documents were assigned, rather than returning the vehicle to the dealer from which they purchased it, the bank was not a party to the litigation, and the purchasers neither pled nor proved an agency relationship between the bank and the dealer; the purchasers' actions in declining to make the necessary payments and deliv-

ering the vehicle to the bank for sale with application of the sales proceeds to their benefit were contrary to any justifiable revocation of acceptance. Additionally, the purchasers' action in turning the vehicle over to the bank, and its subsequent sale, did not constitute notice of revocation, which is an essential element for recovery under § 75-2-711, since the record did not reflect that the dealer was aware of this transaction. Moreover, this action was inconsistent with the seller's ownership, and therefore could not constitute notice of revocation; such action confirmed acceptance under § 75-2-606(1)(c). *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725 (Miss. 1991).

Buyer's use of a truck for five months during which time he failed to reject purchase contract amounted to an acceptance. *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark. 410, 382 S.W.2d 191 (1964), but see, *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

Where seller refused to acknowledge buyer's revocation of acceptance of used automobile, and buyer then kept automobile, used and maintained it, and made payments on financing agreement to bank, buyer failed to revoke his acceptance properly, was in the position of one who had accepted the goods, and had through his notification of revocation of acceptance given seller sufficient and timely notification of breach of warranty (automobile warranty book showed 14000 more miles than car's odometer). *Fecik v. Capindale*, 54 Pa. D. & C.2d 701 (1971).

When a buyer, at his own expense, began installing a hoist and dump bed on a truck he performed an act inconsistent with the seller's ownership, and acceptance of the truck occurred at that time. *Park County Implement Co. v. Craig*, 397 P.2d 800 (Wyo. 1964).

A car buyer who complained that the car was difficult to control at a speed in excess of 30 miles per hour could not revoke his acceptance and at the same time keep the car for driving around town at low speeds, for such use of the car was an exercise of rights of ownership over it, and was consequently wrongful under this section. *Grucella v. GMC*, 10 Pa. D. & C.2d 65 (1957).

9. —Mobile homes.

Tender back of defective mobile home was not prerequisite to buyers' action for cancellation of contract, return of purchase price and incidental and consequential damages resulting from seller's breach, where buyers justifiably revoked their acceptance under UCC § 2-711(1) but seller never made request to have mobile home returned; after revocation of acceptance, buyers and security interest in mobile home for purchase price and they had not only right to retain mobile home, but under certain circumstances had right, after having given notice of revocation of acceptance and no response having been received, to hold mobile home with reasonable care and to sell it if necessary in order to acquire money to get back purchase price; thus, buyers by living in home and maintaining it to best of their ability were also preserving it for benefit of seller as well as holding it for their own security. *Mobile Home Sales Mgt. Inc. v. Brown*, 115 Ariz. 11, 562 P.2d 1378 (Ct. App. 1977).

In action by mobile home purchasers against seller and manufacturer for rescission of purchase agreement, although purchasers' revocation of acceptance was effective, their continued occupancy of mobile home as their residence for approximately six months after revocation of acceptances was wrongful and manufacturer and seller were entitled to offset amount of fair and reasonable use value of mobile home for this period. *Stroh v. American Recreation & Mobile Home Corp.*, 35 Colo. App. 196, 530 P.2d 989 (1975).

Contract for sale of mobile trailer, specifically excluding all warranties except those written in the contract, excluded implied warranty of fitness, and buyer of trailer accepted it where he kept trailer and equipment for over two years without giving notice of rejection or desire to rescind contract. *Chrysler Credit Corp. v. Burns*, 527 P.2d 655 (Utah 1974).

10. Care of goods in buyer's possession.

Purchaser of nonconforming mobile home under installment sales contract rightfully rejected unit and notified seller of rejection within reasonable time under

UCC § 2-601 and 2-602, but purchaser's security interest in goods under UCC § 2-711 did not give him right to continued use of goods until security interest was satisfied; and where purchaser, instead of storing, reshipping, or reselling goods as provided by UCC § 2-604, moved into unit and corrected deficiencies, he accepted goods under UCC § 2-606 and became obligated to pay contract price under UCC § 2-607 retaining only his rights for damages under UCC §§ 2-714 and 2-715; although exclusion, of expressed and implied warranties in dark print which was underlined complied with UCC § 2-316, purchaser could nevertheless recover for breach of express warranty under UCC § 2-313 should trier of fact conclude that dealer made express warranties that mobile home would conform to sample or model shown purchaser on dealer's lot. *Bowen v. Young*, 507 S.W.2d 600, 67 A.L.R.3d 354 (Tex. Civ. App. 1974).

11. Seller's remedies.

In action to recover balance of purchase price of machine which was returned to seller several months after installation, if buyer accepted goods under UCC § 2-606(1)(b) and did not revoke acceptance within reasonable time by notifying seller under UCC § 2-608(2) or reject machine under UCC § 2-602(1), seller would be entitled to recover unpaid purchase price under UCC §§ 2-607(1) and 2-709(1)(a); even if transaction was "sale on approval" under UCC § 2-326(1)(a), buyer's failure to seasonably notify seller of election to return goods was acceptance under UCC § 2-327(1)(b) and reservation of title by seller was limited in effect to reservation of security interest under UCC § 2-401(1); UCC § 2-709(2) provision allowing seller to resell goods did not require seller to make resale over objection of original buyer, but if machine were resold, net proceeds would be credited to seller. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128 (1974).

Purchaser was not liable for damages resulting from theft of rejected cable, where notice of nonconformity of cable was promptly given, purchaser acted in accordance with request of seller in attempting to facilitate return of rejected cable, and seller with full notice of place of

storage which was at place of delivery delayed repossessing its property for more than 3 months. *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 195 S.E.2d 514 (1973).

12. Procedure.

Whether buyer accepted or rejected cattle purchased for breeding purposes

and whether buyer acted within reasonable time after delivery of cattle and inspection, which showed cattle to be infected with Brucellosis, were matters properly left for jury determination. *Harding v. Grant City Sale Barn, Inc.*, 492 S.W.2d 99 (Mo. Ct. App. 1973).

RESEARCH REFERENCES

ALR. Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods or article for defects or failure to comply with warranty or representations. 24 A.L.R.2d 717.

Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later instalment. 32 A.L.R.2d 1117.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty. 41 A.L.R.2d 812.

Am Jur. 67 Am. Jur. 2d, Sales §§ 487, 617, 619, 647-649, 656 et seq.

67A Am. Jur. 2d, Sales §§ 1192, 1202, 1207, 1238.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:681-2:688. (Rightful rejection by buyer; manner and effect).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1351 et seq. (Manner and effect of rightful rejection).

CJS. 77 C.J.S., Sales §§ 189, 190 et seq., 195, 196.

§ 75-2-603. Merchant buyer's duties as to rightfully rejected goods.

(1) Subject to any security interest in the buyer (subsection (3) of Section 2-711) [Section 75-2-711(3)], when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding ten per cent (10%) on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

SOURCES: Codes, 1942, § 41A:2-603; Laws, 1966, ch. 316, § 2-603, eff March 31, 1968.

Cross References — Remedies to be liberally administered, see § 75-1-106. Resale by seller, see § 75-2-706.

Bank's duties with respect to rejected documents, see §§ 75-4-503, 75-5-112.

JUDICIAL DECISIONS

1. In general.

Buyer was liable as matter of law for contract price of cast-iron pipes and other materials purchased for use in water-main construction project where buyer (1) accepted materials under UCC § 2-606(1)(c) by receiving them and installing them into the ground, (2) failed to reject materials within reasonable time after their delivery by seasonable notification to seller required by UCC § 2-602(1), (3) did not comply with duties under UCC § 2-603 as to any materials that buyer might rightfully have rejected, and (4) repaired all leaks in defective pipes shortly after their installation without requesting credit for such defects or revoking acceptance of such pipes under UCC § 2-608(2). *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

In action by mobile home purchasers against seller and manufacturer for rescission of purchase agreement, although purchasers' revocation of acceptance was effective, their continued occupancy of mobile home as their residence for approximately six months after revocation of acceptances was wrongful and manufacturer and seller were entitled to offset amount of fair and reasonable use value of mobile home for this period. *Stroh v. American Recreation & Mobile Home Corp.*, 35 Colo. App. 196, 530 P.2d 989 (1975).

UCC §§ 2-603, 2-604 make it plain that a buyer in possession who has rightfully and effectively rejected goods may resell the goods, either for the account of the seller, with the right to reimbursement for expenses and commission, if the buyer has

no security interest in the goods, or for the buyer's own account to the extent of his security interest, plus expenses; and his action in either case, if it is exercised in good faith and is reasonable under the circumstances will not constitute an acceptance or conversion or serve as the basis of an action for damages. *Clark v. Zaid, Inc.*, 263 Md. 127, 282 A.2d 483 (1971).

That consignee permitted carrier's driver to leave damaged boom section at its place of business "as an accommodation" to carrier did not alter fact that physical delivery occurred, and where bill of lading required written notice to carrier of claim for damage within 9 months after delivery, consignee's failure to give such notice within required time barred recovery. *Johnson & Dealaman, Inc. v. Wm. F. Hegarty, Inc.*, 93 N.J. Super. 14, 224 A.2d 510 (App. Div. 1966).

A buyer who received a shipment of rubber mats which he had not ordered, after requesting of the seller authority to return the goods (which authority he did not receive) was under an obligation to sell the goods for the seller's account, and on failing to do so he became indebted to the seller for their value. *Mitchell Rubber Prods., Inc. v. Hub Auto Supply, Inc.*, 28 Mass. App. Dec. 109 (1964).

An automobile is of a type of goods which threatens to decline in value speedily, and a buyer holding an automobile as security has to sell the car for the seller's account, where he has not received reasonable instructions from the seller. *Gruccella v. GMC*, 10 Pa. D. & C.2d 65 (1957).

RESEARCH REFERENCES

Am Jur. 18 Am. Jur. 2d, Conversion § 34.

67A Am. Jur. 2d, Sales §§ 1192, 1202, 1207, 1232.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:701 et seq. (Complaint, petition,

or declaration; allegation; failure to follow reasonable instructions concerning rejected goods; reshipment).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1361 et seq. (Duties of merchant

buyer as to rightfully rejected goods).

CJS. 77 C.J.S., Sales §§ 189, 190 et seq.

§ 75-2-604. Buyer's options as to salvage of rightfully rejected goods.

Subject to the provisions of Section 75-2-603 on perishables if the seller gives no instructions within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in Section 75-2-603. Such action is not acceptance or conversion.

SOURCES: Codes, 1942, § 41A:2-604; Laws, 1966, ch. 316, § 2-604, eff March 31, 1968.

Cross References — Rejection generally, see § 75-2-602.

Duty of buyer to sell perishables, see § 75-2-603(1).

Buyer's right to reimbursement on selling goods, see § 75-2-603(2).

Resale by seller, see § 75-2-706.

JUDICIAL DECISIONS

1. In general.

In proceeding based on seller's alleged breach of contract to sell buyer 4,150 tons of Class I steel, which matter was submitted to arbitration governed by Uniform Commercial Code, where court order submitting matter to arbitration stated that buyer would have right to sell and make deliveries of nonconforming steel rejected by buyer; where buyer, prior to such order, had informed seller that it would sell nonconforming steel for seller's account if seller did not give buyer other instructions within reasonable time; and where seller did not give any other instructions to buyer and buyer resold such steel, (1) seller had sufficient notice under UCC § 2-706 of buyer's intent to resell; (2) such resale under UCC § 2-604 did not constitute acceptance of goods; and (3) arbitrators under UCC § 2-715(1) properly allowed buyer sales commission on such resale as damages resulting from seller's breach. *North Am. Steel Corp. v. Siderius, Inc.*, 75 Mich. App. 391, 254 N.W.2d 899 (1977).

Under UCC § 2-326 sale or return business arrangement, where seller wrongfully refused to accept return of fertilizer, buyer was justified under UCC § 2-604 in storing it at buyer's expense and later

selling fertilizer at best price obtainable, but expenses of caring for and selling fertilizer could not include storage of other stock in rented warehouse due to fact that fertilizer took up other storage space needed for other stock. *Gulf Oil Corp. v. Rice & Agric. Co-op, Inc.*, 536 S.W.2d 236 (Tex. Civ. App. 1976), writ ref'd n.r.e., (Sept. 29, 1976).

Purchaser of nonconforming mobile home under installment sales contract rightfully rejected unit and notified seller of rejection within reasonable time under UCC §§ 2-601 and 2-602, but purchaser's security interest in goods under UCC § 2-711 did not give him right to continued use of goods until security interest was satisfied; and where purchaser, instead of storing, reshipping, or reselling goods as provided by UCC § 2-604, moved into unit and corrected deficiencies, he accepted goods under UCC § 2-606 and became obligated to pay contract price under UCC § 2-607, retaining only his rights for damages under UCC §§ 2-714 and 2-715; although exclusion of expressed and implied warranties in dark print which was underlined complied with UCC § 2-316, purchaser could nevertheless recover for breach of express warranty under UCC § 2-313 should trier of fact conclude that

dealer made express warranties that mobile home would conform to sample or model shown purchaser on dealer's lot. *Bowen v. Young*, 507 S.W.2d 600, 67 A.L.R.3d 354 (Tex. Civ. App. 1974).

UCC §§ 2-603, 2-604 make it plain that a buyer in possession who has rightfully and effectively rejected goods may resell the goods, either for the account of the seller, with the right to reimbursement for expenses and commission, if the buyer has

no security interest in the goods, or for the buyer's own account to the extent of his security interest, plus expenses; and his action in either case, if it is exercised in good faith and is reasonable under the circumstances will not constitute an acceptance or conversion or serve as the basis of an action for damages. *Clark v. Zaid, Inc.*, 263 Md. 127, 282 A.2d 483 (1971).

RESEARCH REFERENCES

Am Jur. 18 Am. Jur. 2d, Conversion § 34.

67A Am. Jur. 2d, Sales §§ 1192, 1196, 1202, 1207, 1210.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:721, 2:722. (Salvage of goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1371 et seq. (Options of buyer as to salvage of rightfully rejected goods).

CJS. 77 C.J.S., Sales § 545.

§ 75-2-605. Waiver of buyer's objections by failure to particularize.

(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

SOURCES: Codes, 1942, § 41A:2-605; Laws, 1966, ch. 316, § 2-605, eff March 31, 1968.

Cross References — When action is taken seasonably, see § 75-1-204.

Cure by seller of nonconforming tender or delivery, see § 75-2-508.

Contract requiring payment before inspection, see § 75-2-512.

Rejection generally, see § 75-2-602.

When acceptance occurs, see § 75-2-606.

Acceptance impairing any other remedy for nonconformity, see § 75-2-607.

JUDICIAL DECISIONS

1. In General.

Under contract for delivery and installation of pin spotter machines in bowling alley, where buyers did not reject defective, nonconforming pin spotters, but in-

stead accepted them notwithstanding their defects, buyers were not required to give seller notice of particular defects as required by UCC § 2-605(1) in order to maintain action for breach of warranty,

and letter from buyers' attorney to seller's sister, after seller's death, stating that pin spotters were not installed within meaning of contract, that pin spotters needed repairs although contract included guaranty as to quality and performance of equipment, and that buyers were keeping record of their expenses so that they could substantiate claim for any loss which

might be sustained, was sufficient notice under UCC § 2-607(3) to preserve buyers' rights; furthermore, buyers did not waive their rights to warranty recovery by refusing to permit seller to cure defects in pin spotters under UCC § 2-508 since they did not reject nonconforming goods but accepted them. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. Iowa 1974).

RESEARCH REFERENCES

Am Jur. 67A Am. Jur. 2d, Sales § 1254.
6 Am. Jur. Pl & Pr Forms (Rev) Sales, Forms 2:731-2:736. (Rightful rejection by buyer; waiver of buyer's objections).
18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1381 et seq. (Waiver of objections of buyer by failure to particularize).

6 Am. Jur. Proof of Facts 2d, Buyer's Timely Notice of Breach in Regard to Accepted Goods, §§ 5 et seq. (proof that buyer gave seller notice of defects within a reasonable time).

CJS. 77 C.J.S., Sales §§ 195, 196.

§ 75-2-606. What constitutes acceptance of goods.

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2-602) [§ 75-2-602(1)], but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

SOURCES: Codes, 1942, § 41A:2-606; Laws, 1966, ch. 316, § 2-606, eff March 31, 1968.

Cross References — Enforceability of contract, not satisfying requirements of writing, where payment has been accepted, see § 75-2-201(3)(c).

Passing of title, see § 75-2-401.

Risk of loss in absence of breach, see § 75-2-509.

Nonconforming tender or delivery as affecting risk of loss, see § 75-2-510.

Acceptance of commercial unit or units, see § 75-2-601.

Effective rejection, see § 75-2-602.

Merchant buyer's duty after rejection, see § 75-2-603.

Buyer's right to store rejected goods, or reship or resell, see § 75-2-604.

Effect of acceptance of goods, see § 75-2-607.

Revocation of acceptance, see § 75-2-608.

Documents of title, see §§ 75-7-101 et seq.

JUDICIAL DECISIONS

1. In general.
2. Inspection by buyer.
3. Conduct signifying conformity.
4. Waiver of nonconformity.
5. Defective rejection.
6. Acts inconsistent with seller's ownership.
7. —Ratification by seller.
8. —Repair or modification.
9. —Installation or incorporation.
10. —Sale to third party.
11. Misrepresentations as affecting acceptance.
12. Procedural matters.

1. In general.

Prior to the adoption of the Uniform Commercial Code, actual delivery was an essential element of the seller's proof in an action to recover the price of goods shipped to the buyer. At that time, actual delivery determined in whom title to the goods vested. Under the Uniform Commercial Code, however, as is reflected in UCC § 2-606(1) and § 2-709(1)(a), acceptance is the concept that is utilized to determine the rights of the seller in an action for the price of goods. *Montana Seeds, Inc. v. Holliday*, 178 Mont. 119, 582 P.2d 1223 (1978).

Where (1) buyer purchased boat under contract of sale which expressly provided that sale would be void if boat did not perform to buyer's satisfaction, (2) boat never performed to buyer's satisfaction, although buyer tested it on weekends for eight days during month following sale, (3) seller refused to accept return of boat at end of such one-month period and repeatedly attempted to correct boat's problems, (4) seller three months later again refused to accept return of boat, and (5) trial court in seller's action for balance due entered judgment in favor of buyer, evidence supported two legal theories, either of which would sustain trial court's judgment. Under first theory, buyer never accepted boat within meaning of UCC § 2-601(a), § 2-602(1), and § 2-606(1), and his rejection of it one month after sale was effective under UCC § 2-602(1). Under second legal theory, buyer did accept boat but later validly revoked his accep-

tance of it under UCC § 2-608(1)(b), since his delay of over three months in revoking acceptance was reasonable under UCC § 2-608(2) in view of seller's repeated assurances that boat's problems, which were major, would be corrected. *Don's Marine, Inc. v. Haldeman*, 557 S.W.2d 826 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Mar. 8, 1978).

Purchaser who executed conditional sales contract on new automobile in which acceptance of vehicle was acknowledged, and who immediately drove it away from seller's place of business had accepted it, within the meaning of this section. *Rozmus v. Thompson's Lincoln-Mercury Co.*, 209 Pa. Super. 120, 224 A.2d 782 (1966).

2. Inspection by buyer.

Buyer accepted automobile when he failed to make a rejection after having had a reasonable opportunity to inspect it. *Rester v. Morrow*, 491 So. 2d 204 (Miss. 1986).

In action by lessor of ice-vending machine against lessee for overdue lease payments, in which lessee cross-complained against machine's seller alleging breach of seller's implied warranty of fitness for a particular purpose, where evidence showed (1) that seller had sold machine to lessor in order to facilitate leasing it to lessee, (2) that both seller and lessor had advised lessee not to accept machine until he was satisfied with its performance, and (3) that both machine's acceptance notice and lease itself expressly declared that lessee understood that lessor made no warranties, express or implied, concerning machine, court held (1) that since lease agreement between lessor and lessee was merely a financing tool whereby lessee acquired use of machine after seller sold it to lessor, lessor thus was lessee's agent in purchasing machine from seller, (2) that as a result, seller's implied warranty of fitness of machine for particular purpose under UCC § 2-315 extended to lessee, (3) that seller breached such warranty when machine proved to be only 80 percent effective when used, (4) that lessee, by signing acceptance notice wherein

he acknowledged that machine was operative and had no defects, accepted it under UCC § 2-606(1) in an "as is" condition and thus released seller from its implied warranty, and (5) that lessee's use of machine for 22 months with full knowledge of its limitations was unreasonable and prevented him from revoking his acceptance under UCC § 2-608(2). *World Wide Lease, Inc. v. Grobschmit*, 21 Wash. App. 537, 586 P.2d 889 (1978), review denied, 91 Wash. 2d 1023 (1979).

The Uniform Commercial Code incorporates, in UCC § 2-601, the "substantial performance" rule of the common law by giving the buyer the option of rejecting an entire shipment of goods if the goods fail in any respect to conform to the contract. In other words, even a technical breach of the contract will justify the buyer's rejection of the goods, with the result that perfection in performance on the part of the seller is required. However, in UCC §§ 2-606 and 2-607, the code makes it equally clear that if the buyer, instead of rejecting the goods, accepts them and thereafter fails to revoke his acceptance in accordance with the code's provisions, he must pay the purchase price of the goods, even though he may thereafter recover damages as provided in the code for breach of contract. *Envirex, Inc. v. Ecological Recovery Assocs.*, 454 F. Supp. 1329 (M.D. Pa. 1978), *aff'd*, 601 F.2d 574 (3d Cir. Pa. 1979).

Since a buyer's acceptance of goods precludes any rejection thereof, and since buyer's rejection is prerequisite to seller's right under UCC § 2-508 to cure defects in such goods, mobile home buyer's acceptance of home under UCC § 2-606(1), despite knowledge of defects therein, deprived seller of right to cure such defects. *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

In *rem* action in admiralty involving counterclaims by seller and buyer arising from breaches of contract to sell flour, (1) seller breached implied warranty of merchantability created by UCC § 2-314(1) and (2)(c), and also federal adulterated-food statute, as to one cargo of flour which was infested with insects when it arrived at warehouse prior to being loaded on ship, (2) buyer had right under UCC § 2-

601(a) to reject all of such cargo and therefore was not liable for its purchase price or any consequential damages, (3) seller also breached implied warranty of merchantability with respect to two other cargoes of flour, and since buyer had paid for such flour and had ultimately accepted it, buyer was entitled to damages under UCC § 2-606(1)(a), (4) buyer was not barred from claiming damages for such nonconforming cargoes by failure to give notice of nonconformity by registered mail, since buyer's warning to seller of buyer's dissatisfaction with cargoes constituted adequate notice under UCC § 2-607(3)(a), and (5) under UCC § 2-714(2), although there was no evidence as to value of such cargoes at time and place of their acceptance (*Mobile, Alabama*), buyer was entitled to damages for difference between prices for good and infested flour in Bolivia, South America, plus damages for expenses incurred because of flour's infestation, since buyer had accepted such flour after it had been loaded on ships that transported it to Bolivia and had had no reasonable opportunity to inspect it before it was loaded. *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 449 F. Supp. 84 (S.D. Ala. 1976), *rev'd* on other grounds, 629 F.2d 338 (5th Cir. Ala. 1980), *reh'g* denied, 651 F.2d 779 (5th Cir. Ala. 1981).

Where seller was aware that buyer was not ready to use carpet it shipped and that it would be stored because of construction strike, and where evidence showed that no set time for inspection existed but that industry practice was not to inspect until purchaser was found and was ready to use carpet, buyer's nine-month delay in inspecting and subsequently rejecting carpet as non-conforming did not in itself constitute acceptance as matter of law under UCC § 2-606. *La Villa Fair v. Lewis Carpet Mills, Inc.*, 219 Kan. 395, 548 P.2d 825 (1976).

Where last purchase of goods as demonstrated by accounts occurred 20 days prior to commencement of action on accounts, difference between 2 dates represented reasonable time within which any inspection and rejection of goods should have been made, so that sales of goods represented by account were taken out of statute of frauds by receipt and acceptance of

goods by defendant. *Gardner & Beedon Co. v. Cooke*, 267 Or. 7, 513 P.2d 758 (1973).

Where the buyer of a race horse at an auction failed to inspect the animal on the day of the sale and attempted to reject the sale on the next day alleging the horse was unsound by reason of a fractured splint bone, which defect would have been readily ascertainable upon ordinary inspection, it was held the attempted rejection did not come within a reasonable time, that the buyer had the burden of establishing any breach of warranty, and that he had failed to do so. Consequently, a judgment in favor of the seller was affirmed. *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. N.Y. 1968).

If the buyer receives delivery of corrugated paper boxes or "voids" used in pouring concrete beams, with knowledge obtained by immediate inspection that they are not satisfactory, an acceptance of the goods occurs and the buyer cannot sue the seller for breach of warranty when, with knowledge of the defect, he decides to take a chance and use the goods. *Safe-Carry Paper Prods. Co. v. Concrete Eng'g Co.*, 64 Lack. Jur. 53 (Pa. 1962).

3. Conduct signifying conformity.

Lawnmower manufacturer accepted grass catcher bags under § 75-2-606 where, although it was aware of tremendous magnitude of defects in bags, it continued to indicate to manufacturer of bags that it would attempt to sell bags it had in stock and that it anticipated delivery of additional bags in future, thus indicating that bags were accepted in spite of their nonconformity, and where lawnmower manufacturer's continued attempts to sell bags, as well as its destruction of defective bags, were inconsistent with effective rejection. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205 (S.D. Miss. 1986).

Where, pursuant to terms of contract of purchase, tender of coal screens was made by seller to buyer by written notification as to when and where screens could be picked up and buyer, although provided with opportunity to inspect screens, did not at any time give seller any indication that screens would not be accepted, buyer's failure to reject screens within reasonable time after their tender, as required by

UCC § 2-602(1), resulted in acceptance of screens under UCC § 2-606(1)(b), so as to render buyer liable as matter of law for unpaid balance of purchase price. *Unlaub Co. v. Sexton*, 568 F.2d 72 (8th Cir. Ark. 1977).

Conduct of general contractor in taking and using concrete forming equipment manufactured by plaintiff constituted acceptance of goods as provided in UCC § 2-606(1)(c) where, inter alia, contractor received and kept goods, used them throughout dam construction project for which they were ordered and continued to use them since that time, and where, although contractor received forms two to three months before actually using them, and in that time could have rejected forms entirely and built job with wooden forms, decided to keep forms, keep silent and continue to use them. *Economy Forms Corp. v. Kandy, Inc.*, 391 F. Supp. 944 (N.D. Ga. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975).

Buyer who was general contractor on dam construction project accepted steel concrete forming equipment manufactured and delivered by seller, under UCC § 2-606(1)(a), where contractor received erection drawings in October, 1970, and forms themselves in January, 1971, where contractor's agents, in their discussion with seller's agent agreed that forms as shown on erection drawings were conforming, where, in addition, contractor's agents received and then used forms in their delivered condition for many months without notifying seller that goods were inadequate; in addition, contractor failed under UCC § 2-606(1)(b) to reject goods within reasonable time where six months elapsed between date of approval of erection drawings in November and first complaint to seller's agents in May. *Economy Forms Corp. v. Kandy, Inc.*, 391 F. Supp. 944 (N.D. Ga. 1974), *aff'd*, 511 F.2d 1400 (5th Cir. 1975).

Failure to notify growers of beets at any time of alleged defect in quality could be construed to be an acceptance of the goods. *Maine Sugar of Montezuma, Inc. v. Wickham*, 37 A.D.2d 381 (3d Dep't 1971).

Buyers of a house trailer who, after having a reasonable opportunity to inspect and with full knowledge of its de-

fects, made partial payments and performed acts of dominion have accepted the trailer and cannot thereafter rescind their contract to purchase. *Woods v. Van Wallis Trailer Sales Co.*, 77 N.M. 121, 419 P.2d 964 (1966).

A city which used traffic signal equipment delivered to it under purchase orders accepted the equipment. *Marbelite Co. v. Philadelphia*, 40 Pa. D. & C.2d 347 (1966), *aff'd*, 208 Pa. Super. 256, 222 A.2d 443 (1966).

Acceptance was made of a "Dearborn Beautydryer" where the buyers retained it for seven and one-half months before notifying the seller that it failed to operate properly, and offering to return it, and hence the buyers were deemed to have accepted the article and were liable for the agreed price thereof. *Dearborn Stove Co. v. Clark Appliance Co.*, 104 Pitts. Legal J. 403 (Pa. 1956).

4. Waiver of nonconformity.

In action by seller under UCC § 75-2-709(1) for price of defective lawnmower bags sold to defendant buyer, court held (1) that buyer had accepted bags (a) under UCC § 75-2-606(1)(a) by conduct that signified to seller that buyer was accepting bags despite knowledge of their nonconformity, and (b) under UCC § 75-2-606(1)(b) by conduct, such as continuing to try to sell bags and destruction of defective bags, that was inconsistent with effective rejection of bags; (2) that buyer did not effectively revoke acceptance of bags under UCC § 75-2-608(1) because (a) its acts of dominion over bags, including continuing efforts to sell them, were inconsistent with its claim of revocation of acceptance, and (b) buyer also did not comply with notice requirement of UCC § 75-2-608(2) for revocation of acceptance; (3) that seller's damages under UCC § 75-2-709(1)(b) for specially manufactured goods included damages for cost of materials, labor and overhead, administrative and sales expenses, and incidental damages; and (4) that although buyer satisfied burden of proof under UCC § 75-2-607(4) with regard to seller's breach of warranty, buyer's breach-of-warranty counterclaim was foreclosed by failure to give seller adequate notice of breach required by UCC § 75-2-607(3)(a) and Offi-

cial Comment 4. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205 (S.D. Miss. 1986).

In replevin action by buyer against seller to obtain possession of Ferrari sports car of limited availability ordered for buyer from another dealer, where order form and bill of sale identified car by name, year of manufacture, model number, and serial number, and stated that car was "used" car and that buyer had made \$15,000 deposit on purchase price of \$17,500; where half of such deposit was paid by buyer's personal check (on which was written name of car, year of manufacture, and serial number) and other half by cashier's check issued by bank making loan to buyer, which check was made payable to joint order of both buyer and seller and which contained restrictive indorsement requiring "payee" to record first lien on car in bank's favor; where car, when received by seller from other dealer, proved to be virtually new racing vehicle, not intended for highway use, that seller wished to retain for himself; and where seller informed buyer that he would try to locate another Ferrari for him, sale was governed by UCC Art 2 and buyer was entitled to maintain replevin action, despite seller's contention that since car was "new" it was not what buyer had ordered, since (1) under UCC § 2-209, parties had modified their prior oral agreement concerning sale of "used" car by entering into written agreement, evidenced by purchase order and bill of sale prepared by seller, which identified car sold by make, year of manufacture, model number, and serial number; (2) parties' modification of prior oral agreement also was evidenced by seller's acceptance of buyer's personal check and by negotiation by both seller and buyer of bank cashier's check bearing restrictive indorsement; (3) under UCC § 2-106(2), car delivered to seller conformed to modified contract; (4) buyer had right under UCC § 2-601(b) and § 2-606(1)(a) to accept car that did not conform to purchase order, had delivery been tendered by seller; and (5) since car was identified to contract by purchase order and bill of sale which were in buyer's possession, title to car passed to buyer under UCC § 2-401(3)(a), even though

seller retained vehicle. *Tatum v. Richter*, 280 Md. 332, 373 A.2d 923 (1977).

Since buyer, after reasonable opportunity to inspect truck, did not reject it, even though truck was 1963 model rather than 1962 model as represented, buyer accepted nonconformity of truck and could not recover for breach concerning model year. *Bunch v. Signal Oil & Gas Co.*, 505 P.2d 41 (Colo. Ct. App. 1972).

Buyer's continued use of 83 lengths of non-conforming pipe after defect had become apparent was clearly an acceptance. *Fred J. Miller, Inc. v. Raymond Metal Prods. Co.*, 265 Md. 523, 290 A.2d 527 (1972).

5. Defective rejection.

In action by seller under UCC § 75-2-709(1) for price of defective lawnmower bags sold to defendant buyer, court held (1) that buyer had accepted bags (a) under UCC § 75-2-606(1)(a) by conduct that signified to seller that buyer was accepting bags despite knowledge of their nonconformity, and (b) under UCC § 75-2-606(1)(b) by conduct, such as continuing to try to sell bags and destruction of defective bags, that was inconsistent with effective rejection of bags; (2) that buyer did not effectively revoke acceptance of bags under UCC § 75-2-608(1) because (a) its acts of dominion over bags, including continuing efforts to sell them, were inconsistent with its claim of revocation of acceptance, and (b) buyer also did not comply with notice requirement of UCC § 75-2-608(2) for revocation of acceptance; (3) that seller's damages under UCC § 75-2-709(1)(b) for specially manufactured goods included damages for cost of materials, labor and overhead, administrative and sales expenses, and incidental damages; and (4) that although buyer satisfied burden of proof under UCC § 75-2-607(4) with regard to seller's breach of warranty, buyer's breach-of-warranty counterclaim was foreclosed by failure to give seller adequate notice of breach required by UCC § 75-2-607(3)(a) and Official Comment 4. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205 (S.D. Miss. 1986).

Contract for sale of pyrenone was enforceable under statute of frauds where (1) pyrenone was "received and accepted"

by buyer under UCC § 2-201(3)(c), and (2) buyer's attempt to reject pyrenone three months later was not effective under UCC § 2-606(1)(b) and § 2-602(1) (under circumstances of case, rejection three months after delivery was not attempted within reasonable time). *Pride Lab., Inc. v. Sentinel Butte Farmers Elevator Co.*, 268 N.W.2d 474 (N.D. 1978).

Oral contracts for sale of lettuce were enforceable under UCC § 2-201(3)(c), notwithstanding they were not in writing, where seller transferred lettuce from its cooler to motor carrier for delivery for buyer; for purpose of satisfying UCC § 2-201(3)(c), lettuce was "received" by buyer when it was shipped in accordance with each invoice, and buyer would be deemed to have "accepted" lettuce, as defined in UCC § 2-606, since (1) transfer of lettuce to carrier was "an act inconsistent with the seller's ownership," and (2) buyer "failed to make an effective rejection" of lettuce after it was received. *O'Day v. George Arakelian Farms, Inc.*, 24 Ariz. App. 578, 540 P.2d 197 (1975).

In action to recover balance of purchase price of machine which was returned to seller several months after installation, if buyer accepted goods under UCC § 2-606(1)(b) and did not revoke acceptance within reasonable time by notifying seller under UCC § 2-608(2) or reject machine under UCC § 2-602(1), seller would be entitled to recover unpaid purchase price under UCC §§ 2-607(1) and 2-709(1)(a); even if transaction was "sale on approval" under UCC § 2-326(1)(a), buyer's failure to seasonably notify seller of election to return goods was acceptance under UCC § 2-327(1)(b) and reservation of title by seller was limited in effect to reservation of security interest under UCC § 2-401(1); UCC § 2-709(2) provision allowing seller to resell goods did not require seller to make resale over objection of original buyer, but if machine were resold, net proceeds would be credited to seller. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128 (1974).

Where fuse manufacturers established that they had manufactured and delivered to prime government contractor fuses contracted for, that fuses as tendered had been accepted, and that contractor had

refused to pay balances due thereon, and where there was no effective rejection of goods by contractor under UCC § 2-606(1)(b), nor any notification of breach in warranty of goods under § 2-607(3)(a), nor any effective revocation of acceptance under § 2-608(2), any defense or any "remedy"-that contractor might have had under UCC for nonacceptance of goods or for breach of their warranty or revocation of acceptance was predicated, as condition precedent, upon notification to sellers. However, letter from contractor to fuse manufacturers stating that contractor's cash flow had been severely interrupted due in part to quality problem on part of fuse manufacturers could not be construed to suggest either rejection of acceptance of fuses delivered, nor notification of breach of warranty, nor revocation of conformity, much less to constitute identification of particular contract, sale or transaction concerning which complaint was therein attempted by contractor. *Lynx, Inc. v. Ordnance Prods., Inc.*, 273 Md. 1, 327 A.2d 502 (1974).

Buyer did not reject machine for processing credit card purchases and rescind contract therefor as required by UCC §§ 2-601, 2-602, 2-606 and was liable for contract price where evidence failed to support any improper operation of machine and any assurances by seller that it would remedy alleged defects, and where buyer did not use machine for 4 ½ months after delivery, and then for 2 months without rejecting or paying therefor. *Stephens Indus., Inc. v. American Express Co.*, 471 S.W.2d 501 (Mo. Ct. App. 1971).

6. Acts inconsistent with seller's ownership.

The evidence was insufficient to show that purchasers of a used vehicle properly revoked acceptance of the vehicle in a manner sufficient to trigger damage entitlement pursuant to § 75-2-711, where the purchasers turned the vehicle over to the bank to which their financing documents were assigned, rather than returning the vehicle to the dealer from which they purchased it, the bank was not a party to the litigation, and the purchasers neither pled nor proved an agency relationship between the bank and the dealer; the purchasers' actions in declining to

make the necessary payments and delivering the vehicle to the bank for sale with application of the sales proceeds to their benefit were contrary to any justifiable revocation of acceptance. Additionally, the purchasers' action in turning the vehicle over to the bank, and its subsequent sale, did not constitute notice of revocation, which is an essential element for recovery under § 75-2-711, since the record did not reflect that the dealer was aware of this transaction. Moreover, this action was inconsistent with the seller's ownership, and therefore could not constitute notice of revocation; such action confirmed acceptance under § 75-2-606(1)(c). *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725 (Miss. 1991).

Applying UCC rules to a 2 party copier lease agreement, the lessee accepted the copier when it failed to make an effective rejection after having had a reasonable opportunity to inspect it. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

In action for purchase price of new automobile, where (1) buyer's acts in signing all necessary papers and taking delivery of car were so inconsistent with seller's ownership as to constitute acceptance under UCC § 2-606(1)(c), and (2) buyer had no right to revoke her acceptance under UCC § 2-608(1)(a), since she had accepted car without knowledge of any nonconformity, court held that seller's proof of sale and delivery of car at agreed price, together with buyer's admission that she took car, executed paper work connected with its sale, and then refused to pay purchase price, made out case that entitled seller to recover purchase price (stating that fact that fan belt broke two days after car's sale did not show such nonconformity as would allow buyer to revoke acceptance under UCC § 2-608(1)(b)). *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Oral contracts for sale of lettuce were enforceable under UCC § 2-201(3)(c), notwithstanding they were not in writing, where seller transferred lettuce from its cooler to motor carrier for delivery for buyer; for purpose of satisfying UCC § 2-201(3)(c), lettuce was "received" by buyer

when it was shipped in accordance with each invoice, and buyer would be deemed to have "accepted" lettuce, as defined in UCC § 2-606, since (1) transfer of lettuce to carrier was "an act inconsistent with the seller's ownership," and (2) buyer "failed to make an effective rejection" of lettuce after it was received. *O'Day v. George Arakelian Farms, Inc.*, 24 Ariz. App. 578, 540 P.2d 197 (1975).

Seller of machinery was entitled to finding as to whether buyer accepted machinery, thus precluding rescission contract by buyer and recovery of money paid on account, where buyer claimed that it retained and used machinery in its business only upon seller's assurance that seller would correct any problems in connection with machines, but where, on other hand, seller claimed that buyer accepted machines unconditionally. *Lenkay Sani Prods. Corp. v. Benitez*, 47 A.D.2d 524 (2d Dep't 1975).

Evidence did not support position of buyer who claimed that she had been oversupplied by seller for some time with goods not ordered, that she had offered to return goods but had been refused, and that, therefore, she did not accept such goods, where, although buyer testified that she held goods allegedly not ordered for reshipment to seller, she could not identify them as having been shipped during disputed period and there was no evidence of what was done with items allegedly overshipped during that period, but it was reasonable assumption that if they were not held for reshipment they were offered for sale, which would appear to be act inconsistent with seller's ownership and constitute acceptance, and where, furthermore, evidence showed complaint of overshipment by seller for years preceding disputed period, during which time defendant had, however, paid and continued to pay for those goods. *Phil Jacobs Co. v. Mifflin*, 23 Ill. App. 3d 999, 320 N.E.2d 329 (5th Dist. 1974).

UCC requires that plaintiffs' continued use of automobile after their attempted rejection invalidates plaintiffs' revocation of acceptance. *Waltz v. Chevrolet Motor Div.*, 307 A.2d 815 (Del. Super. 1973).

Fact that buyer of automobile kept it for more than 5 months and drove it over

3,000 miles constituted an acceptance of the vehicle. *Green Chevrolet Co. v. Kemp*, 241 Ark. 62, 406 S.W.2d 142 (1966).

A buyer, who with knowledge of the defect, decides to take a chance and uses the defective goods assumes all risks and cannot hold the seller liable. *Safe-Carry Paper Prods. Co. v. Concrete Eng'g Co.*, 64 Lack. Jur. 53 (Pa. 1962).

7. —Ratification by seller.

Buyers of an ice cream freezer and refrigeration compressor unit by using the compressor unit to operate an air conditioner exercised dominion inconsistent with the seller's ownership, and seller by entering judgment for the unpaid balance ratified the sale as represented by the instalment sales contract, and since the seller never accepted or agreed to a rescission by the buyers, the buyers were deemed to have accepted the goods and were precluded from unilaterally asserting a rescission of the sales contract. *F.W. Lang Co. v. Fleet*, 193 Pa. Super. 365, 165 A.2d 258 (1960).

8. —Repair or modification.

Buyer of vinyl-laminating machine that did not operate properly was entitled under UCC § 2-606(1)(c) to rescission of purchase contract and return of money paid thereunder where buyer's use of machine after commencement of action, although substantial and not in mitigation of damages, was to make machine function and not for production purposes in buyer's business (rejecting seller's contention that if buyer's conduct over goods after commencement of action was substantial and not in mitigation of damages, such conduct as matter of law constituted act "inconsistent with seller's ownership" within meaning of UCC § 2-606(1)(c)). *Distco Laminating, Inc. v. Union Tool Corp.*, 81 Mich. App. 612, 265 N.W.2d 768 (1978), appeal denied, 403 Mich. 848 (1978).

Buyer, notwithstanding protests as to defective operational condition of equipment, did not reject contract outright but accepted goods under UCC § 2-606(1)(c) with reasonable expectation that defects would be corrected, where there was evidence, inter alia, that buyer himself worked on equipment to put it in proper condition and that he used some of ma-

chinery for his own purposes. *Dehahn v. Innes*, 356 A.2d 711 (Me. 1976).

Purchaser of nonconforming mobile home under installment sales contract rightfully rejected unit and notified seller of rejection within reasonable time under UCC §§ 2-601 and 2-602, but purchaser's security interest in goods under UCC § 2-711 did not give him right to continued use of goods until security interest was satisfied; and where purchaser, instead of storing, reshipping, or reselling goods as provided by UCC § 2-604, moved into unit and corrected deficiencies, he accepted goods under UCC § 2-606 and became obligated to pay contract price under UCC § 2-607, retaining only his rights for damages under UCC §§ 2-714 and 2-715; although exclusion of expressed and implied warranties in dark print which was underlined complied with UCC § 2-316, purchaser could nevertheless recover for breach of express warranty under UCC § 2-313 should trier of fact conclude that dealer made express warranties that mobile home would conform to sample or model shown purchaser on dealer's lot. *Bowen v. Young*, 507 S.W.2d 600, 67 A.L.R.3d 354 (Tex. Civ. App. 1974).

Repairing, correcting, and altering a purchased unit which is deemed "satisfactory" by the buyer is an indication of acceptance; buyer could not retain possession of the incinerator, use the equipment in its business for an extended period of time, and at the same time claim rejection. *Brule C.E. & E., Inc. v. Pronto Foods Corp.*, 3 Ill. App. 3d 135, 278 N.E.2d 477 (1st Dist. 1971).

9. —Installation or incorporation.

Buyer was liable as matter of law for contract price of cast-iron pipes and other materials purchased for use in water-main construction project where buyer (1) accepted materials under UCC § 2-606(1)(c) by receiving them and installing them into the ground, (2) failed to reject materials within reasonable time after their delivery by seasonable notification to seller required by UCC § 2-602(1), (3) did not comply with duties under UCC § 2-603 as to any materials that buyer might rightfully have rejected, and (4) repaired all leaks in defective pipes shortly after their installation without requesting

credit for such defects or revoking acceptance of such pipes under UCC § 2-608(2). *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

Contractor's installation of kitchen units in dormitory was act inconsistent with seller's ownership, and at that time title to units passed to contractor, regardless of effect of contractor's failure to inspect and reject units for period of approximately 3 months after delivery. *Cervitor Kitchens, Inc. v. Chapman*, 82 Wash. 2d 673, 513 P.2d 25 (1973).

Buyer of brick, stone, and mill irons hauled some of each from seller's property to buyer's building site and incorporated them into his building; buyer further acted inconsistent with seller's ownership by selling some of excess materials at their original site; held, evidence was sufficient to support finding that there had been acceptance of all goods. *Haken v. Scheffler*, 24 Mich. App. 196, 180 N.W.2d 206 (1970).

10. —Sale to third party.

Lumber dealer accepted shipment of lumber under UCC § 2-606, as matter of law, even though he did not order shipment, where he took possession of lumber, put it into inventory in his lumberyard, offered it for sale to public and did, in fact, sell portions thereof, and where, moreover, dealer failed to effectively express dissatisfaction, made partial payment on lumber shipment, and never attempted to return or tender shipment back to seller. *Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 560 P.2d 789 (1977).

Under Code provision indicating that acceptance of goods occurs when buyer does any act inconsistent with seller's ownership, such an act clearly occurred with respect to instalment contract when buyer sold first shipment to its customer. *Gulf Chem. & Metallurgical Corp. v. Sylvan Chem. Corp.*, 122 N.J. Super. 499, 300 A.2d 878 (1973), *aff'd*, 126 N.J. Super. 261, 314 A.2d 73 (1973), certification denied, 64 N.J. 507, 317 A.2d 720 (1974).

A buyer of materials and supplies, for use in manufacturing rubber stamp handles, who processed the materials and at least attempted to sell the product to a third person, without a prior rejection of any of the materials, clearly accepted the

materials by acts inconsistent with the seller's ownership. *Sincavage v. Howells*, 8 Pa. D. & C.2d 515 (1957).

11. Misrepresentations as affecting acceptance.

Seller's false representation that used airplane had passed a 100-hour inspection by a licensed mechanic and was airworthy was a material one, and where buyer's acceptance of the plane was in reliance upon such misrepresentation he was entitled to rescind or cancel the contract. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

12. Procedural matters.

Seller of machinery was entitled to finding as to whether buyer accepted machinery, thus precluding rescission of contract by buyer and recovery of money paid on account, where buyer claimed that it retained and used machinery in its business only upon seller's assurance that seller would correct any problems in connection with machines, but where, on other hand, seller claimed that buyer accepted ma-

chines unconditionally. *Lenkay Sani Prods. Corp. v. Benitez*, 47 A.D.2d 524 (2d Dep't 1975).

Whether buyer accepted or rejected cattle purchased for breeding purposes and whether buyer acted within reasonable time after delivery of cattle and inspection, which showed cattle to be infected with Brucellosis, were matters properly left for jury determination. *Harding v. Grant City Sale Barn, Inc.*, 492 S.W.2d 99 (Mo. Ct. App. 1973).

Code provisions pertaining to manner and effect of rightful rejecting and acceptance of goods were inapplicable to action by seller of hog fence paneling to recover price of extra panels ordered by buyer who counterclaimed for damages for nonconformity between heavy-duty panels ordered and light-weight panels received, although evidence raised fact issue, particularly as to panels first received, under Code section providing for revocation of acceptance. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

RESEARCH REFERENCES

ALR. Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later instalments. 32 A.L.R.2d 1117.

Reasonableness of personal judgment of buyer as test where goods are sold subject to being satisfactory to the buyer. 86 A.L.R.2d 200.

Use of goods by buyer as constituting acceptance under UCC § 2-606(1)(c). 67 A.L.R.3d 363.

Am Jur. 67 Am. Jur. 2d, Sales §§ 372 et seq., 381 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:751-2:755. (Acceptance of goods; what constitutes acceptance).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1401 et seq. (What constitutes acceptance of goods).

6 Am. Jur. Proof of Facts 2d, Buyer's Timely Notice of Breach in Regard to Accepted Goods, §§ 5 et seq. (proof that buyer gave seller notice of defects within a reasonable time).

37 Am. Jur. Proof of Facts 2d 593, Acceptance of Goods.

CJS. 77 C.J.S., Sales §§ 222 et seq.

Law Reviews. 1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L. J. 467, August, 1987.

§ 75-2-607. Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over.

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the

nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this chapter for nonconformity.

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) [Section 75-2-312(3)] and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two (2) litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) [Section 75-2-312(3)] the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) the provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2-312) [Section 75-2-312(3)].

SOURCES: Codes, 1942, § 41A:2-607; Laws, 1966, ch. 316, § 2-607, eff March 31, 1968.

Cross References — What action is taken seasonably, see § 75-1-204.

Explicit reservation of rights, see § 75-1-207.

When goods are conforming, see § 75-2-106.

Warranty against claim for infringement, etc., see § 75-2-312.

Statements of defects on rejection, see § 75-2-605.

Revocation of acceptance, see § 75-2-608.

Seller's remedies for buyer's breach, see §§ 75-2-702 et seq.

Buyer's recoupment in diminution or extinction of price, see § 75-2-717.

JUDICIAL DECISIONS

A. In General.

1. Generally.
2. Payment at contract rate.
3. Acceptance as precluding rejection.
4. —Reasonable expectation of repair.
5. —Acceptance as affecting other remedies.

B. Buyer's Claim of Breach.

6. In general.
7. Persons required to give notice.
8. Sufficiency of notice.
9. —Oral notice.
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11. Timeliness of notice.
12. —Wholesale and retail sales distinguished.
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20. Vouching in original seller.

A. In General.

1. Generally.

"Voucher to warranty" has deep roots in the common law and is codified, insofar as it relates to the law of sales involving "middlemen," by UCC § 2-607(5)(a). Vouching-in is a simple and expedient way for defendants who have a right over against another to avoid the necessity of relitigating in a second suit issues of liability to the plaintiff that were litigated in the first suit. Although it has the unique advantage of not requiring personal service of process, vouching-in does not alleviate the necessity of a second suit. It merely binds the vouchee to any determination of fact that is common to the two actions (holding, where buyer of defective gaskets sued manufacturer, manufacturer filed third-party complaint against supplier of materials, and trial court severed the two actions, that manufacturer had properly vouched in supplier and that supplier was therefore bound under UCC § 2-607(5)(a) by those determinations of fact that were common to the two suits, so as to be precluded from later denying existence of defects in materials used to manufacture the gaskets). *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 177 Ind. App. 508, 380 N.E.2d 571 (1978).

In action by livestock owner against feed company for breach of express warranty, there was sufficient evidence to support finding of express warranty based on alleged representations of defendant

company where there was evidence that employees of company verbally stated that their feed mixture would cause two-pound weight gain per day on calves belonging to livestock owner; however, there was insufficient evidence to support finding that it was this breach of warranty and not combination of number of other factors which proximately caused calves' failure to gain weight as expected. *Heil v. Standard Chem. Mfg. Co.*, 301 Minn. 315, 223 N.W.2d 37 (1974).

A contract providing that all claims for defective goods shall be deemed waived unless presented within 8 days after receipt is manifestly unreasonable and will not be enforced where the defects are latent and could not be discovered until many months after receipt of the merchandise. *Q. Vandenberg & Sons v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964).

UCC § 2-607 does not apply to a transaction occurring prior to the effective date of the Code. *Clarizo v. Spada Distrib. Co.*, 231 Or. 516, 373 P.2d 689 (1962).

The Uniform Commercial Code continues the well-established concept of mitigation of damages, applying it with respect to the acceptance of latently defective goods. *Powell v. Scottdale Mach., Foundry & Constr. Co.*, 25 Fayette Legal J. 167 (Pa. 1962).

2. Payment at contract rate.

Defendant, domestic manufacturer of prestressed concrete, is obligated to pay "at contract rate" under UCC § 2-607 for all steel strand accepted from Dutch manufacturer since defendant failed to make any showing that strand tendered by plaintiff was in any way defective or that defendant notified plaintiff of non-conformity in tender at any time. *Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp.*, 466 F. Supp. 846 (E.D.N.Y. 1979), *aff'd*, 614 F.2d 1289 (2d Cir. N.Y. 1979).

The Uniform Commercial Code incorporates, in UCC § 2-601, the "substantial performance" rule of the common law by giving the buyer the option of rejecting an entire shipment of goods if the goods fail in any respect to conform to the contract. In other words, even a technical breach of the contract will justify the buyer's rejection of the goods, with the result that

perfection in performance on the part of the seller is required. However, in UCC §§ 2-606 and 2-607, the code makes it equally clear that if the buyer, instead of rejecting the goods, accepts them and thereafter fails to revoke his acceptance in accordance with the code's provisions, he must pay the purchase price of the goods, even though he may thereafter recover damages as provided in the code for breach of contract. *Envirex, Inc. v. Ecological Recovery Assocs.*, 454 F. Supp. 1329 (M.D. Pa. 1978), *aff'd*, 601 F.2d 574 (3d Cir. Pa. 1979).

Buyer's failure to make payments on truck constituted unjustifiable breach of sale contract that entitled seller to full remedies provided by Uniform Commercial Code and seller's security agreement, including the right to receive balance due on truck, where (1) buyer accepted truck and became obligated under UCC § 2-607(1) to pay contract price for it; (2) buyer used truck and did not at any time attempt to revoke his acceptance of it; and (3) buyer's only excuse for not making payments was that because county court clerk had not received truck's title papers from seller as required by state law, buyer could not get truck licensed for further use after vehicle's temporary license tags had expired (stating that statutes requiring seller to send title papers to county court clerk were revenue measures that were entirely distinct from provisions of Uniform Commercial Code that govern sales). *Lexington Mack, Inc. v. Miller*, 555 S.W.2d 249 (Ky. 1977).

Under UCC § 2-607(1), directed verdict against raiser of chickens for \$46,391.28 was proper where evidence showed that raiser had accepted chicken feed worth such sum under contract in which seller agreed to furnish buyer with sufficient feed to raise 40,000 chickens during 26-week period. *Ralston Purina Co. v. Hobson*, 554 F.2d 725 (5th Cir. Ala. 1977).

Purchaser of nonconforming mobile home under installment sales contract rightfully rejected unit and notified seller of rejection within reasonable time under UCC §§ 2-601 and 2-602, but purchaser's security interest in goods under UCC § 2-711 did not give him right to continued use of goods until security interest was

satisfied; and where purchaser, instead of storing, reshipping, or reselling goods as provided by UCC § 2-604, moved into unit and corrected deficiencies, he accepted goods under UCC § 2-606 and became obligated to pay contract price under UCC § 2-607, retaining only his rights for damages under UCC §§ 2-714 and 2-715; although exclusion of expressed and implied warranties in dark print which was underlined complied with UCC § 2-316, purchaser could nevertheless recover for breach of express warranty under UCC § 2-313 should trier of fact conclude that dealer made express warranties that mobile home would conform to sample or model shown purchaser on dealer's lot. *Bowen v. Young*, 507 S.W.2d 600, 67 A.L.R.3d 354 (Tex. Civ. App. 1974).

In action to recover balance of purchase price of machine which was returned to seller several months after installation, if buyer accepted goods under UCC § 2-606(1)(b) and did not revoke acceptance within reasonable time by notifying seller under UCC § 2-608(2) or reject machine under UCC § 2-602(1), seller would be entitled to recover unpaid purchase price under UCC §§ 2-607(1) and 2-709(1)(a); even if transaction was "sale on approval" under UCC § 2-326(1)(a), buyer's failure to seasonably notify seller of election to return goods was acceptance under UCC § 2-327(1)(b) and reservation of title by seller was limited in effect to reservation of security interest under UCC § 2-401(1); UCC § 2-709(2) provision allowing seller to resell goods did not require seller to make resale over objection of original buyer, but if machine were resold, net proceeds would be credited to seller. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128 (1974).

A buyer is liable for the contract price where he has received the goods and has failed to prove or offered to prove nonacceptance, effective rejection, or revocation of acceptance within a reasonable time. *Marble Card Elec. Corp. v. Maxwell Dynamometer Co.*, 10 Chest. Co. 145 (Pa. 1961).

3. Acceptance as precluding rejection.

The express language of UCC § 2-607(3)(a) mandates the giving of notice by the buyer, regardless of whether

the buyer, or the seller, or both had actual knowledge of the breach. *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 12 Ohio Op. 3d 246, 587 F.2d 813 (6th Cir. Ohio 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979).

In action by buyer of forging machine for seller's breach of both its express performance warranties and its repair-and-replacement-of-parts warranty, where (1) delivery and installation of machine took place in October, 1967, (2) buyer, on December 29, 1967, sent letter to seller which detailed machine's performance defects, (3) seller for five months attempted to repair machine, but stopped such efforts on June 21, 1968, (4) buyer filed suit for breach of seller's warranties on May 29, 1969, and (5) contract between parties contained one-year limitation period for bringing such suit, which was minimum period allowed by UCC § 2-725(1), court held (1) that under UCC § 2-725(2), cause of action for breach of warranty accrues on initial installation of product, regardless of whether it functions properly, as long as seller's warranty does not extend to future performance, (2) that in present case, seller's express performance warranties explicitly extended to future performance for period of one year, since seller had expressly warranted machine's performance for such period, (3) that as a result, buyer's cause of action on such warranties accrued, under UCC § 2-725(2), when buyer discovered, or should have discovered, that machine was defective, as long as such defects occurred during machine's warranty period, (4) that since parties' contract provided for one-year limitation period for bringing suit for breach of contract, and since buyer had discovered and reported machine's defects to seller by letter on December 29, 1967, buyer's failure to institute suit until May 29, 1969, which was more than one year after discovery of defects, caused such suit to be barred under UCC § 2-725(2), (5) that seller was not estopped to assert statute of limitations as defense because of its spending over five months in attempting to repair machine, since such repair efforts did not toll running of statute under Ohio law, which applied to case under UCC § 2-725(4), (6) that buyer's cause of

action for seller's breach of its express warranty to repair or replace defective parts was not barred by contract's one-year period of limitations, since seller's repair efforts were terminated on June 21, 1968 and buyer's suit was filed within a year thereafter on May 29, 1969, and (7) that buyer's failure to notify seller of its breach of repair-or-replacement-of-defective-parts warranty, which was required by UCC § 2-607(3)(a), was fatal to buyer's cause of action on such warranty. *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 12 Ohio Op. 3d 246, 587 F.2d 813 (6th Cir. Ohio 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979).

Buyer of silage and baled alfalfa, who in suit against seller for breach of express and implied warranties of merchantability of such commodities had failed to give seller reasonable notice of alleged breach required by UCC § 2-607(3)(a), was obligated to pay seller contract price for alfalfa and silage accepted, instead of market price therefor. *Cox v. Mesa Petro. Co.*, 572 S.W.2d 110 (Tex. Civ. App. 1978), writ ref'd n.r.e., (Feb. 28, 1979).

In an action based on the breach of an implied warranty, notice of the breach from buyer to seller, as prescribed by UCC § 2-607(3)(a), is an essential element of the plaintiff's cause (action for breach of implied warranty in sale of intrauterine device wherein court held that buyer's delay of fifteen months in giving notice of breach to defendant manufacturer, which delay was caused in part by buyer's inability to ascertain who had manufactured the device, did not constitute, as a matter of law, giving of notice under UCC § 2-607(3)(a) within reasonable time). *Branden v. Gerbie*, 62 Ill. App. 3d 138, 379 N.E.2d 7 (1st Dist. 1978).

Since the remote manufacturer's implied warranty is tendered along with the goods to the ultimate consumer by the consumer's immediate seller and notice to the immediate seller of the consumer's discovery of any breach, which is required of the consumer by UCC § 2-607(3)(a), inures in the ordinary course of events to the benefit of the remote manufacturer, the remote manufacturer may raise, as a defense to the maintenance of a suit by a

subpurchaser for breach of an implied warranty, the subpurchaser's failure reasonably to notify his immediate seller of the breach, except in cases where the subpurchaser has actually given notice of the breach to the manufacturer. This rule eliminates placing on the unsophisticated consumer the duty to notify a party with whom he has not dealt (the remote manufacturer) and yet affords the remote manufacturer, whether sued alone or with others, the protection of the code, namely, the avoidance of being confronted with stale claims that prevent the marshaling of evidence for a defense. *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1st Dist. 1978).

Where (1) seller sued to recover unpaid balance of purchase price of cinders purchased by buyer for installation in playground, (2) buyer counterclaimed for expenses incurred because seller delivered cinders of improper size, and (3) buyer also contended that seller had no right to "cure" the breach because situation involved a revocation of acceptance by buyer, court held (1) that while seller might not have right to cure nonconformity in revocation-of-acceptance situation, buyer by letter had expressly given seller opportunity to cure breach, (2) seller had not cured breach within meaning of UCC § 2-508(1) because seller refused to deduct cost of regrading replacement cinders from purchase price of cinders contracted for, and (3) buyer's counterclaim was erroneously denied by trial court on ground that seasonable demand by buyer for reimbursement was necessary in addition to notice of revocation of acceptance, since UCC §§ 2-607(3)(a) and 2-608(2) require only that buyer, on revoking acceptance, give notice of breach to seller which states that buyer is not accepting the goods. *Moulden & Sons v. Osaka Landscaping & Nursery, Inc.*, 21 Wash. App. 194, 584 P.2d 968 (1978).

"Seller," as used in UCC § 2-607(3)(a), which provides for notification to seller "where a tender has been accepted," necessarily refers to only to the immediate seller. Hence, buyer is required to give notice of breach only to his immediate seller. *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1st Dist. 1978).

In suit by consumer-subpurchaser against manufacturer for breach of implied warranty of merchantability in sale of oral contraceptive, where (1) plaintiff, who did not give notice of breach to her immediate seller, alleged that by filing suit, she gave reasonable notice of the breach to defendant manufacturer, and (2) evidence showed (a) that plaintiff had last ingested drug on October 21, 1967, (b) that suit had been filed on October 15, 1971 (within applicable four-year statute of limitations), and (c) that notice of adverse effects of using such drug, which constituted basis of breach of warranty alleged, had been received by manufacturer from sources other than plaintiff prior to October 21, 1967 (date plaintiff last used drug), court held, on remand of case, (1) that plaintiff had to have some knowledge of identity of causal agent before she could ascertain party to whom notice of breach should be directed, (2) that even an extended period of time preceding giving of notice to manufacturer could be viewed as reasonable where, as in present case, such notice did not come as surprise to manufacturer, (3) that in view of the foregoing facts, genuine issue of fact was presented as to reasonableness of plaintiff's notice to manufacturer, which notice court deemed to be required by UCC § 2-607(3)(a), and (4) that summary judgment in the case was therefore inappropriate (remanding case for fact determination as to reasonableness of plaintiff's notice to manufacturer). *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1st Dist. 1978).

Under UCC § 2-607(3)(a), notice of a breach of an implied warranty must be given to both the immediate seller and the remote manufacturer. The statute provides such requirement by viewing the acceptance of each tender of the goods moving down the distributive chain as a distinct and separate transaction. In this manner, whether one or more of those upstream of the consumer in the distributive chain is ultimately sued for a breach of the implied warranty by the consumer, the code envisions that when the consumer's notice of the breach is given to the consumer's immediate seller, such person, in order to preserve any right of action

that he may have for a breach of the implied warranty, will give notice to his immediate seller, and so on upstream, until the seminal point of the distributive chain is reached (observing that demise of privity in personal injury actions grounded on breach of implied warranty causes warranties to flow downstream with the goods through any number of intermediate sales, eventually inuring to benefit of ultimate consumer). *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1st Dist. 1978).

Inspection clause contained in contract for manufacture, sale and delivery of railroad hopper cars did not bar manufacturer's liability for delivery of defective cars where clause provided that waiver of inspection by purchaser entitled manufacturer to perform its own inspection and such inspection would have constituted acceptance of railcars, where, in any event, provisions of contract neither expressly provided nor even implied that failure to exercise right of inspection constituted waiver of any other contractual remedy, and where purchaser notified manufacturer of faults or defects when they were first discovered and afforded manufacturer opportunity to verify and repair or replace faults or defects; under UCC §§ 2-607(2), when right to inspect arises after creation of contract, acceptance of goods, even with knowledge that they do not conform to contract, may preclude rejection but it does not impair any other remedy and, under UCC §§ 2-714(1), buyer's right to recover damages for goods that have been accepted but do not conform to contract was expressly reserved. *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. Minn. 1977).

Although buyer knew there was some "pan scale" in some of the 732 bags of sugar retained by buyer out of 800 bags delivered in two shipments, fact that seller accepted return of 68 bags of defective sugar was insufficient evidence that buyer had not accepted sugar prior to inspection and, thus, was insufficient to support exclusion of implied warranty of merchantability under UCC § 2-316. However, buyer's knowledge of defect (pan scale) gained through inspection of sugar that was used to process frozen food pre-

vented buyer from recovering lost profits as consequential damage under UCC § 2-715. Furthermore, although buyer notified seller in November, 1969, of 68 defective bags, notice in May, 1971, that other sugar was defective was not made within commercially reasonable time under UCC § 2-607 where buyer used sugar promptly after delivery in November of 1969. *Michigan Sugar Co. v. Jebavy Sorenson Orchard Co.*, 66 Mich. App. 642, 239 N.W.2d 693, 93 A.L.R.3d 357 (1976).

4. —Reasonable expectation of repair.

In suit by consumer-subpurchaser against manufacturer for breach of implied warranty of merchantability in sale of oral contraceptive, where (1) plaintiff, who did not give notice of breach to her immediate seller, alleged that by filing suit, she gave reasonable notice of the breach to defendant manufacturer, and (2) evidence showed (a) that plaintiff had last ingested drug on October 21, 1967, (b) that suit had been filed on October 15, 1971 (within applicable four-year statute of limitations), and (c) that notice of adverse effects of using such drug, which constituted basis of breach of warranty alleged, had been received by manufacturer from sources other than plaintiff prior to October 21, 1967 (date plaintiff last used drug), court held, on remand of case, (1) that plaintiff had to have some knowledge of identity of causal agent before she could ascertain party to whom notice of breach should be directed, (2) that even an extended period of time preceding giving of notice to manufacturer could be viewed as reasonable where, as in present case, such notice did not come as surprise to manufacturer, (3) that in view of the foregoing facts, genuine issue of fact was presented as to reasonableness of plaintiff's notice to manufacturer, which notice court deemed to be required by UCC § 2-607(3)(a), and (4) that summary judgment in the case was therefore inappropriate (remanding case for fact determination as to reasonableness of plaintiff's notice to manufacturer). *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 378 N.E.2d 1083 (1st Dist. 1978).

Seller of machinery was entitled to finding as to whether buyer accepted machinery, thus precluding rescission of contract

by buyer and recovery of money paid on account, where buyer claimed that it retained and used machinery in its business only upon seller's assurance that seller would correct any problems in connection with machines, but where, on other hand, seller claimed that buyer accepted machines unconditionally. *Lenkay Sani Prods. Corp. v. Benitez*, 47 A.D.2d 524 (2d Dep't 1975).

5. —Acceptance as affecting other remedies.

In an action based on the breach of an implied warranty, notice of the breach from buyer to seller, as prescribed by UCC § 2-607(3)(a), is an essential element of the plaintiff's cause (action for breach of implied warranty in sale of intrauterine device wherein court held that buyer's delay of fifteen months in giving notice of breach to defendant manufacturer, which delay was caused in part by buyer's inability to ascertain who had manufactured the device, did not constitute, as a matter of law, giving of notice under UCC § 2-607(3)(a) within reasonable time). *Branden v. Gerbie*, 62 Ill. App. 3d 138, 379 N.E.2d 7 (1st Dist. 1978).

In action by contractor against supplier of concrete based on supplier's furnishing of substandard strength concrete, contractor was entitled to recover, inter alia, cost of tests performed to determine if slab containing substandard concrete could still be used as floor of building, even though buyer accepted concrete within meaning of UCC § 2-607, where, after performing customary cylinder tests to determine general quality, buyer had no reasonable way to discover insufficiency of compression strengths and cost of tests to determine whether concrete could still be used was reasonable incidental expense within meaning of UCC § 2-715. *S.M. Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc.*, 39 Ill. App. 3d 353, 350 N.E.2d 321 (5th Dist. 1976).

Evidence was sufficient to support finding that seller breached implied warranty that feed was of merchantable quality and reasonably fit for commercial feeding of dairy cattle, where, inter alia, veterinarian testified that cows often backed away from quality of mix which defendant sold plaintiff; although buyer was obligated

under UCC § 2-607 to pay for goods accepted at a contract rate, he was not barred thereby from recovering damages resulting from defects in such goods. *Jorritsma v. Farmers' Feed & Supply Co.*, 272 Or. 499, 538 P.2d 61 (1975).

Buyer of combine that was repossessed by seller and sold at public sale after buyer defaulted on payments was not precluded from recovering damages for breach of warranty from seller notwithstanding buyer did not revoke his acceptance (*ovrlg* *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark 410, 382 SW2d 191, 2 UCCRS 273, to extent it holds that buyer was precluded from recovering damages for breach of warranty where there was no rejection or revocation by buyer). *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

Under contract for delivery and installation of pin spotter machines in bowling alley, where buyers did not reject defective, nonconforming pin spotters, but instead accepted them notwithstanding their defects, buyers were not required to give seller notice of particular defects as required by UCC § 2-605(1) in order to maintain action for breach of warranty, and letter from buyers' attorney to seller's sister, after seller's death, stating that pin spotters were not installed within meaning of contract, that pin spotters needed repairs although contract included guaranty as to quality and performance of equipment, and that buyers were keeping record of their expenses so that they could substantiate claim for any loss which might be sustained, was sufficient notice under UCC § 2-607(3) to preserve buyers' rights; furthermore, buyers did not waive their rights to warranty recovery by refusing to permit seller to cure defects in pin spotters under UCC § 2-508 since they did not reject nonconforming goods but accepted them. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. Iowa 1974).

Since buyer, after reasonable opportunity to inspect truck, did not reject it, even though truck was 1953 model rather than 1962 model as represented, buyer accepted nonconformity of truck and could not recover for breach concerning model year. *Bunch v. Signal Oil & Gas Co.*, 505 P.2d 41 (Colo. Ct. App. 1972).

Purchaser did not waive right of damages for late delivery, by acceptance of such late deliveries. *Beacon Plastic & Metal Prods., Inc. v. Corn Prods. Co.*, 57 Misc. 2d 634 (1968).

Subsection (2) does not impair any other remedy provided by this Article for non-conformity of goods, and a city which alleged that traffic signal equipment purchased by it, and accepted by reason of its use, has a cause of action for damages resulting from failure of the equipment to meet specifications. *Marbelite Co. v. Philadelphia*, 40 Pa. D. & C.2d 347 (1966), *aff'd*, 208 Pa. Super. 256, 222 A.2d 443 (1966).

Where subdivision (3) of this section speaks of a "tender," it means a tender of goods, and a tender being an offer, if it is accepted the buyer is required to notify the seller of any breach. *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 217 A.2d 71 (1965).

B. Buyer's Claim of Breach.

6. In general.

The trial court improperly instructed the jury concerning a franchisor's alleged breach of implied warranty of merchantability, where such instruction precluded the jury from making an independent factual determination of whether the franchisee had properly notified the franchisor of alleged defects in its products so as to preserve the franchisee's claim that the franchisor breached implied warranties of merchantability. *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386 (5th Cir. 1982).

In suit by buyer under Texas Deceptive Trade Practices Act for treble damages for seller's alleged breach of implied warranty in making repairs on new Volvo automobile that buyer had purchased from seller, which vehicle had oil leak that damaged its clutch allegedly because of seller's failure to repair leak satisfactorily, trial court erred in holding that UCC § 2-607(3)(a), providing for notice to seller of defects in accepted goods and allowing seller opportunity to cure such defects, did not apply to case. Under UCC § 2-607(3)(a), where evidence showed that plaintiff's vehicle again began to leak oil six months after seller had last re-

paired vehicle's earlier leaks and that buyer did not notify seller of reoccurrence of leaking problem and give seller opportunity to repair it, buyer was barred from recovering for seller's alleged breach of implied warranty that its repair service was of customary quality within automobile repair business. *Import Motors, Inc. v. Matthews*, 557 S.W.2d 807 (Tex. Civ. App. 1977), *writ ref'd n.r.e.*, (Mar. 22, 1978).

In action by feed company on installment sales contracts and security agreements providing for loan to enable defendant to purchase two hog-feeder houses from plaintiff's alleged agent, where houses were defective because they caused pigs placed therein for fattening to become sick and to die, and where plaintiff claimed that it merely financed purchase of such houses and did not sell them to defendant, (1) evidence supported finding that plaintiff's alleged agent was its agent in fact and that plaintiff was bound by agent's acts, including agent's sale of hog houses to defendant; (2) fact that plaintiff acted as financing agency in defendant's purchase of such houses did not preclude finding that plaintiff was also seller of such houses; (3) houses were goods within meaning of UCC § 2-105(1); (4) defendant, by affirmative defense incorporated by reference in counterclaim, gave plaintiff notice of breach of implied warranty of fitness of goods for particular purpose, which notice was required by UCC § 2-607(3)(a); and (5) whether such implied warranty of fitness, which was in force at time of sale, was breached by plaintiff was question of fact to be determined by trial court on remand of case. *Thompson Farms, Inc. v. Corno Feed Prods.*, 173 Ind. App. 682, 366 N.E.2d 3, 4 A.L.R.4th 58 (1977).

Where buyer purchased truck scale and seller constructed pit and installed scale therein, buyer in suit for defective construction of pit and installation of scale was not required by UCC § 2-607(3)(a) to give seller notice of alleged defects as condition precedent to bringing suit, since suit was based not on sale of scale but on contractual provision for performance of services to which Uniform Commercial Code did not apply. *Dixie Lime & Stone Co. v. Wiggins Scale Co.*, 144 Ga. App. 145, 240 S.E.2d 323 (1977).

Where fuse manufacturers established that they had manufactured and delivered to prime government contractor fuses contracted for, that fuses as tendered had been accepted, and that contractor had refused to pay balances due thereon, and where there was no effective rejection of goods by contractor under UCC § 2-606(1)(b), nor any notification of breach in warranty of goods under § 2-607(3)(a), nor any effective revocation of acceptance under § 2-608(2), any defense-or any "remedy"-that contractor might have had under UCC for nonacceptance of goods or for breach of their warranty or revocation of acceptance was predicated, as condition precedent, upon notification to sellers. However, letter from contractor to fuse manufacturers stating that contractor's cash flow had been severely interrupted due in part to quality problem on part of fuse manufacturers could not be construed to suggest either rejection of acceptance of fuses delivered, nor notification of breach of warranty, nor revocation of conformity, much less to constitute identification of particular contract, sale or transaction concerning which complaint was therein attempted by contractor. *Lynx, Inc. v. Ordnance Prods., Inc.*, 273 Md. 1, 327 A.2d 502 (1974).

Notice requirement of Code § 2-607(3)(a) is applicable only to immediate sellers and has no application to remote seller or manufacturer. *Hickman v. Bross*, 58 Pa. D. & C.2d 137 (1972).

The provisions of the instant section relative to notice of breach of warranty are comparable to those contained in former Sales Act provision relating to acceptance of goods by buyer as affecting seller's liability on warranty. *Sullivan v. H.P. Hood & Sons*, 341 Mass. 216, 168 N.E.2d 80 (1960).

7. Persons required to give notice.

UCC § 2-607 requires only "buyer" to notify seller of breach and UCC § 2-103 clearly defines "buyer" so as to exclude third party beneficiaries; consequently, where automobile body repairman was injured as result of using defective body alignment clamp manufactured by defendant and sold to repairman's employer, repairman's breach of warranty claim as third party beneficiary of warranties un-

der UCC § 2-318, was not barred by his failure to notify seller of breach prior to filing suit, notwithstanding repairman dealt directly with defendant's salesman and requested his employer to buy clamps. *Mattos, Inc. v. Hash*, 279 Md. 371, 368 A.2d 993 (1977).

In action against manufacturer of birth control pills and association from whom pills were purchased arising when plaintiff suffered stroke, lack of privity between plaintiff and manufacturer under UCC § 2-318 was of no consequence and 4 year statute of limitations under UCC § 2-725 governed; birth control association which gave advice and dispensed birth control pills was engaged in sale of goods as required by Code and plaintiff's failure to allege that pills did not prevent contraception would not bar recovery on theory of breach of implied warranty of fitness for particular purpose under UCC § 2-315; however, under UCC § 2-607(3)(a), plaintiff was required to notify association of alleged breach of implied warranty. *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550, 70 A.L.R.3d 304 (1974).

Notice provisions of Code § 2-607(3)(a) do not apply to third party beneficiary, under § 2-318, for as to third party there had been no tender of the goods by seller and no acceptance by third party. *Chaffin v. Atlanta Coca Cola Bottling Co.*, 127 Ga. App. 619, 194 S.E.2d 513 (1972).

Class action for breach of warranty was not precluded by fact that each class member might be required ultimately to satisfy notice requirement of § 2-607. *Metowski v. Traid Corp.*, 28 Cal. App. 3d 332 (3d Dist. 1972).

Buyer of rifle need not give seller notification of injury in order to make submissible case on issue of strict liability. *McLain v. Hodge*, 474 S.W.2d 772 (Tex. Civ. App. 1971), ref. n.r.e. (Apr. 19, 1972).

Where the child of a farm employee is injured there is no requirement that notice of breach of warranty be given the manufacturer as the manufacturer could not possibly be prejudiced by the absence of such notice. *Bengford v. Carlem Corp.*, 156 N.W.2d 855 (Iowa 1968).

Notice now required only of the buyer under this section need not be given by anyone claiming an extended warranty

under § 2-318 of this chapter. *Menard v. Great Atl. & Pac. Tea Co.*, 22 Mass. App. Dec. 170 (1961).

8. Sufficiency of notice.

Lawnmower manufacturer did not sufficiently notify manufacturer of grass catcher bags of breach of warranties, where notification consisted solely of several vague references to problems with product, return of, at most, 3 bags, and warranty claim of \$64.40, and where, at same time, lawnmower manufacturer's president stated that he anticipated taking delivery of all bags in future when problems unrelated to defects were resolved. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205 (S.D. Miss. 1986).

In in rem action in admiralty involving counterclaims by seller and buyer arising from breaches of contract to sell flour, (1) seller breached implied warranty of merchantability created by UCC § 2-314(1) and (2)(c), and also federal adulterated-food statute, as to one cargo of flour which was infested with insects when it arrived at warehouse prior to being loaded on ship, (2) buyer had right under UCC § 2-601(a) to reject all of such cargo and therefore was not liable for its purchase price or any consequential damages, (3) seller also breached implied warranty of merchantability with respect to two other cargoes of flour, and since buyer had paid for such flour and had ultimately accepted it, buyer was entitled to damages under UCC § 2-606(1)(a), (4) buyer was not barred from claiming damages for such nonconforming cargoes by failure to give notice of nonconformity by registered mail, since buyer's warning to seller of buyer's dissatisfaction with cargoes constituted adequate notice under UCC § 2-607(3)(a), and (5) under UCC § 2-714(2), although there was no evidence as to value of such cargoes at time and place of their acceptance (*Mobile, Alabama*), buyer was entitled to damages for difference between prices for good and infested flour in Bolivia, South America, plus damages for expenses incurred because of flour's infestation, since buyer had accepted such flour after it had been loaded on ships that transported it to Bolivia and had had no reasonable opportunity to inspect it before it was loaded. *T.J. Stevenson & Co. v.*

81,193 Bags of Flour, 449 F. Supp. 84 (S.D. Ala. 1976), rev'd on other grounds, 629 F.2d 338 (5th Cir. Ala. 1980), reh'g denied, 651 F.2d 779 (5th Cir. Ala. 1981).

UCC § 2-607(3), requiring that the buyer, within a reasonable time after discovering the breach, must notify the seller of the breach or be barred from any remedy, is designed to defeat commercial bad faith and is not intended to deprive a good-faith consumer of his remedy. Under UCC § 2-607(3), the contents of the buyer's notification to the seller need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification must include a clear statement of all of the objections that will be relied on by the buyer. *Carlson v. Rysavy*, 262 N.W.2d 27 (S.D. 1978).

Buyer who told seller that certain pipes delivered to buyer for use in water-main extension project appeared to be unusually corroded, but who did not request credit for such defective pipes or inform seller that buyer considered seller to be in breach of contract for purchase of pipes, did not give seller effective notice of alleged breach, as required by UCC § 2-607(3)(a), and thus was barred as matter of law from asserting any remedy, including counterclaim for expenses incurred in testing and repairing leaks in defective pipes. *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

Under UCC § 2-607(3)(a) and Official Comment 4, the contents of the buyer's notification to the seller of the alleged breach of contract need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. The notification, which saves the buyer's rights, does not have to include a clear statement of all the objections that the buyer will rely on. *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

In action by seller for purchase price of coal, buyer's counterclaim based on seller's alleged breach of express warranty and implied warranties of merchantability and fitness of coal for particular purpose could not be sustained where (1) evidence did not show that seller had created express warranty under UCC § 2-

313(1)(c) by showing buyer samples and analyses of coal's quality, but revealed instead that such samples and analyses were shown to buyer solely for his information; (2) coal delivered by seller was fit for ordinary purpose for which it was used, was burned as fuel by buyer's customers, and thus complied with seller's implied warranty of merchantability under UCC § 2-314(1); (3) implied warranty of fitness of coal for particular purpose did not arise under UCC § 2-315, since buyer did not rely on seller's skill and judgment in furnishing coal suitable for buyer's customers; and (4) even assuming that seller had breached such express and implied warranties as buyer contended, buyer still could not recover on counterclaim because he did not give seller adequate notice of alleged breach, as required by UCC § 2-607(3)(a), and such breach also was not proximate cause of damages buyer allegedly sustained. *Kopper Glo Fuel, Inc. v. Island Lake Coal Co.*, 436 F. Supp. 91 (E.D. Tenn. 1977).

In action by airline against airplane manufacturer for damages resulting from delay in delivery of airplanes purchased by airline, UCC § 2-607(3)(a) required the airline to give notice to the manufacturer of delays claimed as breach of contract; although notice need not set forth specific claim for damages or assertion of legal right, question whether notice given by airline was sufficient within test of "commercial good faith" was one for jury where correspondence between parties was ambiguous and airline continued to negotiate new, and to amend old, contracts with manufacturer during period of alleged delays, particularly since merchants are held to a higher standard of good faith than ordinary consumers. *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. Fla. 1976).

Under contract for delivery and installation of pin spotter machines in bowling alley, where buyers did not reject defective, nonconforming pin spotters, but instead accepted them notwithstanding their defects, buyers were not required to give seller notice of particular defects as required by UCC § 2-605(1) in order to maintain action for breach of warranty, and letter from buyers' attorney to seller's

sister, after seller's death, stating that pin spotters were not installed within meaning of contract, that pin spotters needed repairs although contract included guaranty as to quality and performance of equipment, and that buyers were keeping record of their expenses so that they could substantiate claim for any loss which might be sustained, was sufficient notice under UCC § 2-607(3) to preserve buyers' rights; furthermore, buyers did not waive their rights to warranty recovery by refusing to permit seller to cure defects in pin spotters under UCC § 2-508 since they did not reject nonconforming goods but accepted them. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. Iowa 1974).

Notice given prior to delivery that late delivery would be considered breach of contract was sufficient to preserve buyer's remedies and second notice after acceptance of delivery was not required under UCC § 2-607. *MacGregor v. McReki, Inc.*, 30 Colo. App. 196, 494 P.2d 1297 (1971).

Where seller refused to acknowledge buyer's revocation of acceptance of used automobile, and buyer then kept automobile, used and maintained it, and made payments of financing agreement to bank, buyer failed to revoke his acceptance properly, was in the position of one who had accepted the goods, and had through his notification of revocation of acceptance given seller sufficient and timely notification of breach of warranty (automobile warranty book showed 14000 more miles than car's odometer). *Fecik v. Capindale*, 54 Pa. D. & C.2d 701 (1971).

In view of the Uniform Laws comment to the instant section indicating that the requirements as to the notice of breach under the instant section are intended to be less rigorous than those required by § 38 of the former Sales Act, at least as applied to a household purchaser as distinguished from a "merchant buyer", a notice given on behalf of a retail consumer alleging injury to the consumer from food purchased at a retail store was not insufficient because it did not set forth the date of the purchase of the food, where the notice did set forth the food purchased by its brand name and the date of the injury, because such a notice is only required to alert the seller to a claim of breach and

thus to lead to settlement through negotiation, and because, once the seller is so altered, may seek further information as to circumstances which he may wish to know about. *Nugent v. Popular Mkts., Inc.*, 353 Mass. 45, 228 N.E.2d 91 (1967).

It is manifest from the comment to the Code that the notice of breach required by UCC Sec 2-607 was intended to be less rigorous than that required by Sec 38 of the Sales Act at least so far as applied to a household purchaser rather than a "merchant buyer." *Nugent v. Popular Mkts., Inc.*, 353 Mass. 45, 228 N.E.2d 91 (1967).

For a case involving the alleged explosion of a bottle of ginger ale purchased by the plaintiff from the defendant retailer in which it was held that the notice given to the retailer was adequate under (3)(a) of the instant section, and in which it was held that there was no variance in that the declaration alleged that the bottle contained soda while the notice referred to both ginger ale and soda since ginger ale is carbonated and is a soda, see *Manfredi v. James C. Fettes, Inc.*, 352 Mass. 775, 226 N.E.2d 365 (1967).

Poultry farmer's regularly submitted reports of egg production obtained from experimental flocks of chickens purchased from seller constituted timely and sufficient notice of breach of seller's warranty that the experimental chickens would average "as good or better" in egg production than farmer's control flock. *Babcock Poultry Farm, Inc. v. Shook*, 204 Pa. Super. 141, 203 A.2d 399 (1964).

In *Clarizo v. Spada Distributing Co.* (1962) 231 Or 516, 373 P.2d 689, the court stated that while the Sales Act § 49 was construed to require that the buyer notify the seller not only of the breach of warranty but also that he intended to claim damages for such breach, "a different interpretation is recommended for a similar provision in the Uniform Commercial Code." *Clarizo v. Spada Distrib. Co.*, 231 Or. 516, 373 P.2d 689 (1962).

A notice which does not give the date of sale and from which it cannot be inferred that a sale of the product as to which a breach of warranty is claimed was made by the defendant is insufficient under the provisions of this section. *Menard v. Great Atl. & Pac. Tea Co.*, 22 Mass. App. Dec. 170 (1961).

The institution of proceedings before an alderman for breach of warranty did not constitute sufficient notice to the seller of the breach, since by beginning the action the buyers were exercising a remedy rather than giving notice, and hence a complaint not alleging notice of the breach and the time of such notice was demurrable. *Solomon & Son v. Thomas*, 45 Luz. Legal Reg. Rep. 269 (Pa. 1955).

9. —Oral notice.

Purpose of notice required by UCC § 2-607(3)(a) is not to enable buyer to claim damages or pursue any other remedy, but to let seller know that transaction is still troublesome and must be watched. Such notice may be given in any manner or form, including oral communications such as phone calls, that is sufficient to apprise seller that there are problems with the transaction. *Oregon Lumber Co. v. Dwyer Overseas Timber Prods. Co.*, 280 Or. 437, 571 P.2d 884 (1977).

Word "notify" as used in UCC § 2-607(3)(a) encompasses proper oral notification of any breach; thus, buyer of camper was not required to give seller written notice of breach before bringing action for breach of warranty, and timely oral notice by buyer to effect that seat in camper gave way due to faulty construction and that buyer suffered injuries as result, was sufficient to inform seller of breach and its possible ramifications. *Page v. Camper City & Mobile Home Sales*, 292 Ala. 562, 297 So. 2d 810 (1974).

In action for injuries sustained by purchaser of facial cosmetic cream, notice of breach of warranty was not sufficient, where buyer's telephone call to defendant seller's store complaining of the effect of her use of cream could not be said to have alerted seller to claim of breach and thus have opened way for normal settlement through negotiations. *Ford v. Barnard, Sumner & Putnam Co.*, 1 Mass. App. Ct. 192, 294 N.E.2d 467 (1973).

In breach of warranty action by distributor of carbon dioxide against brewer which sold its surplus carbon dioxide to distributor, telephone call to one of brewer's foremen made within week of time distributor learned of defective quality of carbon dioxide and informing brewer that no further pick-ups would be made until

problem had been resolved was sufficient and timely notice of alleged breach under Code. *Rock Creek Ginger Ale Co. v. Thermice Corp.*, 352 F. Supp. 522 (D.D.C. 1971).

10. —Constructive notice.

By having car towed to dealer's place of business, and by informing its employees that car was again in need of major repair, thus clearly implying that it could not be operated in safe manner until such repairs were completed, buyer of used car gave sufficient notice to dealer that its implied warranties had been breached. *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1st Dist. 1972).

Evidence that seller's representatives had participated in attempts to make helicopter perform in an expected manner established that the seller had notice of breach of implied warranty of fitness. *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. Minn. 1964).

11. Timeliness of notice.

In action by seller under UCC § 75-2-709(1) for price of defective lawnmower bags sold to defendant buyer, court held (1) that buyer had accepted bags (a) under UCC § 75-2-606(1)(a) by conduct that signified to seller that buyer was accepting bags despite knowledge of their nonconformity, and (b) under UCC § 75-2-606(1)(b) by conduct, such as continuing to try to sell bags and destruction of defective bags, that was inconsistent with effective rejection of bags; (2) that buyer did not effectively revoke acceptance of bags under UCC § 75-2-608(1) because (a) its acts of dominion over bags, including continuing efforts to sell them, were inconsistent with its claim of revocation of acceptance, and (b) buyer also did not comply with notice requirement of UCC § 75-2-608(2) for revocation of acceptance; (3) that seller's damages under UCC § 75-2-709(1)(b) for specially manufactured goods included damages for cost of materials, labor and overhead, administrative and sales expenses, and incidental damages; and (4) that although buyer satisfied burden of proof under UCC § 75-2-607(4) with regard to seller's breach of warranty, buyer's breach-of-warranty

counterclaim was foreclosed by failure to give seller adequate notice of breach required by UCC § 75-2-607(3)(a) and Official Comment 4. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205 (S.D. Miss. 1986).

Notice of alleged breach of warranty attaching to birth control device, which was given more than 30 months after plaintiff's delivery of stillborn baby, did not as matter of law satisfy requirement of UCC § 2-607(3)(a). *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 382 N.E.2d 23 (1st Dist. 1978).

Even adopting lessee's contention that truck-rental-and service contract, which provided that lessee would purchase rented trucks on cancellation of contract within first three years of contract's operation, was actually a sale that was subject to provisions of the Uniform Commercial Code, lessee's reliance on Uniform Commercial Code remedies was misplaced where evidence did not show proper and timely rejection of the goods under either UCC § 2-607(2) and (3)(a) or in the manner required by the contract itself. Furthermore, since lessee's defenses, in action for deficiency arising out of lessee's refusal to purchase rented trucks, related solely to alleged inadequacy of services provided by lessor and not to trucks themselves, and since remedies provided by Uniform Commercial Code apply only to sale of goods and not to sale of services (see UCC § 2-102), lessee could not avail itself of UCC remedies relating to nonconforming goods. *Pepsico Truck Rental, Inc. v. Eastern Foods, Inc.*, 145 Ga. App. 410, 243 S.E.2d 662 (1978).

In action arising out of sale of sporting goods business, sale of inventory as part of transaction amounted to sale of "goods" under UCC 2-105(1) and UCC § 2-607(3)(a) requirement that buyer must within reasonable time notify seller of breach, governed buyers claim, made 14 months after sale, that seller had fraudulently overstated inventory. *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wash. App. 551, 519 P.2d 278 (1974), review denied, 83 Wash. 2d 1014 (1974).

In action by seller of mobile home against purchaser for balance of purchase price, purchaser did not fail to notify seller

of deficiencies in mobile home where seller was notified from very beginning of certain of deficiencies and of others as they were found in connecting utilities to mobile home. *Holiday Homes, Inc. v. Bragg*, 132 Ga. App. 594, 208 S.E.2d 608 (1974).

Breach of warranty action commenced in 1965 was barred neither by provisions of UCC § 2-607, subd 3, nor by former Personal Property Law § 130, where wholesaler notified buyer immediately upon discovering that hand cream purchased in 1961 and 1962 had liquefied, and where wholesaler had no reason earlier to believe that hand cream, sold in solid form, would liquefy. *Alris, Inc. v. Gojer, Inc.*, 75 Misc. 2d 962 (1973).

In breach of warranty action against breeding service company, jury was justified in finding that proper notice of breach was given when rancher found he had only 7 percent calf crop in spring, rather than some 10 months earlier when he found that clean-up bull which had been sent in to cover those cows where artificial insemination did not take was overworked. *Waddell v. American Breeders Serv., Inc.*, 161 Mont. 221, 505 P.2d 417, 61 A.L.R.3d 801 (1973).

Where defendant seller contracted with plaintiff buyer to supply sleeve bearings impregnated with specified oil in accord with government specifications for use in manufacture of bomb fuses, but instead supplied bearings coated with non-conforming oil, and where, although bearings coated with non-conforming oil were visibly different from conforming bearings, buyer used non-conforming bearings to manufacture two lots of bomb fuses which were discovered to be defective as result of use of such bearings, buyer gave timely notice of defect under UCC § 2-607(3)(a) when it gave notice on day it discovered defect, although this was three weeks after it had received bearings. *General Instrument Corp., F.W. Sickles Div. v. Pennsylvania Pressed Metals, Inc.*, 366 F. Supp. 139 (M.D. Pa. 1973), aff'd, 506 F.2d 1051 (3d Cir. Pa. 1974), aff'd, 506 F.2d 1052 (3d Cir. Pa. 1974).

Lessee of television broadcasting equipment which used equipment for more than one year before entering novation contract and making substantial payments on re-

vised lease lost any express or implied warranty rights it might have possessed by accepting goods and by failing to give lessor notification of breach of warranty within reasonable time. *KLPR TV, Inc. v. Visual Elecs. Corp.*, 465 F.2d 1382 (8th Cir. Ark. 1972).

Defense that goods did not meet warranted sample may be asserted only if buyer within reasonable time after discovery of defect notifies seller, notwithstanding acceptance. *Vitromar Piece Dye Works v. Lawrence of London, Ltd.*, 119 Ill. App. 2d 301, 256 N.E.2d 135 (1st Dist. 1969).

Notice of breach of contract for sale of goods must be given within reasonable time after goods are received and accepted by buyer; notice requires no formality and is adequate if it merely informs seller that transaction is claimed to involve breach and thus opens way for normal settlement through negotiation. *Warren's Kiddie Shoppe, Inc. v. Casual Slacks, Inc.*, 120 Ga. App. 578, 171 S.E.2d 643 (1969).

Where a sales contract expressly creates an unlimited express warranty of merchantability which in a separate clause purports to indirectly modify the warranty without expressly mentioning the word merchantability, the language creating the unlimited express warranty must prevail over the time limitation insofar as the latter modifies the warranty, and the express warranty of merchantability includes latent shading defects and defendants may claim for such defects not reasonably discoverable within the time limits established by the contract if plaintiff was notified of these defects within a reasonable time after they were or should have been discovered. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

Notice of any breach of warranty of property sold preserves the buyer's remedy of damages if given within a reasonable time after the breach was or should have been discovered. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

The buyer must give notice of breach of warranty within a reasonable time. *Avant Garde, Inc. v. Armtex, Inc.*, 4 U.C.C. Rep. Serv. 949 (1967, NY Sup).

Whether notice is given within a reasonable time depends upon all the circum-

stances of the case and not merely the lapse of time. *Downey v. Mahoney*, 25 Mass. App. Dec. 196 (1962).

12. —Wholesale and retail sales distinguished.

Prescription of timely notice under Code § 2-607 is to be applied, if at all, differently in commercial and retail sales situations; and notice requirement did not apply in breach of warranty action for personal injuries sustained by user of oral contraceptives. *Fischer v. Mead Johnson Lab.*, 41 A.D.2d 737 (2d Dep't 1973).

The term "his seller" in paragraph (a) of subdivision (5) of this section refers to the person who made the immediate sale to one who is his buyer, and in so providing the legislature intended to make a distinction between the manufacture as a seller to a retailer as buyer, and the retailer as a seller to the public as buyer. *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 217 A.2d 71 (1965).

The time for giving notice of a breach of warranty is to be deemed extended in the case of notice from a retail consumer. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. Pa. 1961).

13. —Agreement of parties.

Notwithstanding contract specified that buyer had thirty days to inspect fabricated pipe, which constituted goods within meaning of UCC § 2-105, trial court erred in holding buyer's performance bond liable by reason of buyer's failure to reject allegedly defective pipe within thirty days of delivery: (1) under UCC § 2-607, buyer was required to notify seller of breach of warranty within a reasonable time after actual or constructive discovery of defects; (2) UCC § 1-204 provides that whenever UCC requires action within reasonable time, any time which is not manifestly unreasonable may be fixed by agreement; (3) seller guaranteed workmanship and material in contract provided claim was made within one year from shipment; and (4) buyer made claim within one year following shipment. *United States Fid. & Guar. Co. v. North Am. Steel Corp.*, 335 So. 2d 18 (Fla. App. 1976).

14. —Question of law or fact.

Where, under franchising agreement between manufacturer of industrial

equipment and manufacturer's franchisee, reserve account was created to aid franchisee in financing sales to customers, court held (1) that if no fiduciary relationship existed between parties, manufacturer was required to handle funds in reserve account in "commercially reasonable manner" required by UCC § 9-502(2); (2) that if fiduciary relationship did exist between parties and if other factors necessary to create constructive trust were present, manufacturer, as trustee of such trust, was required to handle trust (reserve-account funds) in "prudent and proper manner"; (3) that if manufacturer was not trustee and "commercially reasonable manner" standard applied to case, under UCC § 9-507(2), element of price-with regard to sales of repossessed equipment involved in suit was one factor in determining commercial reasonableness of such sales, although it was not determinative factor; and (4) that whether franchisee had given manufacturer notice of defects in equipment supplied by manufacturer, as required by UCC § 2-607(3)(a), was jury question. *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386 (5th Cir. 1982).

What is a reasonable time under UCC § 2-607(3)(a) for giving notice of a breach of warranty is usually a mixed question of law and fact to be determined by the trier of fact. *Jeffries v. Clark's Restaurant Enters., Inc.*, 20 Wash. App. 428, 580 P.2d 1103 (1978).

Buyer's continued use of non-conforming machines for over 2 years and long after the seller's failure to cure became apparent presented a jury question as to whether his notice of revocation of acceptance was served within a reasonable time. *Fablok Mills, Inc. v. Cocker Mach. & Foundry Co.*, 125 N.J. Super. 251, 310 A.2d 491 (App. Div. 1973), certification denied, 64 N.J. 317, 315 A.2d 405 (1973).

In an action on a sales contract of yarn, where the plaintiff moved for summary judgment, defendant's affidavit alleging that a claim was made immediately upon discovery of the breach of warranty after the yarn was knitted and washed, and this was the earliest possible moment at which the defects could reasonably be discovered in the normal manufacturing pro-

cess, such affidavit was sufficient to create a question of fact concerning whether notice of the latent defects alleged was given within a reasonable time. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

Under subparagraph (3)(a) of this section it is a question of fact for the jury if a delay of six months by a purchaser in giving the seller notice of the defective condition of a horse and making demand for a refund of the purchase price is or is not made within a reasonable time. *Schneider v. Person*, 34 Pa. D. & C.2d 10 (1964).

The application of the rule that party has reasonable time for discovering and giving notice of breach of warranty is a question of law where the facts are undisputed and only one inference can be drawn therefrom. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. Pa. 1961).

15. —Reasonable.

In automobile manufacturer's indemnification action against supplier that had manufactured defective part of steering mechanism in vehicle sold to third person, which defect had resulted in personal injury judgment in prior action against manufacturer, manufacturer's tender of suit was seasonable and reasonable under UCC § 2-607(5)(a), even though made only five days before trial of prior action, where supplier had been on notice of such defect for more than a year, had been thoroughly prepared on issue litigated in prior action, and had had notice of all claims asserted in such action (stating that plaintiff's tender of suit was seasonable and reasonable, whether considered under common-law doctrine of "vouching in" or codification of that doctrine in Uniform Commercial Code). *Ford Motor Co. v. Bendix Corp.*, 83 Mich. App. 108, 268 N.W.2d 305 (1978).

In action for damages for breach of warranty of merchantability of houseboat built by defendant seller for plaintiff buyer, plaintiff gave defendant timely notice of breach within meaning of UCC § 2-607(3)(a), requiring buyer to notify seller of breach of warranty within reasonable time after acceptance of tender, where plaintiff notified another boat con-

struction company, to which defendant had assigned contract to build plaintiff's houseboat, of numerous defects in houseboat within three days after its delivery to plaintiff and defendant became aware of such notice within three months after such delivery. *Tarter v. MonArk Boat Co.*, 430 F. Supp. 1290 (E.D. Mo. 1977), *aff'd*, 574 F.2d 984 (8th Cir. Mo. 1978).

Buyer of hardwood lumber, under contract providing that lumber would be equal in quality to lumber inspected by buyer's agent at seller's supply source in foreign country, sufficiently complied with notice requirement of UCC § 2-607(3)(a) by notifying seller of defects in delivered lumber within one month from date that first batch of such lumber was processed in buyer's dry kiln. *Oregon Lumber Co. v. Dwyer Overseas Timber Prods. Co.*, 280 Or. 437, 571 P.2d 884 (1977).

Jury verdict for buyer of defective earth-mover tires, on buyer's counterclaim against manufacturer for damages for breach of express and implied warranties, was proper where (1) manufacturer's printed tire-warranty limitations and exclusions were never brought to buyer's attention in violation of UCC § 2-316(2), (2) manufacturer's regional sales manager orally committed manufacturer to specific performance warranty and had apparent authority to make such warranty, and (3) tires purchased by buyer failed to perform as warranted, despite fact that they were properly used. Moreover, since buyer seasonably notified manufacturer of tires' defects in accordance with UCC § 2-607(3)(a), buyer was not barred from recovery by continued acceptance and use of tires over six-month period in face of repeated tire failures. *Edwards-Warren Tire Co. v. J.J. Blazer Constr. Co.*, 565 F.2d 401 (6th Cir. Ohio 1977).

Plaintiff, who purchased automobile jack stands from defendant, and subsequently suffered serious injuries to his arm and hand when one of stands collapsed, complied with requirement of UCC § 2-607(3)(a) that in order to utilize any Code remedy, including breach of warranty, buyer must, within reasonable time after he discovers breach, notify seller of breach, where he returned to seller's shop

"probably a week or a month later", recited details of accident, and exhibited injured part of his body, and where approximately eight months after accident, buyer's attorney sent written notification of breach to seller. *Bennett v. United Auto Parts, Inc.*, 294 Ala. 300, 315 So. 2d 579 (1975).

In action by purchasers of mobile home against manufacturer for breach of warranty, evidence that purchasers moved into mobile home during June, 1969, that they notified manufacturer of defects by telephone and by letter during same month, and that manufacturer admitted having received written notification in letter sent August 26, 1969, supported finding under UCC § 2-607 that purchasers notified manufacturer within reasonable time after discovery of defects; purchasers claim for damages was not waived by acceptance and use of mobile home nor by fact they did not undertake to repair defective conditions. *Melody Home Mfg. Co. v. Morrison*, 502 S.W.2d 196 (Tex. Civ. App. 1973), ref. n.r.e. (Mar. 20, 1974).

Seller of fabric was liable to buyer for breach of express warranties of merchantability and fitness for particular purpose, where buyer notified seller within 12 to 20 days after receipt of fabric that it had received substantial number of complaints with respect to colorfastness and thus gave reasonable notice to seller under UCC § 2-607. *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973).

In action arising out of contract for purchase of component parts and assemblies for use in manufacture of sound actuated electrical switches, buyer's conduct in sending seller detailed drawings and explanations of problem created by seller's failure to conform to specifications and suggested means for remedying problem satisfied statutory requirement mandating notice within reasonable time after discovery of breach or nonconformity with contract requirements. *Matsushita Elec. Corp. of Am. v. Sonus Corp.*, 362 Mass. 246, 284 N.E.2d 880 (1972).

Accepting party could seek damages for breach of warranty provided there was reasonable notice of defect given to seller under UCC § 2-607(3)(a); held, letter

from buyer to seller outlining additional labor due to non-properly expanded pipe ends met test of reasonable notice. *Fred J. Miller, Inc. v. Raymond Metal Prods. Co.*, 265 Md. 523, 290 A.2d 527 (1972).

Where the plaintiff is made sick because food was not fit for consumption and he was confined to his home for two weeks, a notice given thirty-two days after the breach is given within a reasonable time under the circumstances. *Downey v. Mahoney*, 25 Mass. App. Dec. 196 (1962).

The determination of the period which will constitute a "reasonable time" under the section within which a buyer who desires to prosecute a claim against a seller for breach of warranty must give notice to the seller of the fact of the breach as a condition precedent to his action, depends upon the particular circumstances of each case, and where the retail buyer of a salami give immediate notice to its manufacturer that while attempting to eat it he discovered that it had an embedded piece of metal which caused the buyer a dental injury with pain and suffering, but did not notify the seller until after the lapse of 70 days during which period the representative of the manufacture visited the buyer and took away the piece of metal, and caused the buyer to be examined by a dentist, it was properly found that the notice to the seller was given within a "reasonable time" to hold the seller liable for the breach. *Primak v. Star Mkt. Co.*, 38 Mass. App. Dec. 218 (1967).

16. —Not reasonable.

Notice of alleged breach of warranty attaching to birth control device, which was given more than 30 months after plaintiff's delivery of stillborn baby, did not as matter of law satisfy requirement of UCC § 2-607(3)(a). *Wagmeister v. A.H. Robins Co.*, 64 Ill. App. 3d 964, 382 N.E.2d 23 (1st Dist. 1978).

Where buyer of trucks paid for repairs to trucks over one year after purchase and after they had been driven minimum of 120,000 miles, where buyer talked to salesman of seller about trading trucks in because they weren't doing job for which he had purchased them, and where buyer talked to mechanics about problems with trucks, such actions by buyer did not constitute notice to seller within reasonable

time that sale of trucks was claimed to involve breach of warranties. *Cotner v. International Harvester Co.*, 260 Ark. 885, 545 S.W.2d 627 (1977).

Although notice of breach of warranty as required by UCC § 2-607 may be fulfilled by pleadings, counterclaim by lumber dealer in action by seller to recover purchase price of lumber delivered to dealer filed more than four months following receipt of lumber, was not, as matter of law, made within reasonable time after dealer discovered or should have discovered breach where lumber dealer was merchant and, as such, held to higher standard of dealing than consumers, lumber was of semi-perishable nature when left outside, as it was in present case, dealer had goods in his yard for sale with ample opportunity to inspect, and should have discovered any defects soon after acceptance of lumber. *Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 560 P.2d 789 (1977).

Buyer of automobile was not entitled to recover damages from automobile dealer, based on alleged breach of contract, for difference between value of automobile as it was allegedly represented to be equipped by dealer and its value as actually equipped when delivered, where buyer, although having opportunity to do so, failed to inspect automobile for four or five days after delivery, failed to notify dealer of alleged breach for three weeks thereafter, and continued to make payments with knowledge of defect, thereby failing to comply with notice requirement of UCC § 2-607(3)(a). *Romey v. Willett Lincoln-Mercury, Inc.*, 136 Ga. App. 67, 220 S.E.2d 74 (1975).

Action for damages based upon alleged breach of implied warranty of can of starch was barred where buyer plaintiff failed to notify retail merchant of alleged breach until civil action was filed one year after discovery of breach. *Leeper v. Banks*, 487 S.W.2d 58 (Ky. 1972).

Buyer waived right to assert counterclaim alleging defects in merchandise where there was unreasonable delay in asserting this claim and where buyer continued to order and pay for additional goods from seller without asserting claim or demanding set-off. *G. & D. Poultry*

Farms, Inc. v. Long Island Butter & Egg Co., 33 A.D.2d 685 (2d Dep't 1969).

17. Pleading.

To plead properly cause of action for breach of warranty under Uniform Commercial Code, complaint should at least allege the following: (1) facts respecting sale of the goods; (2) identification of warranty created as being express warranty under UCC § 2-313(1), implied warranty of merchantability under UCC § 2-314(1), or implied warranty of fitness for particular purpose under UCC § 2-315; (3) facts respecting creation of such warranty; (4) facts respecting its breach; (5) giving to seller of notice of breach required by UCC § 2-607(3)(a); and (6) injuries sustained by buyer as result of breach (holding that third-party complaint failed to state cause of action because it did not comply with above list of essential allegations). *Dunham-Bush, Inc. v. Thermo-Air Serv., Inc.*, 351 So. 2d 351 (Fla. App. 1977).

Notice of breach of warranty required by UCC § 2-607(3)(a) is in nature of condition precedent to recovery, since no remedy is ordinarily available to buyer unless notice is given. Basis for notice requirement is to give seller opportunity to correct defect or to effect settlement through negotiation (holding, in action for seller's breach of warranty to sell hamburger patties of certain weight, that seller had waived proof of notice of breach by failing to plead specifically buyer's failure to give notice). *Rich's Restaurant, Inc. v. McFann Enters., Inc.*, 39 Colo. App. 545, 570 P.2d 1305 (1977).

In seller's action to recover contract price of 200 air conditioners purchased by defendant contractors, trial court erred in granting plaintiff judgment on the pleadings and dismissing defendants' counterclaim for damages for breach of contract where undisputed evidence showed that although delivery of air conditioners was to have been made only on defendants' orders, plaintiff nevertheless delivered them without such orders. In such case, (1) defendants were not barred from any remedy under UCC § 2-607(3)(a) because they failed to allege in their counterclaim that they had notified plaintiff of its alleged breach; (2) defendants' original contention that notice of plaintiff's breach

need not have been given to plaintiff (because plaintiff knew that its unauthorized delivery was a breach of the sale contract) was not inconsistent with defendants' subsequent allegation that notice had been given to plaintiff and defendants' pleadings, if amended, would do no more than state an alternative theory for obtaining relief; and (3) plaintiff's motion for judgment on the pleadings should not have been granted, since genuine issues of material fact existed as to whether plaintiff had breached contract by making unauthorized delivery of air conditioners, whether defendants were thus entitled to damages for expense of storing air conditioners and protecting them from theft, and whether defendants had notified seller of its alleged breach. *Bennings Assocs. v. Joseph M. Zamoiski Co.*, 379 A.2d 1171 (D.C. 1977).

In action by seller of cattle against buyer to recover purchase price of cattle, proffered amendment to seller's answer was insufficient to raise defense of breach of implied warranty of fitness for particular purpose under UCC § 2-315 where buyer failed to plead ultimate facts which would bring sale within provisions of statute, i.e., that cattle were being purchased for particular purpose and that buyer was relying on seller's skill and judgment to select suitable cattle; proffered pleading was also deficient in that it failed to allege that buyer gave seller timely notice of breach as required by UCC § 2-607(3)(a). *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976).

In action by farmer who bought consignment hog harrowing house designed and manufactured by defendant for breach of express or implied warranty arising when hogs developed certain illness, under UCC § 2-607(3)(a) buyer had duty to plead and prove notice of alleged defect and pleading notice of claimed breach of warranty was condition precedent to recovery. *Winter v. Honeggers' & Co.*, 215 N.W.2d 316 (Iowa 1974).

Where there is a requirement that buyer give notice to seller of breach of warranty within reasonable time after buyer discovers or should have discovered alleged breach, giving of notice must be pleaded as condition precedent to recovery

for breach of warranty; complaint which does not contain allegation of notice is subject to demurrer. *L.A. Green Seed Co. v. Williams*, 246 Ark. 463, 438 S.W.2d 717 (1969).

A complaint must aver facts showing the particular time that notice of defects was given or facts from which it can be concluded that the notice was given within a reasonable time. *Avant Garde, Inc. v. Armtex, Inc.*, 4 U.C.C. Rep. Serv. 949 (1967, NY Sup.).

Pleadings showing that food processor did not discover the alleged breach of warranty until more than six months after delivery, and did not notify the seller of frozen corn until more than four months later, disclosed on their face what appears prima facie to be an unreasonable delay by the fruit processor in discovering a breach of warranty in delivered goods, and a delay in notifying the seller of the breach, and the claim of the fruit processor was subject to demurrer unless it simultaneously therewith explained and justified the delay. *General Foods Corp. v. Bittinger Co.*, 31 Pa. D. & C.2d 282 (1963).

It is not necessary for a buyer to expressly plead notice to the seller that the buyer was holding the merchandise for the seller's disposition, or otherwise, as provided by the Uniform Commercial Code. It is sufficient that the buyer avers that he notified the seller of the breach of warranty and requested the seller to pick up the goods at his place of business. *A. & H. Paint Co. v. Michaels*, 21 Lawr. L.J. 153 (Pa) (Penna practice).

If the time when notice was given is material to an action for breach of warranty, the time when notice was given must be pleaded. *A. & H. Paint Co. v. Michaels*, 21 Lawr. L.J. 153 (Pa) (Penna practice).

18. Burden of proof.

In action by purchaser of rifle against seller under UCC § 2-314(2)(c) for breach of implied warranty of merchantability and fitness of rifle for ordinary purposes for which it was to be used, defendant failed to discharge its burden of proof to show that there was no defect in rifle and thus no breach of implied warranty sued on. Furthermore, defendant, who alleged that plaintiff did not give notice of alleged

breached of warranty within reasonable time after discovery of breach, as required by UCC § 2-607(3)(a), also did not discharge burden of establishing that reasonable notice of breach had not been given (stating that fact that rifle exploded while it was being loaded constituted evidence that it was unfit for ordinary purposes for which it was intended). *Jones v. Cranman's Sporting Goods*, 142 Ga. App. 838, 237 S.E.2d 402 (1977).

Under UCC § 2-607(4), buyer has burden of establishing any breach with respect to goods accepted. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

In action arising out of auction sale of mare described in sales catalog as "barren," but which subsequently "slipped" a dead foal, buyer who effectively revoked sale had right under UCC §§ 2-601 and 2-608 to reject mare after acceptance and burden under UCC § 2-607 upon buyer to show breach did not apply. Since acceptance was revoked, burden was on seller to show mare's conformity with catalog description but seller did not meet that burden where he failed to prove that mare was either barren or that, pursuant to usage of trade under UCC § 1-205, mare pronounced in foal and later found empty without evidence of abortion could be described as barren. *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976).

Seller of crane was entitled to recover purchase price of replacement parts furnished to buyer, where buyer claimed that it was not required to pay for such parts because they were furnished under seller's warranty obligation, since burden was on buyer to establish any claimed breach of warranty and there was no evidence to establish breach of warranty or that parts were ordered on claim of breach of warranty. *R.G. Moeller Co. v. Van Kampen Constr. Co.*, 57 Mich. App. 308, 225 N.W.2d 742 (1975).

Where goods are effectively rejected for breach of warranty, the burden of proving that they conform presumably remains on the seller, whereas upon acceptance the buyer has the burden to establish any breach. *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. N.Y. 1968).

Because burden of proof on issue of express warranty of soundness of race

horse could not fairly rest on seller where buyer had taken possession of horse, transported it to his barn, and kept it overnight before discovering injury and informing seller thereof, and because Code § 2-607(4) imposes burden on buyer "with respect to the goods accepted", attempted rejection on day after sale was not "within a reasonable time" under Code § 2-602(1), and therefore ineffective to avoid buyer's acceptance under Code § 2-606(1)(b) (see this case, *supra* § 30). *Miron v. Yonkers Raceway, Inc.*, 400 F.2d 112 (2d Cir. N.Y. 1968).

19. Other procedural matters.

In action by cattle buyer against seller for breach of express and implied warranties, buyer's failure to plead and prove notice required under UCC § 2-607(3) was waived by seller's failure to raise lack of notice issue at pre-trial conference. *Dold v. Sherow*, 220 Kan. 350, 552 P.2d 945 (1976).

In breach of contract action relating to allegedly defective siding, failure of buyer to renew its complaint for 2 years could create inference for trier of fact that buyer did not consider alleged defects to be substantial or did not consider that buckling of siding was due to faulty materials; but failure to make prompt renewal of claim does not act as statute of limitations and inflexibly cut off buyer's right to assert its claim, since the initial notice of breach satisfied statute. *Metro Inv. Corp. v. Portland Rd. Lumber Yard, Inc.*, 263 Or. 76, 501 P.2d 312 (1972).

A seller having taken no exception to the failure of the trial court to charge on the notice issue, having offered no request on the point, and having failed to raise the issue in the court below, may not for the first time on appeal attempt to take advantage of the alleged error. *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. Minn. 1964).

20. Vouching in original seller.

Failure of buyer/subsequent seller to tender defense of breach of warranty action brought by subsequent purchaser against buyer and original seller to original seller precludes buyer from recovering attorney fees from seller. Contractor's

Lumber & Supply Co. v. Champion Int'l Corp., 463 So. 2d 1084 (Miss. 1985).

A rubber hose manufacturer, made a cross-defendant in an action in which it was alleged that an airbrake company had manufactured and supplied a defective brake hose that caused a collision between an automobile and a truck, was not bound by a special jury finding that there had been a manufacturing defect in the hose in question, where the brake company's cross-complaint for indemnity against the rubber company had been severed and the rubber company had not participated in the trial in which the jury had returned the finding and had found generally against the brake company, and where, though the brake company had, prior to trial, demanded in writing that the rubber company assume the defense and had stated that indemnity was claimed, it had not expressly stated, as required by UCC § 2-607, subd. (5)(a), that unless the rubber company assumed the the defense, it would be bound in any subsequent litiga-

tion "by any determination of fact common to the two litigations." *Bendix-Westinghouse Automotive Air Brake Co. v. Swan Rubber Co.*, 55 Cal. App. 3d 256 (3d Dist. 1976).

Retailer was entitled to recover from manufacturer of electronic signalling device sums paid to defend action and pay judgment for personal injuries caused by defective electronic signalling device which retailer purchased from manufacturer and sold to employer of injured workman where, inter alia, manufacturer was advised by letter from counsel representing retailer, pursuant to UCC § 2-607, that manufacturer should come in and defend litigation between injured workmen and retailer, and that if it did not do so, it would be bound in any action against it by retailer, and where manufacturer, after reasonable receipt of such notice, did not come in and defend. *Smith Radio Communications, Inc. v. Challenger Equip., Ltd.*, 270 Or. 322, 527 P.2d 711 (1974).

RESEARCH REFERENCES

ALR. Seller's right to retain down payment on buyer's unjustified refusal to accept goods. 11 A.L.R.2d 701.

Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods. 24 A.L.R.2d 717.

Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later instalments. 32 A.L.R.2d 1117.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty. 33 A.L.R.2d 511.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty. 35 A.L.R.2d 1273.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty. 41 A.L.R.2d 812.

Place, in absence of written provision and sales contract, where cash consideration for goods purchased is payable. 49 A.L.R.2d 1350.

Form and substance of notice which buyer of goods must give in order to recover damages for seller's breach of warranty. 53 A.L.R.2d 270.

Extent of liability of seller of livestock infected with communicable disease. 87 A.L.R.2d 1317.

Time for revocation of acceptance of goods under U.C.C. § 2-608(2). 65 A.L.R.3d 354.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under U.C.C. § 2-608(1). 65 A.L.R.3d 388.

Sufficiency and timeliness of buyer's notice under UCC § 2-607 of seller's breach of warranty. 93 A.L.R.3d 363.

Necessity that buyer of goods give notice of breach of warranty to manufacturer under UCC § 2-607, requiring notice to seller of breach. 24 A.L.R.4th 277.

Validity and construction of products liability statute precluding or limiting recovery where product has been altered or modified after leaving hands of manufacturer or seller. 41 A.L.R.4th 47.

Sufficiency and timeliness of buyer's no-

tice under UCC § 607(3)(a) of seller's breach of warranty. 89 A.L.R.5th 319.

Am Jur. 17 Am. Jur. 2d, Contracts § 639.

67 Am. Jur. 2d, Sales §§ 291, 520, 627, 661 et seq.

67A Am. Jur. 2d, Sales, §§ 1161, 1192, 1202, 1207, 1232, 1238, 1254, 1277.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:771-2:783. (Acceptance of goods; effect of acceptance; notice and burden of establishing breach; notice of litigation).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1411 et seq. (Effect of acceptance; notice of breach; burden of establishing breach after acceptance; notice of claim or litigation to person answerable over).

6 Am. Jur. Proof of Facts 2d, Buyer's Timely Notice of Breach in Regard to

Accepted Goods, §§ 5 et seq. (proof that buyer gave seller notice of defects within a reasonable time).

37 Am. Jur. Proof of Facts 2d 593, Acceptance of Goods.

37 Am. Jur. Proof of Facts 2d 681, Buyer's Dissatisfaction with Goods.

2 Am Law Prod Liab 3d, Notice of Breach of Warranty § 23:2.

2 Am Law Prod Liab 3d, Proof of Breach of Warranty § 24:2.

CJS. 77 C.J.S., Sales § 192.

Law Reviews. Wade, Multiple Tortfeasor Liability in Products Liability Suits. 55 Miss. L. J. 683, December 1985.

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§ 75-2-608. Revocation of acceptance in whole or in part.

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

SOURCES: Codes, 1942, § 41A:2-608; Laws, 1966, ch. 316, § 2-608, eff March 31, 1968.

Cross References — When action is taken seasonably, see § 75-1-204.

When goods are conforming, see § 75-2-106.

Buyer's options for nonconforming goods or tender of delivery, see § 75-2-601.

Rejection generally, see § 75-2-602.

Effect of buyer's failure to state particular defect on rejection, see § 75-2-605.

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JUDICIAL DECISIONS

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28. Pleading.

1. In general.

In action by seller under UCC § 75-2-709(1) for price of defective lawnmower bags sold to defendant buyer, court held (1) that buyer had accepted bags (a) under UCC § 75-2-606(1)(a) by conduct that signified to seller that buyer was accepting bags despite knowledge of their nonconformity, and (b) under UCC § 75-2-606(1)(b) by conduct, such as continuing to try to sell bags and destruction of defective bags, that was inconsistent with effective rejection of bags; (2) that buyer did not effectively revoke acceptance of bags under UCC § 75-2-608(1) because (a) its acts of dominion over bags, including continuing efforts to sell them, were inconsistent with its claim of revocation of acceptance, and (b) buyer also did not comply with notice requirement of UCC § 75-2-608(2) for revocation of acceptance; (3) that seller's damages under UCC § 75-2-709(1)(b) for specially manu-

factured goods included damages for cost of materials, labor and overhead, administrative and sales expenses, and incidental damages; and (4) that although buyer satisfied burden of proof under UCC § 75-2-607(4) with regard to seller's breach of warranty, buyer's breach-of-warranty counterclaim was foreclosed by failure to give seller adequate notice of breach required by UCC § 75-2-607(3)(a) and Official Comment 4. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205 (S.D. Miss. 1986).

Applying UCC rules to a copier lease contract, a lessee who asserts the right to revoke acceptance has the same duties as a buyer who rejects goods before acceptance. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

In action by seller of upholstery fabrics against buyer for balance due on unpaid invoices, in which buyer admitted ordering fabrics but alleged that seller had overshipped fabrics to buyer, that buyer had revoked acceptance of overshipped goods and returned them to seller, that seller had allowed credit for returned goods, and that buyer had then paid balance of its account, court held (1) that no overshipments had occurred; (2) that seller had agreed that buyer could return fabrics that buyer could not dispose of at reduced price; (3) that seller never notified buyer that credit memorandum for major part of returned fabrics had been erroneously sent to buyer; (4) that since disputed shipments had conformed to oral orders placed by buyer, buyer's revocation of its prior acceptance of goods under UCC § 2-608(1) was wrongful; (5) that seller was thereafter entitled to remedies provided by UCC § 2-703; (6) that seller's postbreach conduct—which consisted of allowing discount on disputed fabrics, accepting great number of pieces returned to seller, and sending buyer memorandum allowing credit for returned fabrics with no qualification as to memorandum's meaning—showed acquiescence in alleged agreement for return of goods and allowance of discount thereon; and (7) that seller, by failing to exercise diligence in enforcing its rights under the contract,

had not exercised good faith required by UCC § 1-203, had seriously misled buyer, and thus was estopped to assert its abandoned rights. *Castle Fabrics, Inc. v. Fortune Furn. Mfrs., Inc.*, 459 F. Supp. 409 (N.D. Miss. 1978).

In most instances, the Uniform Commercial Code has abandoned use of the term "rescission" in favor of such terms as "cancellation" or "termination." However, "rescission" and "revocation of acceptance" (see UCC § 2-608(1)) are generally viewed as amounting to the same thing under the code, especially since "cancellation," under UCC § 2-711(1), is a remedy that is available to a buyer who has established justifiable grounds for "revocation of acceptance." *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978).

Before a buyer can revoke acceptance under UCC § 2-608(1), he must show that the goods are nonconforming and that the nonconformity substantially impairs their value to him. If the buyer knew of the nonconformity when he accepted the goods, he must show that he acted on the reasonable assumption that the nonconformity would be cured and that it was not seasonably cured. If the buyer did not know of the nonconformity when he accepted the goods, he must then show that his acceptance was reasonably induced by the difficulty of discovering the nonconformity before acceptance or by the seller's assurances. A revocation of acceptance by the buyer must occur, under UCC § 2-608(2), within a reasonable time after he discovered the defect, or should have discovered it, and before any substantial change occurs in the condition of the goods that was not caused by their own defects. Moreover, a revocation of acceptance is not effective until the buyer notifies the seller. *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978).

Revocation of acceptance under UCC § 2-608(1) is possible only where the nonconformity substantially impairs the value of the goods to the buyer. In this regard, the test is not what the seller had reason to know at the time of contracting; instead, it is whether the nonconformity is such as will, in fact, cause a substantial

impairment of value to the buyer, even though the seller had no advance knowledge of the buyer's particular circumstances. *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978).

Buyer was liable as matter of law for contract price of cast-iron pipes and other materials purchased for use in water-main construction project where buyer (1) accepted materials under UCC § 2-606(1)(c) by receiving them and installing them into the ground, (2) failed to reject materials within reasonable time after their delivery by seasonable notification to seller required by UCC § 2-602(1), (3) did not comply with duties under UCC § 2-603 as to any materials that buyer might rightfully have rejected, and (4) repaired all leaks in defective pipes shortly after their installation without requesting credit for such defects or revoking acceptance of such pipes under UCC § 2-608(2). *Clow Corp. v. Metro Pipeline Co.*, 442 F. Supp. 583 (N.D. Ga. 1977).

To revoke acceptance of goods under UCC § 2-608, buyer must show that his acceptance was excused for one of the following reasons: (1) buyer accepted on unreasonable assumption that seller would eliminate defect in goods, but seller failed to do so; (2) buyer accepted without discovering defect in goods, but such failure was caused by difficulty of discovering defect; or (3) buyer accepted without discovering defect, but such failure was caused by seller's assurances that goods were conforming. UCC § 2-608 also requires that buyer's revocation of acceptance must occur before occurrence of any substantial change in condition of goods which was not caused by their own defects and that there must be substantial impairment in value of goods to buyer. *Sauers v. Tibbs*, 48 Ill. App. 3d 805, 363 N.E.2d 444 (4th Dist. 1977).

UCC § 2-608 prescribes the following requirements for an effective revocation of acceptance: (1) the goods must have been nonconforming; (2) the nonconformity must have substantially impaired the value of the goods to the buyer; (3) the buyer must have accepted the goods on the reasonable assumption that the nonconformity would be cured; (4) the noncon-

formity must not have been seasonably cured; (5) the buyer must have notified the seller of the buyer's revocation; (6) revocation must have occurred within a reasonable time after the buyer discovered or should have discovered the ground therefor, and before any substantial change in the condition of the goods which was not caused by their own defects; and (7) the buyer must have taken reasonable care of the goods. *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 98 A.L.R.3d 1170 (Minn. 1977).

Question as to compliance with warranties is to be measured by the specifics that the parties agreed on, and not by a generalized conclusion as to whether there was an overall fitness for the purposes intended. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

In action by buyer of new 1970 Lincoln Continental automobile against dealer and manufacturer, in which buyer alleged seller's breach of warranty and buyer's justifiable revocation of acceptance of vehicle, manufacturer was not "seller" under UCC § 2-103(1)(d), on theory that dealer from whom buyer actually purchased vehicle was "agent" of manufacturer, where (1) sales contract expressly recited that buyer understood that no principal-and-agent relationship existed between dealer and manufacturer, (2) dealer's franchise agreement with manufacturer also expressly stated that dealer was not manufacturer's agent, and (3) no other evidence supported conclusion that dealer was manufacturer's agent in sale of vehicle to buyer. Thus, manufacturer was entitled to directed verdict since buyer, to be entitled to remedy of revocation of acceptance under UCC § 2-608 as against manufacturer, was required to prove existence of buyer-seller relationship, and such proof was absent (also observing that ordinarily automobile dealer's only attribute as agent of manufacturer is authority to extend manufacturer's limited warranty to dealer's purchasers). *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

UCC § 2-608 sets up following conditions for buyer who seeks to justify revocation of acceptance: (1) nonconformity that substantially impaired value to

buyer; (2) acceptance (a) with discovery of defect, if acceptance was on reasonable assumption that nonconformity would be cured, or (b) without discovery of defect, if acceptance was reasonably induced by difficulty of discovery or by seller's assurances; (3) revocation within reasonable time after nonconformity was discovered or should have been discovered; and (4) revocation before substantive change occurred in condition of goods that was not caused by their own defects. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

Code provisions pertaining to manner and effect of rightful rejecting and acceptance of goods were inapplicable to action by seller of hog fence paneling to recover price of extra panels ordered by buyer who counterclaimed for damages for nonconformity between heavy-duty panels ordered and light-weight panels received, although evidence raised fact issue, particularly as to panels first received, under Code section providing for revocation of acceptance. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

Co-owner of boat mold, through his representative, accepted mold in its then condition from other co-owner; held, first co-owner was not entitled to recover for alleged injury to mold while it was in possession of second co-owner. *Marcoux v. Davis*, 230 So. 2d 485 (Fla. Ct. App. 1970), overruled on other grounds, *Blue v. Weinstein*, 381 So. 2d 308 (Fla. Ct. App. 1980).

The time for revocation of acceptance will be governed by decisions under the Sales Act relating to the time for rescission. *Braginetz v. Foreign Motor Sales, Inc.*, 76 Dauph. Co. 1 (Pa. 1961).

2. Scope.

The Uniform Commercial Code has replaced the pre-Code remedy of rescission with the concepts of rejection and revocation of acceptance, but UCC § 2-721, dealing with remedies for fraud, recognizes that such change of remedies does not affect a buyer's right to pursue non-Code remedies. *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. Tex. 1978).

This section performs the same general functions as a rescission of a sale did under § 69 of the Uniform Sales Act.

Howard W. Frantz & Sons v. Moses, 54 Schuyl. L. Rec. 39 (Pa. 1958).

3. Alternative remedies.

UCC § 2-608(2) does not prescribe any particular form or content for the notice of the buyer's revocation of acceptance. However, the notice must be sufficient to inform the seller that the buyer has revoked his acceptance of the goods. It must also be sufficient to identify the particular goods that are the subject matter of such revocation. *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978).

Before a buyer can revoke acceptance under UCC § 2-608(1), he must show that the goods are nonconforming and that the nonconformity substantially impairs their value to him. If the buyer knew of the nonconformity when he accepted the goods, he must show that he acted on the reasonable assumption that the nonconformity would be cured and that it was not seasonably cured. If the buyer did not know of the nonconformity when he accepted the goods, he must then show that his acceptance was reasonably induced by the difficulty of discovering the nonconformity before acceptance or by the seller's assurances. A revocation of acceptance by the buyer must occur, under UCC § 2-608(2), within a reasonable time after he discovered the defect, or should have discovered it, and before any substantial change occurs in the condition of the goods that was not caused by their own defects. Moreover, a revocation of acceptance is not effective until the buyer notifies the seller. *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978).

In action by purchaser of new automobile against dealer seeking revocation of acceptance and damages, contract provision between dealer and purchaser to effect that there were no warranties express or implied made by either dealer or manufacturer, other than manufacturer's warranty against defective materials, although sufficient to exclude all warranties by dealer except implied warranty of merchantability, did not eliminate implied warranty of merchantability in manner required by UCC § 2-316, and evidence that automobile battery was defective as

result of poor materials or poor workmanship was sufficient to establish breach of warranty of merchantability; however, there was no evidence that such nonconformity substantially impaired value of car to purchaser as required by UCC § 2-608 before he could revoke his acceptance of automobile and recover price paid; thus, purchaser's remedy was action for damages and, since purchaser failed to present evidence to support award based on proper measure of damages, i.e., value of automobile in its non-conforming condition at time and place of acceptance, purchaser was not entitled to recover damages. *Bill McDavid Oldsmobile, Inc. v. Mulcahy*, 533 S.W.2d 160 (Tex. Civ. App. 1976).

Before enactment of Uniform Commercial Code, breach of warranty and rescission were considered alternate remedies. The code, however, which is much more comprehensive and explicit than precode law, generally avoids use of ambiguous term "rescission" and provides in UCC § 2-608 specific remedy that permits buyer, under proper conditions, to force seller to retake nonconforming goods, even though buyer has already accepted them. Under the code, buyer's revocation of acceptance is distinct course of action that is not to be confused with rescission by mutual consent. Nor is revocation of acceptance an alternative remedy for breach of warranty. Under UCC § 2-711(1), when buyer justifiably revokes acceptance, he may cancel and recover as much of purchase price as he has paid. On the other hand, under UCC § 2-714(2), basic measure of damages for breach of warranty is difference between value of goods accepted and value that they would have had if they had been as warranted. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

4. —Rescission.

In action for purchase price of new automobile, where (1) buyer's acts in signing all necessary papers and taking delivery of car were so inconsistent with seller's ownership as to constitute acceptance under UCC § 2-606(1)(c), and (2) buyer had no right to revoke her acceptance under UCC § 2-608(1)(a), since she had accepted car without knowledge of any nonconfor-

imity, court held that seller's proof of sale and delivery of car at agreed price, together with buyer's admission that she took car, executed paper work connected with its sale, and then refused to pay purchase price, made out case that entitled seller to recover purchase price (stating that fact that fan belt broke two days after car's sale did not show such nonconformity as would allow buyer to revoke acceptance under UCC § 2-608(1)(b)). *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Under UCC § 2-608(2), revocation of acceptance is required within a reasonable time after discovery of the grounds therefor. Since this remedy is generally resorted to only after attempts at adjustment have failed, the reasonable-time period should extend in most cases (1) beyond the time in which notification of the breach must be given, (2) beyond the time for discovery of the nonconformity after acceptance, and (3) beyond the time for rejection after tender. However, the parties, by their agreement, may limit the time for notification of revocation. *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978).

Before a buyer can revoke acceptance under UCC § 2-608(1), he must show that the goods are nonconforming and that the nonconformity substantially impairs their value to him. If the buyer knew of the nonconformity when he accepted the goods, he must show that he acted on the reasonable assumption that the nonconformity would be cured and that it was not seasonably cured. If the buyer did not know of the nonconformity when he accepted the goods, he must then show that his acceptance was reasonably induced by the difficulty of discovering the nonconformity before acceptance or by the seller's assurances. A revocation of acceptance by the buyer must occur, under UCC § 2-608(2), within a reasonable time after he discovered the defect, or should have discovered it, and before any substantial change occurs in the condition of the goods that was not caused by their own defects. Moreover, a revocation of acceptance is not effective until the buyer notifies the

seller. *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978).

Where seller was unable to obtain acceptable substitute tractor after original tractor proved defective, buyer was entitled under UCC § 2-608 to rescind contract and recover incidental and consequential damages such as value of trade-in allowance for combine, expenditures for travel, telephone calls, and tractor rental fees. *Welken v. Conley*, 252 N.W.2d 311 (N.D. 1977).

Although Uniform Commercial Code does not specifically provide remedy of rescission of contract, rescission and revocation of acceptance under UCC § 2-608(1) amount to the same thing, particularly since cancellation of contract under UCC § 2-711(1) is remedy that is available to buyer who has established a justifiable revocation of acceptance. *Werner v. Montana*, 117 N.H. 721, 378 A.2d 1130 (1977).

Parties to an agreement of sale are entitled to get what they bargained for at the time they bargained for it; right of a buyer to rescind must be determined as of the time the election to rescind is properly exercised, and the party's rights are not to be determined by subsequent events. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

Where testimony of interested parties was in direct conflict as to extent to which delivered boat differed from display boat, court would not reverse order of rescission of sales contract under UCC § 2-608(1), since Chancellor below had opportunity and advantage of seeing and hearing the witnesses. *Marine Mart, Inc. v. Pearce*, 252 Ark. 601, 480 S.W.2d 133 (1972).

5. Tender back.

In action by seller of upholstery fabrics against buyer for balance due on unpaid invoices, in which buyer admitted ordering fabrics but alleged that seller had overshipped fabrics to buyer, that buyer had revoked acceptance of overshipped goods and returned them to seller, that seller had allowed credit for returned goods, and that buyer had then paid balance of its account, court held (1) that no overshipments had occurred; (2) that seller had agreed that buyer could return

fabrics that buyer could not dispose of at reduced price; (3) that seller never notified buyer that credit memorandum for major part of returned fabrics had been erroneously sent to buyer; (4) that since disputed shipments had conformed to oral orders placed by buyer, buyer's revocation of its prior acceptance of goods under UCC § 2-608(1) was wrongful; (5) that seller was thereafter entitled to remedies provided by UCC § 2-703; (6) that seller's postbreach conduct—which consisted of allowing discount on disputed fabrics, accepting great number of pieces returned to seller, and sending buyer memorandum allowing credit for returned fabrics with no qualification as to memorandum's meaning—showed acquiescence in alleged agreement for return of goods and allowance of discount thereon; and (7) that seller, by failing to exercise diligence in enforcing its rights under the contract, had not exercised good faith required by UCC § 1-203, had seriously misled buyer, and thus was estopped to assert its abandoned rights. *Castle Fabrics, Inc. v. Fortune Furn. Mfrs., Inc.*, 459 F. Supp. 409 (N.D. Miss. 1978).

Having elected to rescind purchase of stud horse, any action by buyer in breeding the horse and collecting stud fees were, in effect, as trustee for seller; buyer was entitled to offset the expenses of maintenance and this net profit was to be deducted from the purchase price to be returned. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

If plaintiffs' notice of revocation of acceptance was inadequate for failure to offer to return all goods purchased under contract upon payment of proper amount, plaintiffs' submission to jurisdiction of equity constituted adequate offer to do so. *Melms v. Mitchell*, 266 Or. 208, 512 P.2d 1336, 65 A.L.R.3d 376 (1973).

Auto buyer called seller's attention to knock in motor of new auto; seller elected to pass auto on to seller in that condition; auto returned when it would not operate to satisfaction of buyer; held, buyer was entitled to recover on his demand for return of auto purchase price. *Carretta v. Bud Jack Corp.*, 64 Misc. 2d 689 (1970).

Under the language of § 2-601 and of this section, a buyer is relieved of his

obligations under former law of rescission to tender back property previously received, and it is sufficient if he seasonably notifies seller of his revocation of acceptance. *Campbell v. Pollack*, 101 R.I. 223, 221 A.2d 615 (1966).

Under the Uniform Commercial Code, an offer by the buyer to return the goods after notice of rescission is given is no longer necessary. *Marks v. Lehigh Brickface, Inc.*, 9 Pa. D. & C.2d 666 (1960).

6. Exercise of ownership.

Evidence that the plaintiff revoked acceptance of a farm combine was sufficient to support a jury verdict, even though he retained possession of it, continued to use it, and generated a tax benefit for himself by claiming depreciation of the combine on his tax returns for two years, because (1) it was unlikely that the plaintiff could have purchased or rented another combine as the cost of replacement was high and his credit was adversely affected when he failed to make payments on the loan for the combine, (2) the defendant did not allege that the combine was damaged by continued use by the plaintiff and only alleged that such use caused depreciation, and (3) the defendant refused to accept the return of the combine. *Deere & Co. v. Johnson*, 271 F.3d 613 (5th Cir. 2001).

Mobile home purchasers' continued use of the mobile home after they notified the seller of their intention to revoke acceptance did not constitute a waiver of their right to revoke acceptance where they were financially unable to move elsewhere and they were repeatedly assured by the seller that the defects would be repaired; the purchasers were merely complying with § 75-2-508, which requires a consumer who expresses an intention to revoke acceptance to provide a seller with a reasonable opportunity to attempt to cure the defect; moreover, any excessive or unreasonable use of the home by the purchasers could be remedied through quantum meruit recovery, not through an effectuation of revocation. *North River Homes, Inc. v. Bosarge*, 594 So. 2d 1153, 38 A.L.R.5th 869 (Miss. 1992).

Where (1) buyer purchased mobile home on January 29, 1973, and moved into it three days later, (2) buyer made numerous complaints about home's de-

fects between February 29, 1973, and September, 1973, but defects were never seasonably repaired by seller, (3) buyer revoked acceptance of home in September, 1973, but continued to use home until time of filing suit in 1974, and (4) seller never attempted to remove home from buyer's premises after being notified of buyer's revocation of acceptance, trial court erred in holding that buyer had waived right to revoke acceptance of home under UCC § 2-608(1)(a) & (b) because of his continued use of it after giving seller notice of revocation. *Lawrence v. Modern Mobile Homes, Inc.*, 562 S.W.2d 729 (Mo. Ct. App. 1978).

In action for purchase price of new automobile, where (1) buyer's acts in signing all necessary papers and taking delivery of car were so inconsistent with seller's ownership as to constitute acceptance under UCC § 2-606(1)(c), and (2) buyer had no right to revoke her acceptance under UCC § 2-608(1)(a), since she had accepted car without knowledge of any nonconformity, court held that seller's proof of sale and delivery of car at agreed price, together with buyer's admission that she took car, executed paper work connected with its sale, and then refused to pay purchase price, made out case that entitled seller to recover purchase price (stating that fact that fan belt broke two days after car's sale did not show such nonconformity as would allow buyer to revoke acceptance under UCC § 2-608(1)(b)). *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Retention of pleasure fishing boat by buyer for 32 months before attempting revocation constituted unreasonable delay after discovery of defects and, therefore, revocation of acceptance under UCC § 2-608 was not available remedy; although seller's assurances and attempted repairs justified some of buyer's delay, delay of 32 months was not reasonable particularly where buyer retained possession of boat after his attempted revocation and continued to use it for fishing trips right up to time of trial. Furthermore, continued use of boat for fishing trips did not indicate that buyer retained boat under UCC § 2-711(3) and § 9-207(1) and

(4) for purpose of protecting his security interest pending reimbursement, but rather such use appeared to be "act inconsistent with the seller's ownership" which, under UCC § 2-606(1)(c), constituted new acceptance. *Wadsworth Plumbing & Heating Co. v. Tollycraft Corp.*, 277 Or. 433, 560 P.2d 1080 (1977).

In action by mobile home purchasers against seller and manufacturer for rescission of purchase agreement, although purchasers' revocation of acceptance was effective, their continued occupancy of mobile home as their residence for approximately six months after revocation of acceptance was wrongful and manufacturer and seller were entitled to offset amount of fair and reasonable use value of mobile home for this period. *Stroh v. American Recreation & Mobile Home Corp.*, 35 Colo. App. 196, 530 P.2d 989 (1975).

UCC requires that plaintiffs' continued use of automobile after their attempted rejection invalidates plaintiffs' revocation of acceptance. *Waltz v. Chevrolet Motor Div.*, 307 A.2d 815 (Del. Super. 1973).

Auto purchaser waived his right to make effective revocation of acceptance where he used auto for 17 months and 30,000 miles. *Cooper v. Mason*, 14 N.C. App. 472, 188 S.E.2d 653 (1972).

Where seller refused to acknowledge buyer's revocation of acceptance of used automobile, and buyer then kept automobile, used and maintained it, and made payments on financing agreement to bank, buyer failed to revoke his acceptance properly, was in the position of one who had accepted the goods, and had through his notification of revocation of acceptance given seller sufficient and timely notification of breach of warranty (automobile warranty book showed 14000 more miles than car's odometer). *Fecik v. Capindale*, 54 Pa. D. & C.2d 701 (1971).

Buyer's exercise of ownership over farm equipment was inconsistent with alleged revocation of acceptance, despite assurances of salesman that any nonconformity would be cured. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

7. Partial revocation.

Buyer removed integral working parts of car wash equipment; buyer was not

using that part of electrical system, was not using water softeners or water heaters to full capacity, and interior lining of equipment had been removed; held, removed parts did not constitute "commercial unit" within UCC § 2-608 permitting revocation of acceptance of commercial unit which substantially impairs value to him. *Abbett v. Thompson*, 148 Ind. App. 25, 263 N.E.2d 733 (1970).

A buyer of 16 automobiles under an "entire" contract of sale could reject seven of the automobiles and accept the rest, where the seller accepted the return of the rejected automobiles from the buyer. *Ofgant-Jackson Chevrolet, Inc. v. MacQuade*, 338 Mass. 144, 154 N.E.2d 344 (1958).

8. Substantially impaired value.

The question of whether there has been substantial impairment of the value to the consumer, within the meaning of § 75-2-608(1), is one for the factfinder to resolve; the factfinder's resolution of this issue should entail a subjective and objective review of the evidence; the subjective component of the factfinder's review involves consideration of the "unique circumstances" of the consumer while the objective component involves consideration of whether the defect would substantially impair the value of the good to a reasonable person whose unique circumstances are similar to the consumer's. *North River Homes, Inc. v. Bosarge*, 594 So. 2d 1153, 38 A.L.R.5th 869 (Miss. 1992).

Applying UCC rules to a 2-party copier lease agreement, upon a determination that the deficiencies in the leased copier were such that its value to the lessee was substantially reduced, the lessee could revoke its acceptance of the copier. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Automobile buyer may revoke his acceptance only if there is a substantial impairment of value to him, and substantial impairment is determined by reference to the particular needs of the buyer, even though the seller may have no advance knowledge of those needs and even though such needs may change after acceptance of the automobile. *Rester v. Morrow*, 491 So. 2d 204 (Miss. 1986).

The statute governing an automobile buyer's right to revoke acceptance has both a subjective and an objective component; the "to him" language requires that courts proceed by reference to the buyer's unique circumstances and, once those circumstances have been determined, to proceed to an objective determination of whether the nonconformity would substantially impair the value of the automobile to a reasonable person in the buyer's circumstances. *Rester v. Morrow*, 491 So. 2d 204 (Miss. 1986).

Under UCC § 2-608(1) and Official Comment 2, the test of "substantial impairment" justifying buyer's revocation of acceptance is whether the nonconformity is such as will in fact cause substantial impairment of value to the buyer, even though the seller had no advance knowledge of the buyer's particular circumstances. The statute creates a subjective test in the sense that the requirements of the particular buyer must be examined and deferred to. However, since the rationale of the "substantial-impairment" requirement is to bar revocation for trivial defects or defects that can easily be corrected, the impairment of the buyer's requirements must be substantial in objective terms. *Keen v. Modern Trailer Sales, Inc.*, 40 Colo. App. 527, 578 P.2d 668 (1978).

In buyers' action for rescission of contract for purchase of mobile home, which was treated by trial court as action for revocation of acceptance under UCC § 2-608(1)(b), determinative issues before trial court on remand of case were (1) whether buyers had sought to purchase home of specified dimensions for their particular living requirements, and (2) whether nonconformity of home delivered to buyers, which lacked approximately eight percent of total space warranted by seller, was substantial impairment, in an objective sense, of home's value to buyers. *Keen v. Modern Trailer Sales, Inc.*, 40 Colo. App. 527, 578 P.2d 668 (1978).

Revocation of acceptance is possible under UCC § 2-608 only if the nonconformity substantially impairs value of goods to buyer. For this purpose, test is not what seller had reason to know at time of contracting, but whether nonconformity is

such as will in fact cause substantial impairment of value to buyer, even though seller had no advance knowledge of buyer's particular circumstances. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

Where organ was delivered to buyers' home on December 7, 1972, shortly thereafter two bass pedals and two keys on keyboard failed to play, buyer called seller on December 27, 1972, but nothing was done until March 13, 1973, when seller repaired organ, where, following repairs, one key in every octave in both keyboards failed to play, buyer called seller on May 11, 1973, and told seller that she was still having difficulty with organ and that she wanted refund of purchase price, where buyer agreed to permit seller to bring out replacement organ on condition that if it did not work seller would take it back and refund purchase price of first organ, rhythm system on replacement organ began to malfunction, seller was unable to remedy problem and, during last service call serviceman removed rhythm system component from replacement organ following which lower keyboard failed to play, and where some time after June 1, 1973, seller's employees attempted to return original organ, but were prevented from doing so by buyers who insisted on return of purchase price of organ: (1) evidence was sufficient to establish that defects in organ substantially impaired its value to buyers within meaning of UCC § 2-608(1), thus justifying revocation of acceptance and recovery of purchase price; (2) under all circumstances, buyers notified seller within reasonable time after learning of defects in organ that they intended to revoke their acceptance and ask for refund of purchase price. *Schumaker v. Ivers*, 90 S.D. 75, 238 N.W.2d 284 (1976).

Fact that transmission fell out of used car and that brakes failed in car shortly after transmission trouble was fixed clearly indicated that car was so hazardous to drive that value of buyers' contract for car was substantially impaired, justifying buyers' revocation of acceptance when buyers received unfulfilled assurances that defects would be cured. *Overland Bond & Inv. Corp. v. Howard*, 9 Ill.

App. 3d 348, 292 N.E.2d 168 (1st Dist. 1972).

Right to revoke acceptance of automobile does not arise from every breach of warranty; to revoke acceptance defect must substantially impair value of car to plaintiff, and each case must be carefully examined on its own merits to determine what is substantial impairment of value. *Collum v. Fred Tuch Buick*, 6 Ill. App. 3d 317, 285 N.E.2d 532 (1st Dist. 1972).

9. —Failure to deliver title.

Buyer of automobile was entitled to revoke acceptance under UCC § 2-608 when seller was unable to furnish clear title certificate as required; under UCC §§ 2-711 and 2-713, buyer was entitled to recover purchase price plus difference between purchase price and market value of vehicle with clear title as "non-delivery" damages; fact that automobile was delivered to and used by buyer did not impair buyer's right to revoke acceptance or to recover "non-delivery" damages. *Gawlick v. American Bldrs. Supply, Inc.*, 86 N.M. 77, 519 P.2d 313 (Ct. App. 1974).

UCC § 2-608 permits a buyer to revoke his acceptance of a mobile home if no title is provided, and further if the revocation of acceptance complies with the conditions contained in this section, it being immaterial whether plaintiff chooses to term his remedy rescission or revocation of acceptance. *Gilson v. Twin Trailer Sales, Inc.*, 53 Pa. D. & C.2d 311 (1971).

Seller's inability to deliver title to boiler, blowers, and light fixtures previously represented as included in sale of equipment of automatic car wash substantially impaired value of entire purchase, and entitled buyer to revoke his acceptance or sale, even though value of these items was disproportionately small in comparison with total consideration paid. *Campbell v. Pollack*, 101 R.I. 223, 221 A.2d 615 (1966).

"Conformity" and "non-conformity" of goods sold applies not only to quantity and quality, for the goods are also required to conform to the obligations of the contract of sale; and where one of the obligations of the contract is warranty of title, seller's inability to deliver title to a portion of the goods sold constitutes "non-conformity" sufficient to support buyer's revocation of

acceptance. *Campbell v. Pollack*, 101 R.I. 223, 221 A.2d 615 (1966).

10. —Failure or refusal to repair.

In buyers' action to revoke acceptance of motor home, (1) buyers' signing of document entitled "Pre-Delivery Inspection and Acceptance Declaration"—by means of which seller had attempted both to disclaim all express and implied warranties and to limit remedies available to buyers, in event of a breach, to repair and replacement of defective parts—did not deprive buyers of right to seek revocation of acceptance under UCC § 2-608, since seller's failure after reasonable time to repair numerous defects in home resulted in failure of buyer's limited repair-and-replacement-of-parts remedy in its essential purpose within meaning of UCC § 2-719(2), thus enabling buyers to invoke any remedies available under Uniform Commercial Code; (2) buyers were entitled to revoke acceptance of home under UCC § 2-608(1) and (2), since jury found on sufficient evidence that its defects had substantially impaired its value and that buyers' formal revocation of acceptance had immediately followed several months of nearly continuous efforts to have home repaired; and (3) buyers were entitled to only \$500 as consequential damages allowable under UCC § 2-715(2)(b) for loss of home's use, since there was no evidence of extent to which home would have been used by buyers if it had not been defective. *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

Seller did not have right to repair and cure defects in accord with UCC § 2-508, notwithstanding buyer's notification of revocation of acceptance, where seller was unable to say how long it would have taken him to make all repairs necessary to get mobile home back into good condition. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Language contained in contract between buyer and seller of accounting machine that seller's "obligation if the equipment does not meet these warranties is limited solely to correcting the defect or failure, without charge," did not apply to implied warranty of fitness for particular purpose; but even if it did, buyer's remedy

of revocation was saved, since nothing short of effective right of revocation would satisfy essential purpose of implied warranty of fitness for particular purpose where particular accounting machine delivered and installed by seller did not, and could not, solve buyer's problem by getting accurate payroll out on time, which was purpose for which it was purchased. *NCR v. Adell Indus., Inc.*, 57 Mich. App. 413, 225 N.W.2d 785 (1975).

Where a new car warranty is limited to repair and replacement of parts, buyer was entitled to revoke acceptance under UCC § 2-608, where there was refusal to repair or an unsuccessful repair. *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

Auto buyer called seller's attention to knock in motor of new auto; seller elected to pass auto on to seller in that condition; auto returned when it would not operate to satisfaction of buyer; held, buyer was entitled to recover on his demand for return of auto purchase price. *Carretta v. Bud Jack Corp.*, 64 Misc. 2d 689 (1970).

11. —Extent or cost or repairs.

While an automobile seller has the right to attempt a cure, he cannot postpone revocation in perpetuity, and there comes a time when, after having to take the car into the shop for repairs an inordinate number of times and experiencing all of the attendant inconveniences, the buyer is entitled to revoke his acceptance, notwithstanding the seller's repeated good faith efforts to fix the car. *Rester v. Morrow*, 491 So. 2d 204 (Miss. 1986).

After having accepted nonconforming goods (equipment which was not in ready-to-go condition as promised by seller), buyer could not revoke his acceptance where repairs would cost only \$200 which did not amount to substantial impairment of value under UCC § 2-608(1)(a). *Dehahn v. Innes*, 356 A.2d 711 (Me. 1976).

In buyers' action for rescission of automobile sales contract, evidence showing that cost of repairs needed to bring automobile to standard approximated 25 percent of sale price of car compelled finding that defects in automobile substantially impaired its value. *Moore v. Howard Pontiac-American, Inc.*, 492 S.W.2d 227 (Tenn. Ct. App. 1972).

Non-conformity of station wagon was of such magnitude as to cause "substantial impairment of value" to buyer, where wagon was returned for repairs on at least 30 occasions within 50 days of purchase date for, inter alia, excessive oil use, new fuel pump, new carburetor, new piston rings, "short block", and continual uncorrected skipping and misfiring of engine. *Tiger Motor Co. v. McMurtry*, 284 Ala. 283, 224 So. 2d 638 (1969).

12. —Substantial impairment found.

A buyer of a new car was justified in revoking acceptance, where three successive engines failed within less than 6,000 miles per engine. *Volkswagen of Am., Inc. v. Novak*, 418 So. 2d 801 (Miss. 1982).

Where new car with paint chipped off on front end and improper difference in color between paint on front end and paint on rear end was delivered to buyer in darkness, buyer on observing such defects on the next day demanded either new car or return of purchase price from dealer, dealer in compliance with manufacturer's firm policy refused buyer's demand and attempted to repair paint defects, and car after being stripped down to bare metal and repainted three times still had paint defects that marred its appearance and value for buyer, (1) buyer justifiably revoked acceptance of car under UCC § 2-608(1)(b), (2) such revocation of acceptance was timely under UCC § 2-608(2), and (3) buyer under UCC § 2-711(1) was entitled to rescind contract of sale and be returned purchase price of car, less specified offset for buyer's use of car (stating that buyer is no longer barred from remedy of rescission because of his continued use of substantially impaired goods which are a necessity to him). *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, 382 A.2d 954 (Ch. Div. 1978).

In action by buyer of mobile home against seller for breach of implied warranty of fitness of home for particular purpose, evidence established substantial impairment in value of home within meaning of UCC § 2-608 where it showed that at time of sale of home to plaintiff and plaintiff's commencement of habitation therein, home was infested with numerous "confused flour beetles"; that home's infestation with such beetles in numbers

testified to rendered it unfit for use as residence; and that plaintiff's efforts to exterminate beetles had failed. Furthermore, under UCC § 2-608, such impairment in home's value justified plaintiff in revoking acceptance of home. *Sauers v. Tibbs*, 48 Ill. App. 3d 805, 363 N.E.2d 444 (4th Dist. 1977).

Where new car after its purchase exhibited numerous minor defects and one major defect (frequent stalling of engine), and where seller, despite frequent attempts, failed seasonably to repair such defects, (1) buyer was entitled under UCC § 2-608(1)(a) to revoke acceptance of car, since its defects collectively constituted substantial impairment of its value to buyer; (2) seller did not have unlimited time to repair car's defects; (3) provision in owner's manual limiting buyer's remedies to repair or replacement of defective parts failed as exclusive remedy under UCC § 2-719(2), thus justifying buyer's cancellation of contract and recovery of purchase price; (4) buyer, although failing to prove consequential damages, was entitled to recover incidental damages under UCC § 2-715(1) for repair and maintenance costs incurred in caring for car; and (5) lack of privity between buyer and United States distributor of type of car in suit did not relieve distributor of liability to buyer, since distributor was unable to assure court of continued existence of corporate dealer from which buyer had purchased car. *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 98 A.L.R.3d 1170 (Minn. 1977).

Buyer of new car was entitled to revoke his acceptance pursuant to UCC § 2-608 where, within three weeks after its purchase, car was discovered to be totally inoperable due to defective transmission and where buyer immediately notified seller and manufacturer upon learning of defect. *Asciolla v. Manter Oldsmobile-Pontiac, Inc.*, 117 N.H. 85, 370 A.2d 270 (1977).

Buyer's revocation of acceptance of sloop because it was unseaworthy and continued to leak, despite being allowed to soak in the water and swell for over six weeks, met test for revocation under UCC § 2-608(1) and (2) where (1) buyer purchased sloop in January, 1972, as result of

seller's assurances that it was seaworthy; (2) buyer put sloop into the water for first time in June, 1972, and discovered that it was unseaworthy; and (3) buyer notified seller of revocation of acceptance within reasonable time after discovering that sloop was unseaworthy (holding that as matter of common sense, unseaworthy condition of sloop substantially impaired its value to buyer). *Werner v. Montana*, 117 N.H. 721, 378 A.2d 1130 (1977).

Right of buyer to rescind purchase of stud horse was to be determined at time election to rescind was properly exercised, i.e., when initial attempts at breeding did not meet with success and examination of sperm revealed that the stallion was not acceptable as a breeder; fact that stallion subsequently was bred to 38 mares and produced 27 live foals did not negate claims that warranties as to stallion's capacity as breeder were breached; not only was stallion warranted as being fit for stud purposes but parties agreed that semen samples had to be within normal acceptable limits. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

Where buyers purchased mobile home for purpose of using it as their residence, but soon after they moved in, buyers discovered water and air leaks, gaps in hinged section of mobile home used to widen living room when mobile home was set up, as well as defective doors, cabinets, vents and walls, and where buyers promptly gave seller list of these defects, but seller failed to cure them, value of mobile home to buyers as residence was substantially impaired within meaning of UCC § 2-608(1), thus justifying revocation of acceptance; although defects in mobile home probably could have been repaired at relatively small cost, buyers were deprived of benefits of comfortable home for substantial period of time as result of seller's failure to make timely repairs. *Jorgensen v. Pressnall*, 274 Or. 285, 545 P.2d 1382 (1976).

Where organ was delivered to buyer's home on December 7, 1972, shortly thereafter two bass pedals and two keys on keyboard failed to play, buyer called seller on December 27, 1972, but nothing was done until March 13, 1973, when seller repaired organ, where, following repairs,

one key in every octave in both keyboards failed to play, buyer called seller on May 11, 1973, and told seller that she was still having difficulty with organ and that she wanted refund of purchase price, where buyers agreed to permit seller to bring out replacement organ on condition that if it did not work seller would take it back and refund purchase price of first organ, rhythm system on replacement organ began to malfunction, seller was unable to remedy problem and, during last service call serviceman removed rhythm system component from replacement organ following which lower keyboard failed to play, and where some time after June 1, 1973, seller's employees attempted to return original organ, but were prevented from doing so by buyers who insisted on return of purchase price of organ: (1) evidence was sufficient to establish that defects in organ substantially impaired its value to buyers within meaning of UCC § 2-608(1), thus justifying revocation of acceptance and recovery of purchase price; (2) under all circumstances, buyers notified seller within reasonable time after learning of defects in organ that they intended to revoke their acceptance and ask for refund of purchase price. *Schumaker v. Ivers*, 90 S.D. 75, 238 N.W.2d 284 (1976).

In action arising out of auction sale of mare described in sales catalog as "barren," but which subsequently "slipped" a dead foal, buyer who effectively revoked sale had right under UCC §§ 2-601 and 2-608 to reject mare after acceptance and burden under UCC § 2-607 upon buyer to show breach did not apply. Since acceptance was revoked, burden was on seller to show mare's conformity with catalog description but seller did not meet that burden where he failed to prove that mare was either barren or that, pursuant to usage of trade under UCC § 1-205, mare pronounced in foal and later found empty without evidence of abortion could be described as barren. *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976).

Language contained in contract between buyer and seller of accounting machine that seller's "obligation if the equipment does not meet these warranties is limited solely to correcting the defect or

failure, without charge," did not apply to implied warranty of fitness for particular purpose; but even if it did, buyer's remedy of revocation was saved, since nothing short of effective right of revocation would satisfy essential purpose of implied warranty of fitness for particular purpose where particular accounting machine delivered and installed by seller did not, and could not, solve buyer's problem of getting accurate payroll out on time, which was purpose for which it was purchased. *NCR v. Adell Indus., Inc.*, 57 Mich. App. 413, 225 N.W.2d 785 (1975).

Under UCC § 2-608, buyer was entitled to revoke his acceptance of new automobile following fire under dashboard, where fire substantially impaired value of vehicle, defect causing fire was virtually impossible to discover before acceptance of vehicle, revocation within six weeks of fire was reasonable time within meaning of UCC § 2-608(2), and no substantial change in condition of vehicle occurred between date of fire and date of revocation. *Henry v. Don Wood Volkswagen, Inc.*, 526 S.W.2d 483 (Tenn. Ct. App. 1974).

Under UCC § 2-608, buyer of cattle justifiably revoked acceptance of 398 steers when it was determined that sellers were unable to deliver total of approximately 600 steers in accordance with their obligation under sales contract. *Johnsrud v. Lind*, 219 N.W.2d 181 (N.D. 1974).

In action by seller to recover purchase price of carpeting there was sufficient evidence to support trial court judgment in favor of purchasers on their counterclaim alleging breach of warranty of merchantability and seeking revocation of acceptance of carpeting pursuant to UCC § 2-608 where, after carpeting was installed in purchaser's home, seams in carpeting split and, upon examination, carpeting was found to be wet, notwithstanding seller's contention that moisture was seeping up into carpeting from concrete slab on which it was installed. *Federated Dep't Stores, Inc. v. Planes*, 305 So. 2d 248 (Fla. App. 1974).

The test of substantial impairment is not determined by a dollar percentage appraisal but by the effect of the defect upon the intended user of the goods. Hence heating and lighting equipment

used in a car wash business in a northern state is such that its absence substantially impairs the contract for the sale of equipment to run such an enterprise. *Campbell v. Pollack*, 101 R.I. 223, 221 A.2d 615 (1966).

13. —Substantial impairment not found.

In action for purchase price of new automobile, where (1) buyer's acts in signing all necessary papers and taking delivery of car were so inconsistent with seller's ownership as to constitute acceptance under UCC § 2-606(1)(c), and (2) buyer had no right to revoke her acceptance under UCC § 2-608(1)(a), since she had accepted car without knowledge of any nonconformity, court held that seller's proof of sale and delivery of car at agreed price, together with buyer's admission that she took car, executed paper work connected with its sale, and then refused to pay purchase price, made out case that entitled seller to recover purchase price (stating that fact that fan belt broke two days after car's sale did not show such nonconformity as would allow buyer to revoke acceptance under UCC § 2-608(1)(b)). *American Imports, Inc. v. G.E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E.2d 798 (1978).

Buyer's extensive use of crawler-tractor for 13 months after its purchase, absent proof that such use was not normally productive, negated buyer's attempt to show that tractor had nonconformity, consisting of an allegedly excessive oil consumption, that substantially impaired its value within meaning of UCC § 2-608(1). *Allis-Chalmers Corp. v. Sygitowicz*, 18 Wash. App. 658, 571 P.2d 224 (1977).

In action by purchaser of motor home against seller to enforce written revocation of acceptance pursuant to UCC § 2-608, nonconformity of vehicle at time of surrender approximately one year after delivery did not substantially impair its value to purchaser and did not justify his action in attempting to revoke his acceptance where, inter alia, despite evidence of a large number of defects and repairs, there was no evidence that repairs were inadequate or unsatisfactory, none of defects discovered earlier remained when acceptance was revoked, vehicle was in

immaculate condition and for all practical purposes only repair needed was quite minor, and where there was no evidence that purchaser missed business trips or would do so in future because of lingering defects which seller was unwilling or unable to repair. *McGilbray v. Scholfield Winnebago, Inc.*, 221 Kan. 605, 561 P.2d 832 (1977).

Where buyer of truck claimed that vintage of truck affected working agreement buyer had with employer, but where buyer's employability was not impaired as employer hired buyer as a trucking contractor after inspecting truck, buyer failed to prove that difference in age of truck substantially impaired its value to him within contemplation of UCC § 2-608(1). *Bergenstock v. Lemay's G.M.C., Inc.*, 118 R.I. 75, 372 A.2d 69 (1977).

Fact that immediately following acceptance by purchaser new automobile began emitting smoke and making a thumping noise-defects speedily remedied by seller's mechanic-did not constitute substantial impairment in value of vehicle sufficient to support a revocation of acceptance. *Rozmus v. Thompson's Lincoln-Mercury Co.*, 209 Pa. Super. 120, 224 A.2d 782 (1966).

14. Reasonable assumption that defect will be cured.

In action based upon automobile dealer's failure to accept purchaser's notice of revocation of acceptance and tender of automobile back to dealer, jury verdict in purchaser's favor was not against weight of evidence in light of purchaser's previous attempt at revocation, total failure of dealer to notify plaintiff of damage to automobile which had been repaired by dealer prior to sale of car, and dealer's constant representation that any defects in car would be rectified. *Luther v. Bud-Jack Corp.*, 72 Misc. 2d 924 (1972).

In action by buyer of truck against seller and manufacturer for breach of warranty, directed verdict for defendants was error, since factual issue was established as to whether defendants' actions and repeated attempts to make repairs induced buyer to retain truck or prevented him from seeking independent advice from mechanic of his own choice to determine cause of truck's mechanical failure.

Gramling v. Baltz, 253 Ark. 352, 485 S.W.2d 183 (1972).

15. Discovery of nonconformity.

Applying UCC rules to a 2 party copier lease agreement, lessee's acceptance of copier was reasonably induced by the difficulty of the discovery of defects before acceptance and by the lessor's assurances. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Buyer's acceptance of defective automobile was reasonably induced by difficulty of discovery of defects before acceptance and by the seller's assurances. *Rester v. Morrow*, 491 So. 2d 204 (Miss. 1986).

In action for breach of implied warranties of merchantability and fitness for particular purpose of trailer that was dangerously unroadworthy, (1) trailer's condition demonstrated that implied warranties under UCC § 2-314(1) and § 2-315 were breached, (2) buyer accepted trailer by offering to pay balance of contract price on assumption that trailer could be repaired, (3) under UCC § 2-608(1)(a), buyer was entitled to revoke acceptance on discovering structural defects in trailer's welding and design that he could not have known about without aid of an expert, (4) buyer's revocation of acceptance was timely under UCC § 2-608(2), and (5) under UCC § 2-711(1), buyer was not required to prove that damages were inadequate remedy before obtaining right to rescind contract. *McCormick v. Ornstein*, 119 Ariz. 352, 580 P.2d 1206 (Ct. App. 1978).

Where a ring did not live up to an express warranty that it would appraise for \$30,000, the buyer had a right to revoke her acceptance of the ring under Code §§ 2-711(1) and 2-608(1). However, a perhaps more accurate characterization of the facts in this case involved the right given to all buyers under Code § 2-513(1) to inspect goods before purchase. Inspection in a case involving valuable gems entails an appraisal by an expert. Therefore the court concluded that the sale in this case was made subject to the right of the buyer to have the ring appraised and that if the ring did not live up to expectation she had the right to revoke her acceptance under Code § 2-608(1)(b). *Lawner v. Engelbach*, 433 Pa. 311, 249 A.2d 295 (1969).

A contract providing that all claims for defective goods shall be deemed waived unless presented within 8 days after receipt is manifestly unreasonable and will not be enforced where the defects are latent and could not be discovered until many months after receipt of the merchandise. *Q. Vandenberg & Sons v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964).

16. Assurances by seller.

Applying UCC rules to a 2 party copier lease agreement, lessee's acceptance of copier was reasonably induced by the difficulty of the discovery of defects before acceptance and by the lessor's assurances. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

Buyer's acceptance of defective automobile was reasonably induced by difficulty of discovery of defects before acceptance and by the seller's assurances. *Rester v. Morrow*, 491 So. 2d 204 (Miss. 1986).

Buyer's exercise of ownership over farm equipment was inconsistent with alleged revocation of acceptance, despite assurances of salesman that any nonconformity would be cured. *Ingle v. Marked Tree Equip. Co.*, 244 Ark. 1166, 428 S.W.2d 286 (1968).

Where seller assured buyer that all equipment located within four walls of leased building and used in operation of car wash business was included in sale, buyer who subsequently discovered that landlord was claiming title to boiler, blowers, and light fixtures was entitled to revoke his acceptance. *Campbell v. Pollack*, 101 R.I. 223, 221 A.2d 615 (1966).

17.—Fraud.

Defendant's advertisement that the car he sold to plaintiff was in "very good condition" and his statements at the time of sale that the car had not been in a collision, when in fact the car had previously been "totaled" in an accident and then rebuilt by defendant at his body and fender shop, and that he was selling the car for a friend who had left the country in order to divert plaintiff's suspicion concerning possible trouble with the car, constitute express warranties which may be enforced against both merchants and nonmerchants (Uniform Commercial Code, § 2-313) and which may exist, de-

spite the absence of the words "guarantee or warranty", as long as there is an affirmation of fact which is made a part of the basis of the bargain; in addition, defendant's active concealment and failure to disclose the fact that the car had been in an accident constitute fraud especially since defendant used his skill to restore the exterior of the car to lull to rest any suspicion as to the existence of the facts concealed; accordingly, since plaintiff properly revoked his acceptance (Uniform Commercial Code, § 2-608) one month after purchase, having first tried on his own to have the car repaired, he is entitled to the cost of the car less the amount realized from the subsequent sale. *McGregor v. Dimou*, 101 Misc. 2d 756 (1979).

Revocation of acceptance was timely where buyer of used car relied on seller's fraudulent representations that vehicle had not been used for racing and did not contain racing equipment, and, upon discovery of nonconformities, buyer was persuaded not to rescind by seller's unkept promises to cure defects and replace engine; fraud prevented seller from relying on written warranty and parol evidence rule was not applicable. *Ed Fine Oldsmobile, Inc. v. Knisley*, 319 A.2d 33 (Del. Super. 1974).

The court cited UCC § 2-608 as analogous authority in reaching the conclusion that the buyer of a business could rescind the purchase where it had been induced by fraud and earlier rescission was delayed by the seller's assertions that the business would improve with the summer season, and that the right to rescind was not lost because two substantial payments had been made on the purchase price with knowledge of the falsity of the misrepresentations. *Parker v. Johnston*, 244 Ark. 355, 426 S.W.2d 155 (1968).

Code § 2-608 recognizes buyer's right to revoke his acceptance of vending machine business despite continued monthly payments, where seller's pre-sale representation as to value and net monthly income were false, were material, and were relied upon by buyer. *Parker v. Johnston*, 244 Ark. 355, 426 S.W.2d 155 (1968).

Seller's false representation that used airplane had passed a 100-hour inspection

by a licensed mechanic and was airworthy was a material one, and where buyer's acceptance of the plane was in reliance upon such misrepresentation he was entitled to rescind or cancel the contract. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

The purchasers of a race horse misrepresented to them by the seller have the same right to rescission as though they had rejected the goods in the first place provided their revocation of acceptance occurs within a reasonable time. *Grandi v. LeSage*, 74 N.M. 799, 399 P.2d 285 (1965).

18. —Assurance of repair.

In action by buyer of new Lincoln Continental automobile against seller in which buyer alleged seller's breach of warranty and buyer's justifiable revocation of acceptance of vehicle, (1) where buyer, although he did not revoke acceptance until 14 months after sale, was in almost constant touch with seller concerning vehicle's condition and was relying on seller's continued assurances that vehicle would be satisfactorily repaired; (2) where buyer's unequivocal notification to seller that buyer was revoking acceptance of vehicle occurred only when it became apparent to buyer that repeated attempts at adjustment had failed; and (3) where circumstances of case involved almost continuous series of negotiations and repairs, buyer's delay in giving notice of revocation of acceptance did not prejudice seller and was not unreasonable under UCC § 2-608(2). Although seller had right under UCC § 2-508 to attempt to cure vehicle's defects, this right did not last for indefinite period. Furthermore, since continued use of vehicle was inevitable while seller was attempting to repair vehicle's defects as they became apparent, such use did not defeat buyer's revocation of acceptance. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

Seller of machinery was entitled to finding as to whether buyer accepted machinery, thus precluding rescission of contract by buyer and recovery of money paid on account, where buyer claimed that it retained and used machinery in its business only upon seller's assurance that seller would correct any problems in connection with machines, but where, on other hand,

seller claimed that buyer accepted machines unconditionally. *Lenkay Sani Prods. Corp. v. Benitez*, 47 A.D.2d 524 (2d Dep't 1975).

A purchaser of van trailers who proposes to use them to haul loads of soft drinks of stated size and weight, who purchases in reliance on the sellers assurance that they are suitable for this purpose, who thereafter on discovery that because of the defects due to light weight construction the vans sag in the middle to the extent that it is necessary to use a fork lift to open and close the doors, who immediately notifies the seller and is given assurance that the defects will be remedied, is not necessarily precluded from subsequently rejecting the vans because of continued use where, after a series of conversations in which he receives assurance that they will be fixed he eventually turns them in on the understanding that he will resume instalment payments at such time as they are returned to him in a usable condition. *Trailmobile Div. of Pullman, Inc. v. Jones*, 118 Ga. App. 472, 164 S.E.2d 346 (1968).

While revocation of acceptance must be made within a reasonable time, it is not required that it be made within the same period in which notice of breach must be given, or within the time for the discovery of non-conformity after acceptance, or within the time for rejection of tender. This is particularly so when notice of breach was timely given and delay was caused by four successive attempts of the seller to remedy the defect, the seller assuring the buyer each time that the defect had been remedied. *Braginetz v. Foreign Motor Sales, Inc.*, 76 Dauph. Co. 1 (Pa. 1961).

19. Notice of revocation.

Where fuse manufacturers established that they had manufactured and delivered to prime government contractor fuses contracted for, that fuses as tendered had been accepted, and that contractor had refused to pay balances due thereon, and where there was no effective rejection of goods by contractor under UCC § 2-606(1)(b), nor any notification of breach in warranty of goods under § 2-607(3)(a), nor any effective revocation of acceptance under § 2-608(2), any defense or any

"remedy"—that contractor might have had under UCC for nonacceptance of goods or for breach of their warranty or revocation of acceptance was predicated, as condition precedent, upon notification to sellers. However, letter from contractor to fuse manufacturers stating that contractor's cash flow had been severely interrupted due in part to quality problem on part of fuse manufacturers could not be construed to suggest either rejection of acceptance of fuses delivered nor notification of breach of warranty, nor revocation of conformity, much less to constitute identification of particular contract, sale or transaction concerning which complaint was therein attempted by contractor. *Lynx, Inc. v. Ordnance Prods., Inc.*, 273 Md. 1, 327 A.2d 502 (1974).

Notice that a party intends to consider a contract at an end or terminated amounts to a revocation of acceptance, and preserves to the buyer the remedies afforded by § 2-711. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

20. —Sufficient.

In action by buyer of used car to recover purchase price from seller for seller's breach of express and implied warranties, where engine in vehicle at time of sale and also replacement engine subsequently installed were both defective, so as to cause breach of seller's express engine warranty and also breach of vehicle's implied warranty of merchantability under UCC § 2-314(1) and (2)(c), remedy of recovery of purchase price was available to buyer because (1) language in seller's express warranty did not expressly limit buyer's remedy to repair and replacement of defective parts; (2) even if seller's express warranty could be construed as limiting buyer's remedy to repair and replacement of defective parts, such exclusive remedy failed in its essential purpose within meaning of UCC § 2-719(2); and (3) buyer's remedies were not limited by any exclusion or modification by seller, under UCC § 2-316(2), of vehicle's implied warranty of merchantability. Furthermore, since buyer under UCC § 2-608(2) had sufficiently revoked her acceptance of vehicle, she was entitled to recover its purchase price. *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 2d 99 (1977).

Evidence, *inter alia*, that mobile home was delivered and installed on June 7, that buyer had to wait three weeks in order to inspect interior because no keys were delivered with mobile home, that buyer notified seller by letter dated July 3 that he demanded immediate replacement of mobile home, or refund of purchase price where he paid prior to delivery, was sufficient to support conclusion that buyer revoked his acceptance; fact that buyer stayed in unit after revoking did not vitiate any of his rights; seller did not have right to repair and cure defects in accord with UCC § 2-508, notwithstanding buyer's notification of revocation of acceptance, where seller was unable to say how long it would have taken him to make all repairs necessary to get mobile home back into good condition. *Davis v. Colonial Mobile Homes*, 28 N.C. App. 13, 220 S.E.2d 802 (1975), cert. denied, 289 N.C. 613, 223 S.E.2d 391 (1976).

Where purchaser of mobile home notified seller of defects approximately two weeks after delivery, where on numerous occasions seller attempted to cure defects but failed to do so, where purchaser refused to allow seller to perform any further work, and purchaser sued for return of purchase price, conduct was sufficient notice of revocation of acceptance under UCC § 2-608(2). *Fenton v. Contemporary Dev. Co.*, 12 Wash. App. 345, 529 P.2d 883 (1974), review denied, 85 Wash. 2d 1007 (1975).

Constant complaints from September to December with cessation of payment would seem to constitute sufficient notice of revocation of acceptance of mobile home into which buyer had moved. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972).

21. —Insufficient.

The evidence was insufficient to show that purchasers of a used vehicle properly revoked acceptance of the vehicle in a manner sufficient to trigger damage entitlement pursuant to § 75-2-711, where the purchasers turned the vehicle over to the bank to which their financing documents were assigned, rather than returning the vehicle to the dealer from which they purchased it, the bank was not a party to the litigation, and the purchasers

neither pled nor proved an agency relationship between the bank and the dealer; the purchasers' actions in declining to make the necessary payments and delivering the vehicle to the bank for sale with application of the sales proceeds to their benefit were contrary to any justifiable revocation of acceptance. Additionally, the purchasers' action in turning the vehicle over to the bank, and its subsequent sale, did not constitute notice of revocation, which is an essential element for recovery under § 75-2-711, since the record did not reflect that the dealer was aware of this transaction. Moreover, this action was inconsistent with the seller's ownership, and therefore could not constitute notice of revocation; such action confirmed acceptance under § 75-2-606(1)(c). *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725 (Miss. 1991).

Lawnmower manufacturer did not effectively revoke acceptance of grass catcher bags under § 75-2-608, where it indicated to manufacturer of bags that it would accept future shipments and continued to attempt to sell bags, and where, under circumstances of case, defects in bags were never sufficiently brought to bag manufacturer's attention. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205 (S.D. Miss. 1986).

While notice of revocation of acceptance required by UCC § 2-608(2) need not be in any particular form and may be implied from conduct, such notice must inform seller that buyer does not wish to keep the goods. Thus, buyer of crawler-tractor did not effectively revoke acceptance of tractor simply by notifying seller shortly after purchase date about tractor's excessive oil consumption, since such notice did not inform seller that buyer did not wish to keep tractor. *Allis-Chalmers Corp. v. Sygitowicz*, 18 Wash. App. 658, 571 P.2d 224 (1977).

Under Code § 2-608(2) revocation of acceptance not effective until buyer notifies seller thereof; buyer failed to establish revocation of acceptance of wig cases by letters to assignee of seller's accounts receivable asking for credit and promising return of unused cases at buyer's expense, or by non-completed telephone calls to seller with whom buyer had conversation

about other matter without speaking of revocation. *Grossman v. D'Or*, 98 Ill. App. 2d 198, 240 N.E.2d 266 (1st Dist. 1968).

22. Timeliness of notice.

Notice of revocation of acceptance of leased copier, given on August 14th, was timely, where copier had been installed on lessee's premises on May 15th and had provided acceptable service for about a month. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

In action by buyer of new type of portable sawmill against manufacturer-seller for latter's breach of express and implied warranties attaching to such sawmill, where buyer testified that he was induced into retaining sawmill by defendant's continued representations that it would repair it, and that he modified sawmill under defendant's directions, defendant could not avail itself of UCC § 2-608(2) to foreclose buyer's revocation of acceptance. *Butcher v. Garrett-Enumclaw Co.*, 20 Wash. App. 361, 581 P.2d 1352 (1978), review denied, 91 Wash. 2d 1004 (1978).

In action to recover balance of purchase price of machine which was returned to seller several months after installation, if buyer accepted goods under UCC § 2-606(1)(b) and did not revoke acceptance within reasonable time by notifying seller under UCC § 2-608(2) or reject machine under UCC § 2-602(1), seller would be entitled to recover unpaid purchase price under UCC §§ 2-607(1) and 2-709(1)(a); even if transaction was "sale on approval" under UCC § 2-326(1)(a), buyer's failure to seasonably notify seller of election to return goods was acceptance under UCC § 2-327(1)(b) and reservation of title by seller was limited in effect to reservation of security interest under UCC § 2-401(1); UCC § 2-709(2) provision allowing seller to resell goods did not require seller to make resale over objection of original buyer, but if machine were resold, net proceeds would be credited to seller. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128 (1974).

Seller of dictating machines was entitled to recover agreed price from buyer who accepted delivery under UCC § 2-607(1); seller's termination of buyer as its exclusive distributing agent could not be asserted as defense where, after buyer

learned that it was no longer distributor, it failed to take timely action to revoke acceptance under UCC § 2-608 or to give seller timely notice of election to offset damages under UCC § 2-717; nor could buyer rely on UCC § 2-609 right to demand adequate assurance of performance where buyer had already accepted goods in question. *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938 (1st Cir. Mass. 1974).

The buyer of a used airplane was not required to notify the seller of his intention to revoke his acceptance until he was reasonably certain that the nonconformity impaired the value of the plane to him, and buyer was entitled to have the plane inspected by experts in order to determine the effect of the nonconformity. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

A reasonable time for revocation of acceptance will extend ordinarily beyond the time in which notice of breach must be given. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

While revocation of acceptance must be made within a reasonable time, it is not required that it be made within the same period in which notice of breach must be given, or within the time for the discovery of non-conformity after acceptance, or within the time for rejection of tender. This is particularly so when notice of breach was timely given and delay was caused by four successive attempts of the seller to remedy the defect, the seller assuring the buyer each time that the defect had been remedied. *Braginetz v. Foreign Motor Sales, Inc.*, 76 Dauph. Co. 1 (Pa. 1961).

A rescission based on breach of warranty must be made within a reasonable time and cannot be made if the buyer exercises dominion over the goods or permits the goods to be altered or changed while in his exclusive possession. *F.W. Lang Co. v. Fleet*, 193 Pa. Super. 365, 165 A.2d 258 (1960).

23. —Substantial change of condition.

Buyer of industrial machine was not entitled to revoke his acceptance under UCC § 2-608, notwithstanding there was breach of warranty, where there was not sufficient showing of damage to warrant conclusion that defects complained of sub-

stantially impaired value of machine to buyer, where buyer's use of machine and its depreciation over period of five and one-half years out of a total of seven to ten years life expectancy clearly constituted substantial change in condition of goods, and where although only one and one-half years elapsed by time buyer commenced suit, thus giving notice of revocation, during four-year period that elapsed thereafter, buyer's conduct throughout indicated clear intent to keep machine in production and reap all benefits that would normally attach to ownership. *Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364 (E.D. Mich. 1977).

Where auto had been returned to seller on numerous occasions for free repairs, there was no effective revocation of acceptance under UCC § 2-608 where engine finally blew up eighteen months after date of purchase and after auto had been driven 27,000 miles. *Poole v. Marion Buick Co.*, 14 N.C. App. 721, 189 S.E.2d 650 (1972).

24. —Agreement of parties.

Mere fact that because of seller's action the passing of title to stud horse was accelerated by some six months did not affect timing of obligation to inspect horse to determine its fitness for breeding purposes, or decision to accept or reject the horse since, pursuant to agreement, it was only in the two-month period prior to stated date for passing of title and after end of racing season that seller was to have horse tested to determine his fitness for breeding purposes, actual inspection took place during such time and horse sustained no serious bodily injury during last months of racing; inspection and rejection in month before title would have passed absent acceleration was timely. *White Devon Farm v. Stahl*, 88 Misc. 2d 961 (1976).

25. —Question of law or fact.

Whether acceptance was revoked within reasonable time under UCC § 2-608(2) is question of fact to be determined by circumstances of each case. *Heller v. Sullivan*, 57 Ill. App. 3d 190, 372 N.E.2d 1036 (1st Dist. 1978).

Fact that buyers stayed in and used mobile home during pendency of lawsuit

for cancellation of contract, return of purchase price and incidental and consequential damages could not be, as matter of law, considered waiver of buyers' right to revoke prior acceptance of mobile home under UCC § 2-608; whether there was proper revocation of acceptance due to breach of warranty was question for jury. *Mobile Home Sales Mgt. Inc. v. Brown*, 115 Ariz. 11, 562 P.2d 1378 (Ct. App. 1977).

Trial court properly submitted to jury issue of whether buyer revoked acceptance of cattle herd within reasonable time under UCC §§ 1-204 and 2-608 and buyer failed to persuade jury that his revocation occurred within reasonable time, notwithstanding cattle were nonconforming, value of herd was substantially impaired and buyer gave notice of nonconformity 17 days after delivery, where, prior to notice of revocation given 15 months later after failure of adjustment negotiations, herd was underfed, herd suffered weight and death loss, and introduction of bulls into herd caused pretermisison of registration. *Sylvester v. Watkins*, 538 S.W.2d 827 (Tex. Civ. App. 1976), *ref. n.re.* (Nov. 10, 1976).

Whether goods were substantially impaired by nonconformity under UCC § 2-608(1) and whether buyer's revocation of acceptance under UCC § 2-608(2) was given within reasonable time are questions of fact for jury. Under UCC § 1-204(2), what is reasonable time for taking any action under the code depends on nature, purpose, and circumstances of such action. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

Under subsection (2) of this section, it is a question of fact for the jury if a delay by a purchaser of six months' time in giving the seller notice of the defective condition of a horse and making demand for a refund of the purchase price is or is not made within a reasonable time. *Schneider v. Person*, 34 Pa. D. & C.2d 10 (1964).

Whether goods are non-conforming and whether such a non-conformity exists as to substantially impair the value of the goods to the buyer are questions of fact to be determined at the trial and should not be determined by the court on the plead-

ings. *Braginetz v. Foreign Motor Sales, Inc.*, 76 Dauph. Co. 1 (Pa. 1961).

26. —Reasonable.

Where new car with paint chipped off on front end and improper difference in color between paint on front end and paint on rear end was delivered to buyer in darkness, buyer on observing such defects on the next day demanded either new car or return of purchase price from dealer, dealer in compliance with manufacturer's firm policy refused buyer's demand and attempted to repair paint defects, and car after being stripped down to bare metal and repainted three times still had paint defects that marred its appearance and value for buyer, (1) buyer justifiably revoked acceptance of car under UCC § 2-608(1)(b), (2) such revocation of acceptance was timely under UCC § 2-608(2), and (3) buyer under UCC § 2-711(1) was entitled to rescind contract of sale and be returned purchase price of car, less specified offset for buyer's use of car (stating that buyer is no longer barred from remedy of rescission because of his continued use of substantially impaired goods which are a necessity to him). *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, 382 A.2d 954 (Ch. Div. 1978).

Where (1) buyer purchased boat under contract of sale which expressly provided that sale would be void if boat did not perform to buyer's satisfaction, (2) boat never performed to buyer's satisfaction, although buyer tested it on weekends for eight days during month following sale, (3) seller refused to accept return of boat at end of such one-month period and repeatedly attempted to correct boat's problems, (4) seller three months later again refused to accept return of boat, and (5) trial court in seller's action for balance due entered judgment in favor of buyer, evidence supported two legal theories, either of which would sustain trial court's judgment. Under first theory, buyer never accepted boat within meaning of UCC § 2-601(a), § 2-602(1), and § 2-606(1), and his rejection of it one month after sale was effective under UCC § 2-602(1). Under second legal theory, buyer did accept boat but later validly revoked his acceptance of it under UCC § 2-608(1)(b), since his delay of over three months in revoking

acceptance was reasonable under UCC § 2-608(2) in view of seller's repeated assurances that boat's problems, which were major, would be corrected. *Don's Marine, Inc. v. Haldeman*, 557 S.W.2d 826 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Mar. 8, 1978).

Buyer of new car was entitled to revoke his acceptance pursuant to UCC § 2-608 where, within three weeks after its purchase, car was discovered to be totally inoperable due to defective transmission and where buyer immediately notified seller and manufacturer upon learning of defect. *Asciolla v. Manter Oldsmobile-Pontiac, Inc.*, 117 N.H. 85, 370 A.2d 270 (1977).

In action arising out of auction sale of mare described in sales catalog as "barren," but which subsequently "slipped" a dead foal, buyer made effective revocation within reasonable time under UCC §§ 1-204 and 2-608 where buyer wrote letters five days after mare "slipped" to seller and to sales director of organization which conducted sale indicating that the sale should be "null and void" on basis of misrepresentation of mare in sales catalog. *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976).

Purchaser of mobile home who advised seller of numerous defects upon delivery of home, but took possession after seller advised buyer that downpayment would be forfeited and assured buyer that repairs would be made to home, was entitled to recover damages against seller for defects on basis of either: (1) theory of rejection of goods under UCC § 2-601, since evidence established that home did not comply with contract terms and seller had no right to threaten to forfeit downpayment; or (2) even if home was accepted, buyer was entitled to revoke acceptance under UCC § 2-608 after using home and discovering further numerous defects. Under either theory, use of mobile home as residence for over year after delivery was not sufficient to render rejection or revocation of acceptance ineffective since use of goods was direct result of oppressive conduct of seller in threatening to forfeit downpayment and further assurances of seller that defects would be repaired. *Jones v. Abriani*, 169 Ind. App. 556, 350 N.E.2d 635 (1976).

In action by buyer of new Lincoln Continental automobile against seller in which buyer alleged seller's breach of warranty and buyer's justifiable revocation of acceptance of vehicle, (1) where buyer, although he did not revoke acceptance until 14 months after sale, was in almost constant touch with seller concerning vehicle's condition and was relying on seller's continued assurances that vehicle would be satisfactorily repaired; (2) where buyer's unequivocal notification to seller that buyer was revoking acceptance of vehicle occurred only when it became apparent to buyer that repeated attempts at adjustment had failed; and (3) where circumstances of case involved almost continuous series of negotiations and repairs, buyer's delay in giving notice of revocation of acceptance did not prejudice seller and was not unreasonable under UCC § 2-608(2). Although seller had right under UCC § 2-508 to attempt to cure vehicle's defects, this right did not last for indefinite period. Furthermore, since continued use of vehicle was inevitable while seller was attempting to repair vehicle's defects as they became apparent, such use did not defeat buyer's revocation of acceptance. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

Where organ was delivered to buyers' home on December 7, 1972, shortly thereafter two bass pedals and two keys on keyboard failed to play, buyer called seller on December 27, 1972, but nothing was done until March 13, 1973, when seller repaired organ, where, following repairs, one key in every octave in both keyboards failed to play, buyer called seller on May 11, 1973, and told seller that she was still having difficulty with organ and that she wanted refund of purchase price, where buyers agreed to permit seller to bring out replacement organ on condition that if it did not work seller would take it back and refund purchase price of first organ, rhythm system on replacement organ began to malfunction, seller was unable to remedy problem and, during last service call serviceman removed rhythm system component from replacement organ following which lower keyboard failed to play, and where some time after June 1, 1973, seller's employees attempted to re-

turn original organ, but were prevented from doing so by buyers who insisted on return of purchase price of organ: (1) evidence was sufficient to establish that defects in organ substantially impaired its value to buyers within meaning of UCC § 2-608(1), thus justifying revocation of acceptance and recovery of purchase price; (2) under all circumstances, buyers notified seller within reasonable time after learning of defects in organ that they intended to revoke their acceptance and ask for refund of purchase price. *Schumaker v. Ivers*, 90 S.D. 75, 238 N.W.2d 284 (1976).

Evidence supported finding that emergency electric power plant was substantially valueless to purchaser and that purchaser was entitled to revoke its acceptance under UCC § 2-608, where it was stipulated that power plant did not produce amount of power specified by contract, where seller himself warranted full unit for performance and did not take any exception to any of specifications as written, and where output of power plant was 65 percent of that called for in specifications and was insufficient to run equipment; furthermore, purchaser acted within reasonable time in revoking its acceptance of contract where seller knew of defects in power plant shortly after delivery, where seller attempted to repair it during 1968 and 1969, and where seller was present at test in June, 1970, when power plant failed to deliver specified power, after which purchaser revoked its acceptance. *Regents of Univ. v. Pacific Pump & Supply, Inc.*, 35 Colo. App. 36, 528 P.2d 941 (1974).

Under UCC § 2-608, buyer was entitled to revoke his acceptance of new automobile following fire under dashboard, where fire substantially impaired value of vehicle, defect causing fire was virtually impossible to discover before acceptance of vehicle, revocation within six weeks of fire was reasonable time within meaning of UCC § 2-608(2), and no substantial change in condition of vehicle occurred between date of fire and date of revocation. *Henry v. Don Wood Volkswagen, Inc.*, 526 S.W.2d 483 (Tenn. Ct. App. 1974).

In action between purchaser of nonconforming mobile home and assignee of se-

curity agreement, purchaser's revocation of acceptance occurred within reasonable time under UCC §§ 2-608 and 1-204(2) where purchaser relied on dealer's promises to make corrections while retaining option of cancellation; under UCC § 2-711(1) and (3) purchaser retained security interest in price paid and was allowed to recover so much of price as had been paid. *Frontier Mobile Home Sales, Inc. v. Trigleth*, 256 Ark. 101, 505 S.W.2d 516 (1974).

Allegation that purchaser of new automobile, which was defective, returned it to dealer and demanded either refund of purchase price or new car was sufficient to support claim based on revocation of acceptance pursuant to UCC § 2-608; even though purchaser did not surrender vehicle to dealer until 11 months after date of purchase, notice of revocation of acceptance may have been made within reasonable time after discovery of grounds for revocation in accord with UCC § 2-608 where purchaser allegedly delayed taking any dispositive action pending dealer's unsuccessful attempt to remedy defects in automobile. *Galloway v. Cameron Auto, Inc.*, 97 Dauph. Co. 56 (Pa. 1974).

Where plaintiffs notified defendant of revocation of acceptance of cordwood business 3 months after execution of sales contract, delay was not unreasonable, since it was to be expected from very nature of transaction that plaintiffs might not discover immediately that quantity of dry wood was not as represented. *Melms v. Mitchell*, 266 Or. 208, 512 P.2d 1336, 65 A.L.R.3d 376 (1973).

In action to recover purchase price of new car, revocation of acceptance was justified and timely, where buyer returned car following repeated but unsuccessful attempts to have seller correct vibration and stalling problems. *Stofman v. Keenan Motors, Inc.*, 63 Pa. D. & C.2d 56 (1973).

Buyers' revocation of acceptance of automobile 9 months after sale of automobile and 7 months after filing of suit for rescission of sale contract was within "reasonable time" when balanced against obligation of automobile dealer under contract. *Moore v. Howard Pontiac-American, Inc.*, 492 S.W.2d 227 (Tenn. Ct. App. 1972).

Where buyer of used car waited 3 weeks for dealer to repair brakes and then noti-

fied 2 salesmen and credit manager of seller of revocation of acceptance, revocation was timely and reasonable, especially in view of other problems with car which resulted in buyer's actual possession of it for only 7 days during about 6 weeks of ownership, and lack of any evidence that seller ever attempted to cure defect by repairing faulty brakes. *Overland Bond & Inv. Corp. v. Howard*, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1st Dist. 1972).

Acceptance of crane delivered in July 1965 and repeatedly repaired for malfunctioning over a period of time while in use was effectively revoked by notice of revocation of acceptance and election to rescind given on June 17, 1966. *Uganski v. Little Giant Crane & Shovel, Inc.*, 35 Mich. App. 88, 192 N.W.2d 580 (1971).

Where repeated attempted (30 returns for repairs within year of purchase) adjustment of auto's excessive oil use, skipping and misfiring failed, buyer revoked his acceptance of auto within "reasonable time" when revocation occurred within year of purchase. *Tiger Motor Co. v. McMurtry*, 284 Ala. 283, 224 So. 2d 638 (1969).

A delay of less than three weeks between the time that the buyer discovered the unairworthiness of the used airplane he had purchased and the date on which he gave notice to the seller of his intention to rescind was not an unreasonable delay. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

27. —Not reasonable.

In buyer's action for seller's breach of written and oral warranties in sale of marine diesel engine, (1) where terms of sale contract were contained in seller's letter to buyer, buyer's written purchase order, and manufacturer's written warranty which accompanied sale of engine; (2) where seller also orally warranted to buyer that engine would deliver specified standard of performance, that if it did not do so it could be removed from buyer's boat at seller's expense, and that it would be delivered in time to meet requirements of builder of buyer's boat; (3) where such oral warranties were breached and buyer, within six-months period provided in written engine warranty for manufacturer's repair or replacement of defective parts,

refused to allow manufacturer's mechanic to inspect defective engine; (4) where buyer, more than six months after date engine was put into operation, notified seller that he had removed engine from his boat, tendered engine back to seller, and demanded return of purchase price; and (5) where such tender and demand were refused by seller, (1) trial court properly found that all terms of sale contract had not been reduced to writing; (2) admission in evidence of oral warranties as part of sale contract did not violate parol evidence rule contained in UCC § 2-202; (3) such oral warranties did not constitute "sale or return" provision in contract under UCC § 2-326(1)(b), but were analogous to "sale on approval" provision under UCC § 2-326(1)(a) and thus were not required by UCC § 2-326(4) to be in writing; (4) buyer's failure to allow seller to exercise right under UCC § 2-508(1) to inspect and repair engine negated warranty provisions of sale contract; (5) buyer accepted engine under UCC § 2-327(1)(b) by not seasonably notifying seller of buyer's election to return engine; and (6) buyer's delay of nearly six months in informing seller of buyer's intention to revoke acceptance of engine was insufficient compliance with buyer's good faith obligation under UCC § 1-203 and did not revoke such acceptance under UCC § 2-608. *Peter Pan Seafoods, Inc. v. Olympic Foundry Co.*, 17 Wash. App. 761, 565 P.2d 819 (1977), review denied, 90 Wash. 2d 1015 (1978).

Retention of pleasure fishing boat by buyer for 32 months before attempting revocation constituted unreasonable delay after discovery of defects and, therefore, revocation of acceptance under UCC § 2-608 was not available remedy; although seller's assurances and attempted repairs justified some of buyer's delay, delay of 32 months was not reasonable particularly where buyer retained possession of boat after his attempted revocation and continued to use it for fishing trips right up to time of trial. Furthermore, continued use of boat for fishing trips did not indicate that buyer retained boat under UCC § 2-711(3) and § 9-207(1) and (4) for purpose of protecting his security interest pending reimbursement, but

rather such use appeared to be “act inconsistent with the seller’s ownership” which, under UCC § 2-606(1)(c), constituted new acceptance. *Wadsworth Plumbing & Heating Co. v. Tollycraft Corp.*, 277 Or. 433, 560 P.2d 1080 (1977).

Buyer’s attempted revocation under UCC § 2-608 of contract for purchase of electrical hearing control system was neither timely nor supported by facts where buyer failed to prove that consoles, as delivered in June and July, 1969, respectively, were defective in any respect, where buyer did not attempt to revoke its acceptance until February, 1970, although consoles were defective from date of their delivery and buyer had ample opportunity to test them in production as early as July, 1969, when they were installed, and where installation of additional equipment in one console in January, 1970, totally altered basic functioning capability of that console. *Republic Corp. v. Proceadyne Corp.*, 401 F. Supp. 1061 (S.D.N.Y. 1975).

Where conduct of buyer prior to trial did not constitute notice of revocation of acceptance of cot covers for exercising device and notice given to seller in buyer’s post-trial brief was not within reasonable time,

buyer was precluded from recovery of purchase price under Missouri UCC. *Foam-Tex Indus., Inc. v. Relaxaway Corp.*, 358 F. Supp. 8 (E.D. Mo. 1973).

Noting seasonal nature of toy business and somewhat faddish demand for certain toys, held that delay until mid-February in giving notice of revocation of acceptance of toys delivered prior to Christmas was unreasonable. *Hays Merchandise, Inc. v. Dewey*, 78 Wash. 2d 343, 474 P.2d 270 (1970).

28. Pleading.

Pleadings showing that food processor did not discover the alleged breach of warranty until more than six months after delivery, and did not notify the seller of frozen corn until more than four months later, disclosed on their face what appears prima facie to be an unreasonable delay by the fruit processor in discovering a breach of warranty in delivered goods, and a delay in notifying the seller of the breach, and the claim of the fruit processor was subject to demurrer unless it simultaneously therewith explained and justified the delay. *General Foods Corp. v. Bittering Co.*, 31 Pa. D. & C.2d 282 (1963).

RESEARCH REFERENCES

ALR. Time for revocation of acceptance of goods under U.C.C. § 2-608(2). 65 A.L.R.3d 354.

Measure and elements of buyer’s recovery upon revocation of acceptance of goods under U.C.C. § 2-608(1). 65 A.L.R.3d 388.

What constitutes “substantial impairment” entitling buyer to revoke his acceptance of goods under UCC § 2-608(1). 98 A.L.R.3d 1183; 38 A.L.R.5th 191.

Am Jur. 67A Am. Jur. 2d, Sales §§ 1166, 1192, 1210, 1226, 1235, 1236 1268.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:801-2:805 (acceptance of goods; revocation).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1431 et seq. (revocation of acceptance in whole or in part).

6 Am. Jur. Proof of Facts 2d, Buyer’s Timely Notice of Breach in Regard to Accepted Goods, §§ 5 et seq. (proof that buyer gave seller notice of defects within a reasonable time).

26 Am. Jur. Proof of Facts 2d, Sales: Implied Warranty of Merchantability, §§ 33 et seq. (proof of seller’s liability for breach of implied warranty of merchantability).

37 Am. Jur. Proof of Facts 2d 593, Acceptance of Goods.

CJS. 77 C.J.S., Sales § 192.

Law Reviews. 1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss. L. J. 141, March 1983.

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§ 75-2-609. Right to adequate assurance of performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of ground for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty (30) days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

SOURCES: Codes, 1942, § 41A:2-609; Laws, 1966, ch. 316, § 2-609, eff March 31, 1968.

Cross References — Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

What is reasonable time, see § 75-1-204.

Contract providing for acceleration of payment or performance, see § 75-1-208.

Delegation of performance; assignment of rights, see § 75-2-210.

Obligations generally of buyer and seller, see § 75-2-301.

Payment against tender of required documents, see §§ 75-2-319, 75-2-320.

Acceleration of commercial paper, see §§ 75-3-109, 75-3-304, 75-3-503.

Contract requiring payment before inspection, see § 75-2-512.

Retraction of repudiation, see § 75-2-611.

Seller's resale of goods, see § 75-2-706.

Secured transactions, see §§ 75-9-101 et seq.

JUDICIAL DECISIONS

1. In general.
2. Acceptance of delivery or payment.
3. Grounds for insecurity; reasonable.
4. —Not reasonable.
5. Demand for assurance.
6. Suspension of performance.
7. Repudiation.

1. In general.

UCC § 2-609(1) is designed to obviate necessity of one party's having to guess whether other party intends to perform when former begins to receive signals that cause him concern. *Cole v. Melvin*. 441 F. Supp. 193 (D.S.D. 1977).

In contractor's action against subcontractor for breach of contract to install flooring in building, defendant could not escape liability on ground that plaintiff's breach of prior contract with defendant constituted reasonable grounds for insecurity under UCC § 2-609 with respect to plaintiff's performance of contract in suit, since UCC Article 2 applies only to transactions in goods and contract in suit was primarily contract for performance of services with sale of goods necessary to perform such services being incidental to the service contract. Test for determining whether mixed contract for sale of goods

and services constitutes sale of goods under Uniform Commercial Code is whether contract's predominant purpose is to render services with sale of goods being incidentally involved or to sell goods with rendition of services being incidentally involved. *Ranger Constr. Co. v. Dixie Floor Co.*, 433 F. Supp. 442 (D.C.S.C. 1977).

The Ohio Uniform Commercial Code recognizes that a party to an instalment contract has the right to a continuing sense of reliance and security that the promised performance will be forthcoming when due. *Republic-Odin Appliance Corp. v. Consumers Plumbing & Heating Supply Co.*, 24 Ohio Op. 2d 226, 192 N.E.2d 132 (C.P. 1963).

2. Acceptance of delivery or payment.

Seller of dictating machines was entitled to recover agreed price from buyer who accepted delivery under UCC § 2-607(1); seller's termination of buyer as its exclusive distributing agent could not be asserted as defense where, after buyer learned that it was no longer distributor, it failed to take timely action to revoke acceptance under UCC § 2-608 or to give seller timely notice of election to offset damages under UCC § 2-717; nor could buyer rely on UCC § 2-609 right to demand adequate assurance of performance where buyer had already accepted goods in question. *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938 (1st Cir. Mass. 1974).

3. Grounds for insecurity; reasonable.

In seller's action for buyer's failure to pay for 10,000 bushels of corn delivered to buyer, where evidence showed (1) that seller had entered into four contracts for sale of corn to buyer, (2) that buyer had paid for corn delivered under first contract only after demand made by plaintiff's attorney, (3) that buyer had also refused to pay for corn delivered under second contract, and (4) that such failure to pay was result of effort by buyer to compel performance of other contracts that buyer had entered into with seller's brother and father, court held (1) that under UCC § 2-609(1), seller, in light of buyer's delay in paying for corn delivered under first contract and its failure to pay for corn delivered under second contract, was justified

in not delivering corn under third and fourth contracts, since buyer's conduct constituted reasonable grounds for insecurity on part of seller with respect to buyer's performance under the third and fourth contracts, and (2) that seller was entitled to payment in full for corn delivered under second contract, since buyer's refusal to pay therefor was not legally justified (observing that buyer's action in withholding payment to seller as leverage against seller's brother and father, with respect to their dealings with buyer, established lack of good faith on part of buyer in its dealings with seller). *Toppert v. Bunge Corp.*, 60 Ill. App. 3d 607, 377 N.E.2d 324 (3d Dist. 1978).

Purchaser of cash registers had reasonable grounds for insecurity within meaning of UCC § 2-609 where seller projected delivery of 23 units by first half of 1969 but later rescheduled delivery to January, 1970, where buyer learned in March, 1969, that work had not commenced and pilot unit would not be ready until July, 1969, where seller's own personnel were concerned about design of model and attempted to reduce buyer's order, and where prototype unit furnished buyer performed unsatisfactorily. Written demand for adequate assurance of performance was not necessary where evidence established that buyer and seller had clear understanding that buyer had suspended performance until receipt of adequate assurance of performance from seller and thus seller's failure to give adequate assurance entitled buyer to suspend its performance and cancel order pursuant to UCC § 2-610 and UCC § 2-711. *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir. Ill. 1976).

4. —Not reasonable.

Buyer of cooling systems to be incorporated into electronic countermeasure (ECM) pods for United States Air Force, after breaching contract by failing to supply seller with source-control drawings for such systems within reasonable time, could not claim that it had ample grounds under UCC § 2-609(1) for feeling insecure and for demanding adequate assurances of due performance by seller, and that it was also entitled under UCC § 2-610(b) to terminate contract for seller's alleged an-

tipicatory breach thereof, where buyer's own breach had so contributed to facts giving rise to buyer's alleged insecurity as to estop it from demanding any adequate assurances of performance. *Westinghouse Elec. Corp. v. Garrett Corp.*, 437 F. Supp. 1301 (D. Md. 1977), *aff'd*, 601 F.2d 155 (4th Cir. Md. 1979).

In action for breach by seller of contract to repurchase Blonde D'Aquitaine heifers, where contract provided that buyer would buy 16 heifers from seller, that all would be fertile for breeding, that seller would "purchase same heifers" each guaranteed "safe in calf" to purebred Blonde D'Aquitaine bulls, and that contract would be "dissolved" if buyer should resell heifers to another person before July 31, 1974, and where buyer did not resell heifers to another person before such date, but seller refused to repurchase heifers because of drastic drop in their market price, (1) seller's repurchase was not contingent on buyer's providing proof that heifers were pregnant before tender to seller; (2) buyer was not obligated to have all 16 heifers pregnant at end of period for seller's repurchase, and seller was obligated to repurchase all that had become pregnant by that time; (3) buyer's allegation that seller was guilty of anticipatory repudiation of contract was not based on reasonable grounds within meaning of UCC § 2-609(1); (4) although buyer did not make tender at place agreed on, buyer's tender in telephone call of 11 pregnant heifers sufficiently complied with UCC § 2-503(1) in view of buyer's reasonable belief that seller would not accept heifers if buyer would transport them to place agreed on; and (5) on seller's breach of repurchase agreement, buyer's measure of damages was not difference between resale price and contract price under UCC § 2-706(1)-because of buyer's failure to effect commercially reasonable sale within meaning of UCC § 2-706(1)-but was difference between contract price and market price under UCC § 2-708(1), plus incidental damages for sheltering and feeding rejected heifers. *Cole v. Melvin*, 441 F. Supp. 193 (D.S.D. 1977).

In action by seller of one million gallon water tank against buyer for repudiation of sales contract, in which buyer counter-

claimed for breach of contract, water tank constituted goods within meaning of UCC § 2-105(1) even though tank was not in existence when contract was executed. However, under sales contract which required payment 30 days after completion of tank, knowledge by seller that buyer had not completed loan negotiations was not "reasonable grounds for insecurity" within meaning of UCC § 2-609 justifying seller's demand of buyer for personal guarantee or for escrow of entire purchase price. *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. Ill. 1976).

Seller who sold lifting magnets to buyer on open account did not have right to reclaim magnets under UCC § 2-702(2), dealing with buyer's insolvency, or UCC § 2-609(4), dealing with right to adequate assurance of performance, where (1) seller produced no evidence that buyer was insolvent when it received either first or second shipment of magnets, and seller did not assert its right to reclaim within applicable ten day limitation; (2) there was no evidence that seller had reasonable grounds for insecurity with respect to buyer's performance, nor any demand for adequate assurance made in writing. *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d 53 (5th Cir. Fla. 1975).

No reasonable grounds for insecurity existed under UCC § 2-609 where cabinets for which payment had been withheld had not been installed as provided for by contract. *Ellis Mfg. Co. v. Brant*, 480 S.W.2d 301 (Tex. Civ. App. 1972).

The mere fact that payment under one contract is not made when due is not necessarily a reasonable ground for insecurity as to payment under another contract; in instant case, there was no question of defendant's financial ability to pay and plaintiff knew that defendant was withholding payment in order to cover possible losses when it replaced plywood order; even if seller had reason to suppose that buyer might also refuse to make payment for order in issue if it were shipped, cancellation of the order without a prior request for guarantee of payment was not justified. *Northwest Lumber Sales, Inc. v. Continental Forest Prods., Inc.*, 261 Or. 480, 495 P.2d 744 (1972).

5. Demand for assurance.

In buyer's suit for seller's alleged breach of contract to sell two million pounds of polyvinyl chloride plastic in regrind form for use in manufacture of records, (1) where telephone conversations between buyer and seller caused buyer to doubt that seller could deliver sufficient quantity of suitable plastic and buyer therefore gave seller revocable letter of credit instead of irrevocable letter, and (2) where seller then declared that buyer had breached contract and demanded payment of liquidated damages as provided in contract for such breach, district court's granting of summary judgment for defendant seller would be vacated and case remanded for further proceedings because (1) reasonableness of buyer's action in giving seller revocable letter of credit, allegedly to avoid paying for nonconforming goods, was question of fact that could not be resolved on summary judgment; (2) buyer may have been entitled under UCC § 2-609(1) to suspend its performance (by not furnishing seller with irrevocable letter of credit) until seller had complied with buyer's request for assurance of performance by seller; and (3) buyer may also have been entitled under UCC § 2-610(a) and (c) to suspend its performance for seller's possible anticipatory breach of such contract. *Diskmakers, Inc. v. DeWitt Equip. Corp.*, 555 F.2d 1177 (3d Cir. N.J. 1977).

Seller of corn was not entitled, pursuant to UCC § 2-609, to withhold from buyer delivery of corn due on contract for sale of corn, notwithstanding buyer had made deductions for grading and weight discrepancies, where seller was promised reimbursement for grading discounts and was given option of directing future deliveries at another elevator and where seller did not in writing demand adequate assurance of due performance from buyer. *Teeman v. Jurek*, 312 Minn. 292, 251 N.W.2d 698 (1977).

Notwithstanding sale was on credit and seller's suspicion that buyer was insolvent may have been inaccurate, seller was justified under UCC § 2-609(1) in demanding adequate assurance of due performance by buyer and thus seller's

subsequent nondelivery did not constitute breach of contract, after buyer refused to give any assurances and purported to cancel contract, where, inter alia, buyer was in arrears in payment for goods already delivered, buyer's "Fifth Avenue Showroom" was telephone answering service, buyer's factory was someone else's premises to which buyer did not have key, buyer did not lease space on premises, buyer had no employees, payroll, machinery or equipment on premises, another supplier told seller that it had been stuck with an unpaid bill by buyer, and buyer had bad reputation for performance or payment. *Turntables, Inc. v. Gestetner*, 52 A.D.2d 776 (1st Dep't 1976).

6. Suspension of performance.

In action for breach by buyer of contract to purchase bank-building equipment, where buyer contended that it had properly rejected the entire contract pursuant to UCC § 2-601(a), and seller contended that under UCC § 2-609(1), it had right to refuse to render further performance until buyer had given adequate assurance that it would honor its contractual commitments, evidence amply supported jury's findings that seller, pending appropriate assurance from buyer, had right to refuse full performance of the contract, and that this right did not constitute a breach of contract by the seller. *Financial Bldg. Consultants, Inc. v. St. Charles Mfg. Co.*, 145 Ga. App. 768, 244 S.E.2d 877 (1978).

Purchaser of cash registers had reasonable grounds for insecurity within meaning of UCC § 2-609 where seller projected delivery of 23 units by first half of 1969 but later rescheduled delivery to January, 1970, where buyer learned in March, 1969, that work had not commenced and pilot unit would not be ready until July, 1969, where seller's own personnel were concerned about design of model and attempted to reduce buyer's order, and where prototype unit furnished buyer performed unsatisfactorily. Written demand for adequate assurance of performance was not necessary where evidence established that buyer and seller had clear understanding that buyer had suspended performance until receipt of adequate assurance of performance from seller and

thus seller's failure to give adequate assurance entitled buyer to suspend its performance and cancel order pursuant to UCC § 2-610 and UCC § 2-711. *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir. Ill. 1976).

7. Repudiation.

Where in 1969 United States, through Bureau of Indian Affairs ("BIA") on behalf of Indian tribe entered into timber sale contract with lumber company and, although contract was to have been fully performed before December 31, 1969, not all timber subject to contract was taken during 1969 and written extension of contract to December 31, 1970, was executed by lumber company and tribe with approval of BIA, where additional one-year extension was requested by lumber company in December, 1970, tribe agreed to extension and signed agreement was forwarded by BIA to lumber company on or about January 28, 1971, although extension was never executed by lumber company's surety, and where in December, 1971, lumber company requested additional extension of contract to December 31, 1972, but where no logging took place under contract after September 15, 1969: (1) waiver of performance to December 31, 1970, did not operate as waiver of performance for 1971 and, under UCC § 2-609, letters from BIA to lumber company constituted sufficient notice that strict performance of contract would be required, upon receipt of which, lumber company was obligated to provide adequate assurance of performance; (2) under UCC § 2-609(4), lumber company's failure to perform or give adequate assurance of performance within reasonable time amounted to repudiation of contract. *In re Humboldt Fir, Inc.*, 426 F. Supp. 292 (N.D. Cal. 1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980).

Where seller of grain notified buyer on January 26, 1973 that seller would not deliver any grain to buyer on any of 14 outstanding contracts between parties until buyer had paid seller all monies due for

deliveries previously made, which monies buyer had retained to protect himself against actual or potential loss from seller's failure to make timely delivery of grain under certain contracts, seller was guilty within meaning of UCC § 2-610 of anticipatory repudiation of contracts with last-delivery dates occurring after January 31, 1973 by failing to deliver any grain at all after January 26, 1973 because (1) Uniform Commercial Code does not give party right to refuse performance under one contract between parties simply because other party had breached separate contract between them; (2) measures short of suspending delivery under all contracts could have preserved seller's right to payment for prior grain deliveries; (3) seller did not employ remedy available under UCC § 2-609(1) of requesting assurance of buyer's performance; (4) time was not of the essence under contracts repudiated and at time of such repudiation, there was no indication that buyer's ability to pay was impaired; and (5) seller was first party to breach any of the contracts. *National Farmers Org. v. Bartlett & Co., Grain*, 560 F.2d 1350 (8th Cir. Mo. 1977).

In action by supplier of plumbing and heating supplies against contractor for materials supplied to contractor under terms of written installment contract, contractor's failure to pay for several deliveries of supplies was breach of contract; fact that supplier brought present action with respect only to past installments did not result in reinstatement of contract where supplier had "reasonable grounds for insecurity," informed contractor that it would deliver balance of material only if payment of entire contract was guaranteed, and contractor's failure to provide adequate assurance of due performance within reasonable time after such request, and after action had been brought, was repudiation of contract, excusing supplier from further performance thereunder. *Kunian v. Development Corp. of Am.*, 165 Conn. 300, 334 A.2d 427 (1973).

RESEARCH REFERENCES

ALR. Sales: what constitutes "reasonable grounds for insecurity" justifying demand for adequate assurance of performance under UCC § 2-609. 37 A.L.R.5th 459.

Am Jur. 67 Am. Jur. 2d, Sales §§ 503, 666.

67A Am. Jur. 2d, Sales §§ 861 et seq., 882-886, 986 et seq., 1081, 1087 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:821-2:823. (Acceptance of goods; right to adequate assurance of performance).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1441 et seq. (Right to adequate assurance of performance).

3 Am. Jur. Proof of Facts 2d, Anticipatory Repudiation of Contract for Sale of Goods, §§ 6 et seq. (proof of anticipatory repudiation of sales contract); §§ 12 et seq. (proof of anticipatory repudiation by failure to give adequate assurance of performance).

CJS. 77 C.J.S., Sales § 208.

§ 75-2-610. Anticipatory repudiation.

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 or Section 2-711) [Sections 75-2-703 or 75-2-711], even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance with the provisions of this chapter on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704) [Section 75-2-704].

SOURCES: Codes, 1942, § 41A:2-610; Laws, 1966, ch. 316, § 2-610, eff March 31, 1968.

Cross References — Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

Failure to provide assurance of due performance, as repudiation, see § 75-2-609.

Retraction of repudiation, see § 75-2-611.

Effect of defective delivery under installment contract, see §§ 75-2-612, 75-2-616.

Seller's remedies for breach, see § 75-2-703.

Aggrieved seller's rights with respect to unfinished goods, see § 75-2-704.

Seller's damages for repudiation, see § 75-2-708.

Buyer's remedies for breach, see § 75-2-711.

JUDICIAL DECISIONS

1. In general.
2. Impairment of contract.
3. —Effect of retraction.
4. —Substantial impairment.
5. —Not substantial impairment.
6. Remedies.
7. —Waiting for commercially reasonable time.
8. —Action for breach.
9. —Suspension of performance.

1. In general.

UCC § 2-610(a) and § 2-713(1) should be interpreted in a consistent manner. Thus, since under UCC § 2-610(a), an aggrieved party may, for a commercially reasonable time, await performance, UCC § 2-713(1) should be interpreted to measure damages within a commercially reasonable time after learning of the repudiation. *First Nat'l Bank v. Jefferson Mtg. Co.*, 576 F.2d 479 (3d Cir. N.J. 1978).

Where lessor agreed to lease 144 television sets to lessee for period of 60 months, lessee was given option to purchase goods at expiration of such period for one dollar per set, lease agreement was repudiated by lessee before delivery of goods to lessee, and lessee defended repudiation on ground that, in violation of express provision in lease, lessor had requested lessee to execute certain forms for filing as part of lessor's financing of lease contract, court held (1) that lessor's asking for financing documents did not constitute repudiation of lease and that lessor had unequivocally sought to deliver goods, (2) that lessee was not free to refuse goods simply because of request to prepare financing forms, and (3) that under circumstances of case, lessor was not obligated to make tender of goods, since under UCC § 2-610(c), lessee's repudiation of lease had eliminated lessor's duty of further performance (reinstating trial court's judgment allowing recovery for 35 of the television sets). *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 379 N.E.2d 1166 (1978).

Repudiation within meaning of UCC § 2-610 occurs when one party declares that he will not perform under the contract or that he will perform only on conditions that go beyond the contract, as where such party declares that he will not perform unless the other party agrees to pay a higher price for the goods than that originally contracted for (holding that finding that defendant had breached or repudiated contract for sale of grain sorghum at specified price per hundred-weight was supported by the evidence). *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743, 1 A.L.R.4th 512 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Apr. 5, 1978).

Where there has been an anticipatory breach of prior agreements, UCC § 2-209

is, by its terms, inapplicable, and UCC § 2-610 becomes applicable to show what alternatives are available to the party aggrieved by an anticipatory breach. *Gorge Lumber Co. v. Brazier Lumber Co.*, 6 Wash. App. 327, 493 P.2d 782 (1972).

2. Impairment of contract.

Under Code § 2-610 repudiation of contract is not actionable unless it "substantially impairs value of contract", and test to determine if substantial value of contract has been impaired is whether "material inconvenience or injustice will result." *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. Tex. 1973).

3. —Effect of retraction.

Where contract between owner of commercial tennis courts and defendant manufacturer and seller of air structures for sale and installation of three such structures to cover owner's tennis courts by November 15, 1975, was entered into on October 7, 1975, and became unconditional obligation on part of defendant on October 28, 1975, when owner obtained financing for such purchase, admission by defendant's employees on October 29, 1975, that defendant could not complete installation on November 15, 1975, as promised, constituted anticipatory repudiation of contract by defendant under UCC § 2-610 and Comment 1, so as to justify owner's purchase of substitute equipment from different manufacturer. Moreover, defendant's failure to deliver and complete installation of air structures by November 15, 1975, constituted breach of contract sued on, so as to justify under UCC § 2-711(1) owner's cancellation of contract on November 20, 1975 (applying Pennsylvania law; also holding that letter from defendant to owner on November 17, 1975, in which defendant offered to complete installation, could not serve under UCC § 2-611(1) as retraction of defendant's earlier repudiation because letter was written two days after defendant's complete performance was due). *Tennisland, Inc. v. Precision Tennis Sys.*, 437 F. Supp. 339 (W.D. Pa. 1977).

4. —Substantial impairment.

Evidence that farmer indicated he wished to deliver soy beans during Janu-

ary as specified by his contract with buyer, but was notified delivery date had been extended into February, and that farmer was told reason for extension was buyer's inability to accept soy beans, was sufficient to support determination that buyer repudiated contract; buyer's repudiation substantially impaired value of contract to farmer under UCC § 2-610 where, although farmer had agreed to deliver 3,000 bushels of soy beans, his soy bean crop came to only 2,000 bushels leaving him 1,000 bushels short, where price of soy beans was increasing daily, and where cost to farmer of making up his 1,000 bushel shortage would have increased materially if he were forced to wait for February delivery date and, thus, pursuant to UCC § 2-703(f), farmer was authorized to cancel agreement. *Pillsbury Co. v. Ward*, 250 N.W.2d 35 (Iowa 1977).

5. —Not substantial impairment.

Although plaintiff seller requested UCC-1 forms from defendants for secondary financing, the mere asking for these statements would not constitute a repudiation of the agreements, which did not provide for such financing; regardless of how the seller desired to finance the transaction, it unequivocally sought to deliver the television sets to defendants who, therefore, were not at liberty to refuse the goods simply because requests to prepare UCC-1 secondary financing forms had been made and denied. *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 379 N.E.2d 1166 (1978).

Buyer of cooling systems to be incorporated into electronic countermeasure (ECM) pods for United States Air Force, after breaching contract by failing to supply seller with source-control drawings for such systems within reasonable time, could not claim that it had ample grounds under UCC § 2-609(1) for feeling insecure and for demanding adequate assurances of due performance by seller, and that it was also entitled under UCC § 2-610(b) to terminate contract for seller's alleged anticipatory breach thereof, where buyer's own breach had so contributed to facts giving rise to buyer's alleged insecurity as to estop it from demanding any adequate assurances of performance. *Westinghouse Elec. Corp. v. Garrett Corp.*, 437 F. Supp.

1301 (D. Md. 1977), *aff'd*, 601 F.2d 155 (4th Cir. Md. 1979).

Shipping instructions issued by buyer calling for delivery of 10,000 tons of fertilizer during first 25 working days of month, freight prepaid, to places other than buyer's plant, did not constitute anticipatory repudiation of contract under which seller agreed to sell and ship, and buyer agreed to buy and receive at its plant, 10,000 tons of fertilizer within eight-month period of time where (1) quantity requested in shipping instructions did not exceed quantity specified in contract; (2) evidence established that prepayment of freight and shipping to place other than buyer's plant were in accord with course of dealing between parties and, even without course of dealing, there was nothing in language of contract repugnant to place or manner of shipment specified in shipping instructions; (3) seller failed to demonstrate that buyer's demanding entire season's supply in one month was commercially unreasonable and not made in good faith as required by UCC § 2-311(1). *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. Ill. 1974).

6. Remedies.

Where seller of grain notified buyer on January 26, 1973 that seller would not deliver any grain to buyer on any of 14 outstanding contracts between parties until buyer had paid seller all monies due for deliveries previously made, which monies buyer had retained to protect himself against actual or potential loss from seller's failure to make timely delivery of grain under certain contracts, seller was guilty within meaning of UCC § 2-610 of anticipatory repudiation of contracts with last-delivery dates occurring after January 31, 1973 by failing to deliver any grain at all after January 26, 1973 because (1) Uniform Commercial Code does not give party right to refuse performance under one contract between parties simply because other party had breached separate contract between them; (2) measures short of suspending delivery under all contracts could have preserved seller's right to payment for prior grain deliveries; (3) seller did not employ remedy available under UCC § 2-609(1) of requesting as-

surance of buyer's performance; (4) time was not of the essence under contracts repudiated and at time of such repudiation, there was no indication that buyer's ability to pay was impaired; and (5) seller was first party to breach any of the contracts. *National Farmers Org. v. Bartlett & Co., Grain*, 560 F.2d 1350 (8th Cir. Mo. 1977).

UCC § 2-610(b) gives aggrieved party option to "resort to any remedy for breach...even though he has notified the repudiating party that he would await the latter's performance and has urged the retraction," and this negates any requirement that there must be acceptance of anticipatory breach by aggrieved party. *William B. Tanner Co. v. WIOO, Inc.*, 528 F.2d 262 (3d Cir. Pa. 1975).

Where dealer in lighting fixtures agreed to furnish fixtures to electric subcontractor at lump-sum price, subject to additions or reductions as required by subcontractor, subcontractor had option under UCC § 2-610, when dealer repudiated agreement, to "cover" in accord with UCC § 2-712(1). *Robert Mfg. Co. v. South Bay Corp.*, 82 Misc. 2d 250 (1975).

Under UCC buyer can seek damages for anticipatory repudiation of contract and for breach of warranty. *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. Tex. 1973).

Seller of nickel cathodes bargained for and had every right to expect that it would receive valid check, and check which was subject to stop payment order at time of receipt was not valid, so that seller had right under Code to cancel contract, even though it might well not have chosen to do so if price of metal had gone down instead of up. *Goldstein v. Stainless Processing Co.*, 465 F.2d 392 (7th Cir. Ill. 1972).

Claim for additional sum by boat seller was rejection of contractual obligation; absent any evidence that this repudiation was ever retracted or that retraction was made known to buyer, buyer was entitled to rescission. *Puget Sound Marina, Inc. v. Jorgensen*, 3 Wash. App. 476, 475 P.2d 919 (1970).

7. —Waiting for commercially reasonable time.

In action by bank against mortgage company for breach of contract to sell

bank mortgage-backed securities guaranteed by Government National Mortgage Association (GNMA), where evidence showed (1) that such sale was orally arranged by mortgage broker, (2) that mortgage company did not authorize broker to make contract with bank, but contemplated solicitation of offer to buy at specified price, subject to acceptance of proposed written commitment, and (3) that mortgage company repudiated oral contract made by broker on October 1, 1973, long before date fixed for contract's performance, court held (1) that mortgage company was not liable to bank, since it did not authorize broker to make oral contract in suit and did not subsequently ratify it, (2) broker, because of breach of its implied warranty of authority, was liable to bank for all damages resulting from such breach, (3) letter sent by bank to confirm oral contract satisfied statute of frauds provision in UCC § 8-319(c) [Repealed], since it was written promptly, was received by party against whom enforcement was sought (mortgage company), and was not objected to in writing within ten days, (4) securities involved were investment securities within meaning of UCC § 8-102(1)(a), (5) bank did not attempt to "cover" such securities by independent purchases on the market, (6) bank's damages were to be measured by damages that bank could have recovered from nonperforming seller for breach of an authorized contract, (7) under UCC § 2-713(1), such measure of damages was difference between market price of securities at time when bank, as purchaser thereof, learned of breach and contract price of securities, (8) phrase "at the time when the buyer learned of the breach" in UCC § 2-713(1) means, in present suit, "at the time the buyer learned of the repudiation," and (9) UCC § 2-713(1) would be interpreted to measure bank's damages as occurring "within a commercially reasonable time" after bank learned of repudiation of oral contract (applying New Jersey law; holding that because of circumstances in GNMA securities market at time of mortgage company's anticipatory repudiation of oral contract in suit, a commercially reasonable time for bank to await performance, as provided by UCC

§ 2-610(a), did not extend substantially beyond date on which repudiation occurred). *First Nat'l Bank v. Jefferson Mtg. Co.*, 576 F.2d 479 (3d Cir. N.J. 1978).

UCC § 2-610(a) and § 2-713(1) should be interpreted in a consistent manner. Thus, since under UCC § 2-610(a), an aggrieved party may, for a commercially reasonable time, await performance, UCC § 2-713(1) should be interpreted to measure damages within a commercially reasonable time after learning of the repudiation. *First Nat'l Bank v. Jefferson Mtg. Co.*, 576 F.2d 479 (3d Cir. N.J. 1978).

In action for breach of oral contract to sell and deliver by end of 1973 10,000 bushels of corn to plaintiff grain dealer, who in reliance on such contract resold the corn for delivery on or before January 1, 1974, course of performance by parties justified finding that parties had agreed that tender of payment by plaintiff prior to delivery of corn, which would ordinarily be required under UCC § 2-511(1), was not condition precedent to defendant's duty to tender and complete deliveries of corn contracted for. Furthermore, even assuming that plaintiff could have treated defendant's silence, after delivering and receiving payment for 2,700 bushels of corn by March, 1973, as repudiation of contract, plaintiff's waiting until December 28, 1973 before considering contract breached was not unreasonable under UCC § 2-610(a) (noting that earliest date on which plaintiff could have learned of defendant's breach was August 14, 1973, and also holding that under UCC § 2-713(1), use of December 28, 1973 as date for determining, with respect to plaintiff's damages, market value of undelivered corn was proper). *Carson v. Mulnix*, 263 N.W.2d 701 (Iowa 1978).

In action by wholesaler against purchaser to recover for breach of contract to purchase Christmas trees, there was sufficient evidence to support finding that, after buyer repudiated contract, seller's attempted resale was within commercially reasonable time under circumstances where, *inter alia*, by time buyer notified seller of his desire to cancel contract, October 2, one-third of time had elapsed between signing of agreement, September 4, and delivery date, December

1, and where there would have been no market for trees after repudiation, since date contract was entered into indicated other wholesalers of trees would have made arrangements at same time. *Whewell v. Dobson*, 227 N.W.2d 115 (Iowa 1975).

Since farmer's repudiation in June of contract for future delivery of grain was unequivocal and "cover" easily and immediately was available to grain dealer, dealer's commercially reasonable time to await performance by repudiating farmer expired on date repudiation was made, and he should at that time have resorted to remedies provided for in Code § 2-711. *Oloffson v. Coomer*, 11 Ill. App. 3d 918, 296 N.E.2d 871 (3d Dist. 1973).

8. —Action for breach.

Where in 1969 United States, through Bureau of Indian Affairs ("BIA") on behalf of Indian tribe entered into timber sale contract with lumber company and, although contract was to have been fully performed before December 31, 1969, not all timber subject to contract was taken during 1969 and written extension of contract to December 31, 1970, was executed by lumber company and tribe with approval of BIA, where additional one-year extension was requested by lumber company in December, 1970, tribe agreed to extension and signed agreement was forwarded by BIA to lumber company on or about January 28, 1971, although extension was never executed by lumber company's surety, and where in December, 1971, lumber company requested additional extension of contract to December 31, 1972, but where no logging took place under contract after September 15, 1969, under UCC § 2-610, after waiting for commercially reasonable time, tribe was entitled to treat lumber company's conduct as clear repudiation of contract and to resort to available remedies for breach, and lumber company's request for additional extension to December 31, 1972, was not retraction of repudiation since it was not accompanied by any assurance that performance would be forthcoming. *In re Humboldt Fir, Inc.*, N.D.Cal.1977, 426 F. Supp. 292, affirmed 625 F. 2d 330 *In re Humboldt Fir, Inc.*, 426 F. Supp. 292

(N.D. Cal. 1977), *aff'd*, 625 F.2d 330 (9th Cir. 1980).

9. —Suspension of performance.

While ordinarily a tender of goods is required, the repudiation of a contract by the buyer eliminates the need for further performance by the seller; such an anticipatory repudiation can be determined to have occurred whenever there is an overt communication of intention not to perform, which announcement of intention should be shown to have been positive and unequivocal. *Tenavision, Inc. v. Neuman*, 45 N.Y.2d 145, 379 N.E.2d 1166 (1978).

In buyer's suit for seller's alleged breach of contract to sell two million pounds of polyvinyl chloride plastic in regrind form for use in manufacture of records, (1) where telephone conversations between buyer and seller caused buyer to doubt that seller could deliver sufficient quantity of suitable plastic and buyer therefore gave seller revocable letter of credit instead of irrevocable letter, and (2) where seller then declared that buyer had breached contract and demanded payment of liquidated damages as provided in contract for such breach, district court's granting of summary judgment for defendant seller would be vacated and case remanded for further proceedings because (1) reasonableness of buyer's action in giving seller revocable letter of credit, allegedly to avoid paying for nonconforming goods, was question of fact that could not be resolved on summary judgment; (2) buyer may have been entitled under UCC § 2-609(1) to suspend its performance (by not furnishing seller with irrevocable letter of credit) until seller had complied with buyer's request for assurance of performance by seller; and (3) buyer may also have been entitled under UCC § 2-610(a) and (c) to suspend its performance for seller's possible anticipatory breach of such contract. *Diskmakers, Inc. v. DeWitt Equip. Corp.*, 555 F.2d 1177 (3d Cir. N.J. 1977).

Purchaser of cash registers had reasonable grounds for insecurity within meaning of UCC § 2-609 where seller projected delivery of 23 units by first half of 1969 but later rescheduled delivery to January, 1970, where buyer learned in March,

1969, that work had not commenced and pilot unit would not be ready until July, 1969, where seller's own personnel were concerned about design of model and attempted to reduce buyer's order, and where prototype unit furnished buyer performed unsatisfactorily. Written demand for adequate assurance of performance was not necessary where evidence established that buyer and seller had clear understanding that buyer had suspended performance until receipt of adequate assurance of performance from seller and thus seller's failure to give adequate assurance entitled buyer to suspend its performance and cancel order pursuant to UCC § 2-610 and UCC § 2-711. *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir. Ill. 1976).

Where buyer and seller allegedly entered into two oral contracts for sale of corn, although seller denied existence of second contract, and where, after seller had partially completed delivery under first contract, buyer refused to promise to pay seller for balance of corn that remained to be delivered under first contract and stated he would instead withhold payment as setoff against second contract: (1) buyer wrongfully asserted right of setoff under UCC § 2-717 since there were two separate contracts and (2) seller justifiably withheld delivery under UCC §§ 2-610 and 2-703, having interpreted seller's statement as wrongful refusal to pay on contract and as repudiation thereof. *Jurek v. Thompson*, 308 Minn. 191, 241 N.W.2d 788 (1976).

UCC § 2-610(c) permitted purchaser of photo-flash lamps, which were to be delivered in four separate shipments, to suspend payment for goods delivered when seller indicated he did not intend to complete delivery as required by contract. *Westinghouse Elec. Corp. v. CX Processing Lab., Inc.*, 523 F.2d 668 (9th Cir. Wash. 1975).

A party to a contract of sale is not obligated to do the vain thing of performing, assuming that he is ready to perform, when the other party has given notice of refusal to accept performance. *Swift Canadian Co. v. Banet*, 224 F.2d 36 (3d Cir. Pa. 1955).

RESEARCH REFERENCES

ALR. What constitutes anticipatory repudiation of sales contract under UCC § 2-610. 1 A.L.R.4th 527.

Am Jur. 67 Am. Jur. 2d, Sales §§ 503, 506.

67A Am. Jur. 2d, Sales §§ 861 et seq., 1135.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:831-2:834. (Anticipatory repudiation).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1451 et seq. (Anticipatory repudiation).

3 Am. Jur. Proof of Facts 2d, Anticipatory Repudiation of Contract for Sale of Goods, §§ 6 et seq. (proof of anticipatory repudiation of sales contract); §§ 12 et seq. (proof of anticipatory repudiation by failure to give adequate assurance of performance).

CJS. 78 C.J.S., Sales §§ 326 et seq., 375 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-2-611. Retraction of anticipatory repudiation.

(1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this chapter (Section 2-609) [Section 75-2-609].

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

SOURCES: Codes, 1942, § 41A:2-611; Laws, 1966, ch. 316, § 2-611, eff March 31, 1968.

Cross References — Assurance of due performance, see § 75-2-609.

JUDICIAL DECISIONS

1. In General.

Where contract between owner of commercial tennis courts and defendant manufacturer and seller of air structures for sale and installation of three such structures to cover owner's tennis courts by November 15, 1975, was entered into on October 7, 1975, and became unconditional obligation on part of defendant on October 28, 1975, when owner obtained financing for such purchase, admission by defendant's employees on October 29, 1975, that defendant could not complete installation on November 15, 1975, as promised, constituted anticipatory repu-

diation of contract by defendant under UCC § 2-610 and Comment 1, so as to justify owner's purchase of substitute equipment from different manufacturer. Moreover, defendant's failure to deliver and complete installation of air structures by November 15, 1975, constituted breach of contract sued on, so as to justify under UCC § 2-711(1) owner's cancellation of contract on November 20, 1975 (applying Pennsylvania law, also holding that letter from defendant to owner on November 17, 1975, in which defendant offered to complete installation, could not serve under UCC § 2-611(1) as retraction of defen-

dant's earlier repudiation because letter was written two days after defendant's complete performance was due).

Tennisland, Inc. v. Precision Tennis Sys., 437 F. Supp. 339 (W.D. Pa. 1977).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales § 503.
67A Am. Jur. 2d, Sales §§ 861 et seq., 1192, 1196, 1202 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:841-2:843. (Anticipatory repudiation; retraction).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1461 et seq. (Retraction of an anticipatory repudiation).

3 Am. Jur. Proof of Facts 2d, Anticipatory Repudiation of Contract for Sale of Goods, §§ 6 et seq. (proof of anticipatory repudiation of sales contract); §§ 12 et seq. (proof of anticipatory repudiation by failure to give adequate assurance of performance).

CJS. 78 C.J.S., Sales §§ 326 et seq.; 375 et seq.

§ 75-2-612. "Installment contract"; breach.

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever nonconformity or default with respect to one (1) or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

SOURCES: Codes, 1942, § 41A:2-612; Laws, 1966, ch. 316, § 2-612, eff March 31, 1968.

Cross References — Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

Course of performance showing waiver or modification, see § 75-2-208.

Single delivery or delivery in lots, see § 75-2-307.

Effect of acceptance, see § 75-2-607.

Assurance of due performance, see § 75-2-609.

Rights and remedies of aggrieved party for repudiation with respect to performance not yet due, see § 75-2-610.

Seller's remedies, see § 75-2-703.

Buyer's remedies, see § 75-2-711.

JUDICIAL DECISIONS

1. In general.

Potato seller's right to cancel contract under UCC § 2-612 because of buyer's breach of 15-day payment provision (even if found to substantially impair value of whole contract), was waived by seller when he continued to make deliveries under contract, or, more correctly, seller's subsequent shipment of potatoes indicated election on his part to continue performance of contract. *Dangerfield v. Markel*, 252 N.W.2d 184 (N.D. 1977).

Where buyers contracted to purchase several breeds of cattle, where seller was required to breed some cattle which would entail instalment deliveries, and where buyers accepted first delivery of cattle without rejecting or revoking acceptance, pursuant to UCC § 2-612(3), buyer could not reject future instalments because of alleged defect in first shipment of cattle as whole contract was reinstated by acceptance of non-conforming instalment without notification of cancellation. *Merwin v. Ziebarth*, 252 N.W.2d 193 (N.D. 1977).

Buyer's termination of installment sales contract was improper under UCC § 2-612 (3) where, inter alia, buyer previously had displayed lack of concern over delivery delays and about ability of seller to cure defects generally, where there was repetition of only one significant defect, and where buyer, shortly before cancellation, placed purchase orders with seller for items identical to those in first contract in all significant respects. *Holiday Mfg. Co. v. B.A.S.F. Sys.*, 380 F. Supp. 1096 (D. Neb. 1974).

After buyer's failure to pay for first shipment of instalment contract, in order for seller to relieve itself of its obligation to continue contract, there must be showing by seller that buyer's failure to pay for first instalment "substantially impaired" value of whole contract. *Gulf Chem. & Metallurgical Corp. v. Sylvan Chem. Corp.*, 122 N.J. Super. 499, 300 A.2d 878 (1973), *aff'd*, 126 N.J. Super. 261, 314 A.2d 73 (1973), certification denied, 64 N.J. 507, 317 A.2d 720 (1974).

In action by supplier of plumbing and heating supplies against contractor for materials supplied to contractor under

terms of written installment contract, contractor's failure to pay for several deliveries of supplies was breach of contract; fact that supplier brought present action with respect only to past installments did not result in reinstatement of contract where supplier had "reasonable grounds for insecurity," informed contractor that it would deliver balance of material only if payment of entire contract was guaranteed, and contractor's failure to provide adequate assurance of due performance within reasonable time after such request, and after action had been brought, was repudiation of contract, excusing supplier from further performance thereunder. *Kunian v. Development Corp. of Am.*, 165 Conn. 300, 334 A.2d 427 (1973).

While December 8 was originally last date for sellers' performance of contract for delivery of Christmas trees, this date was later extended to December 16, so that when sellers were notified on December 14 that trees delivered did not conform to contract, sellers' notification of intention to cure non-conforming deliveries was seasonable under Pennsylvania law on December 14, especially since buyer renewed demands for trees of other varieties on same date; and even if non-conforming parts of first two deliveries of trees impaired value of whole contract and gave buyer right to treat such deliveries as breach of whole contract, buyer reinstated contract by demanding delivery in future instalments of yet undelivered varieties of trees on December 14. *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972).

Assuming without deciding that the nonconforming parts of the first two Christmas tree deliveries impaired the value of the whole contract and gave the buyer the right to treat the earlier non-conforming deliveries as breach of the whole contract, the buyer reinstated the contract by demanding delivery in future installments of yet undelivered trees, under UCC § 2-612(3). *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972).

Buyer was not entitled to cancel entire contract where deviation from conformity consisted of first carload of plywood which had 9% variance; held, deviation was mi-

nor and curable. *Continental Forest Prods., Inc. v. White Lumber Sales, Inc.*, 256 Or. 466, 474 P.2d 1 (1970).

To allow an aggrieved party to cancel instalment contracts, the breach must be of the whole contract, which occurs when a nonconformity of one or more instalments substantially impairs the value of the whole contract and seasonable notification of cancellation is given.

What amounts to a substantial impairment is a question of fact which may turn not only on the quality of the goods but also on such factors as time, quantity, assortment, and must be judged in terms of the normal or specifically known purposes of the contract. *Graulich Caterer, Inc. v. Hans Holterbosch, Inc.*, 101 N.J. Super. 61, 243 A.2d 253 (App. Div. 1968).

RESEARCH REFERENCES

ALR. Buyer's acceptance of delayed or defective instalment of goods as waiver of similar default as to later instalments. 32 A.L.R.2d 1117.

Replevin or claim-and-delivery: modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail instalment sales contract. 45 A.L.R.3d 1233.

Liability of person furnishing, installing, or servicing burglary or fire alarm system for burglary or fire loss. 37 A.L.R.4th 47.

Acceptance of some "commercial units" of goods purchased under UCC § 2-601(c). 41 A.L.R.4th 396.

Sales: construction and application of UCC § 2-612(2), dealing with rejection of goods under instalment contracts. 61 A.L.R.5th 611.

Am Jur. 67 Am. Jur. 2d, Sales § 681.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:851 et seq. (Complaint, petition, or declaration; rescission; breach of instalment contract by seller; substantial impairment of entire contract by nonconformity of instalment).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1471 et seq. (Instalment agreement; breach).

CJS. 77 C.J.S., Sales §§ 102-106, 177.

§ 75-2-613. Casualty to identified goods.

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (Section 2-324) [Section 75-2-324] then

(a) if the loss is total the contract is avoided; and

(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

SOURCES: Codes, 1942, § 41A:2-613; Laws, 1966, ch. 316, § 2-613, eff March 31, 1968.

Cross References — "No arrival, no sale", see § 75-2-324.

JUDICIAL DECISIONS

1. In general.

UCC § 2-613 is applicable to a casualty loss that renders the goods nonconformable or defective. However, the statute does not apply where the buyer's claim for relief depends not on the original defects in the goods that caused them to be returned to the seller for repairs, but on defects that existed after the goods were repaired and again delivered to the buyer (where new roof was installed on mobile home after original roof blew off in storm while home was being delivered to buyer). *Linscott v. Smith*, 3 Kan. App. 2d 1, 587 P.2d 1271 (1978).

Contract of seller of wheat was supplemented under UCC § 2-202(a) by evidence of trade usage that parties to such contracts intend to be bound regardless of success of seller's crop, and seller's failure to deliver all wheat under his contract because of partial crop failure was not excused under either UCC § 2-613 (dealing with casualty to identified goods) or UCC § 2-615(a) (dealing with commercial impracticability), which were, inapplicable to case. *Colley v. Bi-State, Inc.*, 21 Wash. App. 769, 586 P.2d 908 (1978).

UCC § 2-613 applies only where the continuing existence of identified goods is a presupposition to the agreement. USS § 2-615(a) applies only where the parties, by their agreement, have not assumed any greater liability. Thus, in a case involving reliance on these statutes as a defense for failure to perform, the court must analyze the terms of the party's contract before it can decide whether either statute is applicable. Furthermore, under UCC § 2-202(a) and (b), the terms of the contract can be construed or supplemented by evidence of trade usage, course of dealing, course of performance, and consistent additional terms. *Colley v. Bi-State, Inc.*, 21 Wash. App. 769, 586 P.2d 908 (1978).

In action by buyer for seller's breach of contract to deliver 130,000 dowels (round, interchangeable wooden rods or sticks) which seller alleged had been totally destroyed on ship during storm at sea, seller could not avoid liability on contract under UCC § 2-613(a) where dowels had not been shipped, marked, segregated, or oth-

erwise "identified" within meaning of UCC § 2-613(a) at time sale was made. *Valley Forge Flag Co. v. New York Dowel & Moulding Import Co.*, 90 Misc. 2d 414 (1977).

UCC § 2-613 conforms to general contracts rule that if performance of contract depends on existence of specific goods and such goods are destroyed without fault before time contract is to be performed, breach by seller will be excused. However, UCC § 2-613 applies only in limited situations where continued existence of identified goods is a presupposition of the contract. Thus, sale of unique chattel comes within scope of UCC § 2-613, but not sale of chattels any one of which fitting description in the contract may be delivered. With respect to fungible goods, more than mere identification of such goods by kind and amount in sales contract is necessary to bring contract within operation of UCC § 2-613; there must also be meeting of minds of parties as to particular goods designated to be bought and sold. *Valley Forge Flag Co. v. New York Dowel & Moulding Import Co.*, 90 Misc. 2d 414 (1977).

In action by buyer of soybeans for damages resulting from failure of seller to deliver soybeans on either date due or date to which seller had extended delivery, destruction by severe weather conditions of seller's soybean crop did not excuse his performance under UCC § 2-613, where beans were not identified other than by kind and amount and seller, therefore, could have purchased beans elsewhere and delivered them to buyer. *Bunge Corp. v. Recker*, 519 F.2d 449 (8th Cir. Mo. 1975).

Grower of soybeans who agreed to sell to buyer 75,000 bushels of soybeans for future delivery was not exonerated from liability for failure to deliver soybeans by reason of fact that excessive rainfall destroyed grower's soybean crop where contract between parties made no reference to soybeans grown or to be grown by grower on any identified acreage, nor did it obligate grower to grow beans at all, but merely required grower to deliver soybeans and did not restrict grower as to where beans were grown and grower could

have fulfilled its contractual obligation by acquiring beans from any place or source.

Semo Grain Co. v. Oliver Farms, Inc., 530 S.W.2d 256 (Mo. Ct. App. 1975).

RESEARCH REFERENCES

ALR. Construction and effect of UCC sec. 2-613 governing casualty to goods identified to a contract, without fault of buyer or seller. 51 A.L.R.4th 537.

Am Jur. 67 Am. Jur. 2d, Sales §§ 227, 411-425, 585, 586.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:871-2:874. (Casualty to identified goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1481, 253:1482. (Casualty to identified goods).

25 Am. Jur. Proof of Facts 2d 99, Risk of Loss — Damage to or Destruction of Goods.

§ 75-2-614. Substituted performance.

(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory.

SOURCES: Codes, 1942, § 41A:2-614; Laws, 1966, ch. 316, § 2-614, eff March 31, 1968.

Cross References — Obligation of financing agency under letter of credit, see §§ 75-5-102, 75-5-103, 75-5-109, 75-5-114.

Use of credit in portions, see § 75-5-110.

JUDICIAL DECISIONS

1. In general.

UCC § 2-614(1) obligates seller to use, and buyer to accept, delivery by commercially reasonable means if agreed method of transportation becomes impracticable. However, if the substitute transportation involves extra expense, UCC § 2-614(1) does not answer question as to who should bear such expense (holding in action for breach of contract to sell grain sorghum that extra expense of substitute transportation should be borne by seller who repudiated the contract). *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743, 1

A.L.R.4th 512 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Apr. 5, 1978).

Where buyer refused on delivery date to accept foreign currency purchased with dollars under futures contract, seller's liquidation of contract by crediting buyer with difference between contract price and market price of foreign currency on delivery date was commercially reasonable substitute under UCC § 2-614(1) for delivery. *United Equities Co. v. First Nat'l City Bank*, 52 A.D.2d 154 (1st Dep't 1976), aff'd, 41 N.Y.2d 1032, 395 N.Y.S.2d 640, 363 N.E.2d 1385 (1977).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 591, 596 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:891-2:895 (substituted performance).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1491 et seq (substituted performance).

CJS. 77 C.J.S., Sales § 208.

§ 75-2-615. Excuse by failure of presupposed conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c), or failure to take delivery as provided for under the contract on the part of a buyer who complies with paragraph (d), is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.

(d) The buyer must notify the seller seasonably that there will be a delay or total inability to take delivery, and where practicable, state the contingency which has occurred causing such delay or inability.

SOURCES: Codes, 1942, § 41A:2-615; Laws, 1966, ch. 316, § 2-615, eff March 31, 1968.

Cross References — Construction of code to promote underlying purposes and policies, see § 75-1-102.

Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

When action is taken seasonably, see § 75-1-204.

Unconscionable contract or clause, see § 75-2-302.

Output, requirements and exclusive dealings, see § 75-2-306.

Term measuring quantity by seller's output or buyer's requirements, see § 75-2-603.

Assurance of due performance, see § 75-2-609.

Casualty to goods identified when contract made, see § 75-2-613.

Substituted performance, see § 75-2-614.

Buyer's rights on receipt of notification of delay or allocation, see § 75-2-616.

JUDICIAL DECISIONS

1. In general.
2. Seller's assumption of greater liability.
3. Substituted performance.
4. Unforeseen contingency as excuse.
5. —Price increase.
6. —Failure of source of supply.
7. —Strike or the like.
8. —Fire or other casualty.
9. Compliance with government regulations as excuse.
10. Allocation.
11. Notice.
12. Impossibility.

1. In general.

Where contract to supply fuel for one of plaintiff's two nuclear power plants, which was entered into before effective date of Florida Uniform Commercial Code, bound plaintiff to buy and defendant to sell such fuel, and also granted plaintiff option to purchase fuel for a second nuclear power plant, and where such option was exercised by plaintiff after effective date of Florida Uniform Commercial Code, court held (1) that under Florida UCC §§ 10-101 and 10-102(2), provisions of Florida Uniform Commercial Code applies only to second fuel contract, which arose when plaintiff exercised option to purchase fuel for second power plant, and did not apply to original contract to furnish fuel for plaintiff's first power plant, since plaintiff's exercise of option to purchase fuel for second power plant was not an "event" within meaning of Florida UCC § 10-101; and (2) that as a result, defendant could not rely on Florida UCC § 2-615(a) to excuse nonperformance of its obligations under the original fuel contract, but could rely on such statute with respect to nonperformance of its obligations under the second contract. *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 579 F.2d 856 (4th Cir. Va. 1978).

UCC § 2-613 applied only where the continuing existence of identified goods is a presupposition to the agreement. USS § 2-615(a) applies only where the parties, by their agreement, have not assumed any greater liability. Thus, in a case involving

reliance on these statutes as a defense for failure to perform, the court must analyze the terms of the party's contract before it can decide whether either statute is applicable. Furthermore, under UCC § 2-202(a) and (b), the terms of the contract can be construed or supplemented by evidence of trade usage, course of dealing, course of performance, and consistent additional terms. *Colley v. Bi-State, Inc.*, 21 Wash. App. 769, 586 P.2d 908 (1978).

Contract of seller of wheat was supplemented under UCC § 2-202(a) by evidence of trade usage that parties to such contracts intend to be bound regardless of success of seller's crop, and seller's failure to deliver all wheat under his contract because of partial crop failure was not excused under either UCC § 2-613 (dealing with casualty to identified goods) or UCC § 2-615(a) (dealing with commercial impracticability), which were inapplicable to case. *Colley v. Bi-State, Inc.*, 21 Wash. App. 769, 586 P.2d 908 (1978).

In assumpsit action by buyer of pesticides against manufacturer-seller for latter's failure to deliver all of plaintiff's good-faith contract requirements, where defendant, on motion for summary judgment, contended that it was excused from performance of its obligations under doctrine of commercial impracticability set forth in UCC § 2-615(a) because chemical plant of defendant's supplier had been shut down by fire and supplier, allegedly because defendant was not regular customer, had not included defendant among those to whom supplier had allocated, as required by UCC § 2-615(b), its remaining supplies of chemicals, including chemicals needed to manufacture pesticides required by plaintiff, court on denying defendant's motion for summary judgment ruled that record did not establish, as matter of law, that defendant was excused by UCC § 2-615(a) and (b) from performing its contractual obligations because affidavit of supplier's officer stated that defendant, at time of fire in question, had been regular customer of supplier and that supplier had allocated to it certain quantities of chemicals needed in manufacture of pesticides in suit. Common-

wealth v. Diamond Shamrock Chem. Co., 38 Pa. Commw. 89, 391 A.2d 1333 (1978).

UCC § 2-615(a) and (c), governing excuse of performance, has replaced the common-law requirement of impossibility of performance by a less stringent standard of commercial impracticability. UCC § 2-615(a) and (c) contain four requirements that must be met before a seller's performance can be excused: (1) occurrence of a contingency that has made performance impracticable, (2) fact that nonoccurrence of such contingency was a basic assumption on which the contract was made, (3) no assumption of a greater obligation by the seller, and (4) seasonable notification to buyer by seller that there will be a delay or nondelivery. *Barbarossa & Sons v. Iten Chevrolet, Inc.*, 265 N.W.2d 655 (Minn. 1978).

Where defendant's argument that by its terms the dealer's contract was terminated by plaintiff's repossession of the trucks and, hence, that plaintiff was required to repurchase them and credit defendant with list price was not based on an appropriate answer, Special Term properly ignored it; in any event, repurchase provision was inapplicable since contract contemplated the dealer's having possession of the equipment, whereas by virtue of its default the equipment had been repossessed. *Linde Hydraulics Corp. v. Kenco Equip. Co.*, 59 A.D.2d 1016 (4th Dep't 1977).

Under UCC § 2-615(a), before party is excused from performance of contract, three conditions must be met: (1) a contingency must have occurred; (2) performance of contract must thereby have been made impracticable; and (3) nonoccurrence of such contingency must have been a basic assumption on which contract was made (holding that seller of harvesting combine was excused from performing contract because all three conditions of above test were met). *Olson v. Spitzer*, 257 N.W.2d 459 (S.D. 1977).

2. Seller's assumption of greater liability.

Supplier who unconditionally warranted delivery of large quantities of natural gas to transmission company, on basis of supplier's expectation that bulk of gas would come from reserves in particular

field, was not excused under doctrine of commercial impracticability for failure to deliver gas contracted for when reserves in field relied on proved to be insufficient where supplier failed to show (1) not only that it could only perform at a loss, but also (2) that such loss would be especially severe and unreasonable (citing Comment 4 to UCC § 2-615(a) and holding that supplier's unconditional warranty, by its very nature, precluded any relief on theory of commercial impracticability). *Gulf Oil Corp. v. F.P.C.*, 563 F.2d 588 (3d Cir. 1977), cert. denied, 434 U.S. 1062, 98 S. Ct. 1235, 55 L. Ed. 2d 762 (1978), reh'g denied, 435 U.S. 981, 98 S. Ct. 1632, 56 L. Ed. 2d 74 (1978), cert. dismissed, 435 U.S. 911, 98 S. Ct. 1462, 55 L. Ed. 2d 502 (1978).

In action by buyer of soybeans against seller for nondelivery, where some of soybeans had been destroyed by fire and where contracts specified measure of damages generally and further specified measure of damages if seller was unable to deliver solely because of reasons beyond his control, trial court erred in instructing jury that nondelivery was not breach if it was made impractical by occurrence of contingency, the non-occurrence of which was basic assumption on which contract was made, and in refusing to instruct that under UCC § 2-615 seller may assume by contract greater obligation which would have allowed jury to determine whether contract imposed greater obligation upon seller than otherwise provided for by law. *Gold Kist, Inc. v. Stokes*, 138 Ga. App. 482, 226 S.E.2d 268 (1976).

Doctrine of commercial impracticability under UCC § 2-615 would not be applicable with respect to seller's repudiation of contracts to supply nuclear fuel for electrical power plants, which was based on unforeseen price increases and scarcity of uranium, if parties to contract bargained for greater or lesser liability. *TVA v. Westinghouse Elec. Co.*, 69 F.R.D. 5 (E.D. Tenn. 1975).

Where cotton merchant failed to deliver full amount of cotton called for in contract with textile manufacturer and where contract provided that "if for any reasons...the seller fails to make shipment or delivery..., the buyer may...buy

in the open market cotton equal to that contracted for...the market difference to be adjusted between the buyer and seller," merchant was not excused under UCC § 2-615 from performing contract in full on grounds of impracticability, and was liable to manufacturer for damages, notwithstanding merchant's inability to perform was caused by fact that cotton farmer with whom he had contracted to purchase cotton crops refused to perform their contracts due to dramatic increase in price of cotton; by bringing action for damages, manufacturer did no more than merchant agreed could be done pursuant to their contract upon failure of delivery for any reason and manufacturer's suit amounted to no more than attempt "to adjust the difference" between contract and market prices of cotton at time that manufacturer learned of merchant's inability to make delivery. *Swift Textiles, Inc. v. Lawson*, 135 Ga. App. 799, 219 S.E.2d 167 (1975).

3. Substituted performance.

Grower of soybeans who agreed to sell to buyer 75,000 bushels of soybeans for future delivery was not exonerated from liability for failure to deliver soybeans by reason of fact that excessive rainfall destroyed grower's soybean crop where contract between parties made no reference to soybeans grown or to be grown by grower on any identified acreage, nor did it obligate grower to grow beans at all, but merely required grower to deliver soybeans and did not restrict grower as to where beans were grown and grower could have fulfilled its contractual obligation by acquiring beans from any place or source. *Semo Grain Co. v. Oliver Farms, Inc.*, 530 S.W.2d 256 (Mo. Ct. App. 1975).

4. Unforeseen contingency as excuse.

Expectation that natural gas market would continue to be strong was not assumption on which gas purchase contract was made within meaning of § 75-2-615, where, although performance has become dramatically more costly than purchasers expected, purchasers have neither alleged nor offered to prove that fulfillment of contract is impossible. *Day v. Tenneco, Inc.*, 696 F. Supp. 233 (S.D. Miss. 1988).

In action by airline against airplane manufacturer for damages resulting from delay in delivery of airplanes purchased, exculpatory clause in contract exempting manufacturer for delays due to specified events and preceded by phrase "included but not limited to", incorporated commercial impracticability doctrine of UCC § 2-615. *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. Fla. 1976).

Where buyer entered into contract with seller to purchase seller's output of special type of waste paper, called "printed broke" or "No. 2 broke," and where seller subsequently entered into contracts with other buyers for sale of similar type of waste paper, called "unprinted broke" or "No. 1 broke," at prices lower than than specified in first contract, drop in market prices, even though caused by seller's marketing of "No. 1 broke" waste paper, did not constitute "commercial impracticability" within meaning of UCC § 2-615, and problem of depressed market did not reach level of severity required to excuse performance under § 2-615. *Hancock Paper Co. v. Champion Int'l Corp.*, 424 F. Supp. 285 (E.D. Pa. 1976), *aff'd*, 565 F.2d 151 (3d Cir. Pa. 1977).

The fact that an electronics manufacturer's failure to deliver a digital computer was the result of unanticipated technical problems does not excuse performance under provisions of this section; for when the manufacturer promoted his device as a revolutionary breakthrough, the reasonable supposition was that the breakthrough had already occurred, and risk of its nonoccurrence falls on the manufacturer. *United States v. Wegematic Corp.*, 360 F.2d 674 (2d Cir. N.Y. 1966).

5. —Price increase.

In action by buyer against seller for breach of contract to deliver potash at 21 cents per unit, performance of contract was not excused by impracticability under UCC § 2-615, notwithstanding seller closed its Utah potash mine, which previously had been its principal source of supply, Canadian mine became seller's principal source of supply and Canadian governmental regulations did not permit seller to sell potash below regulated price

of 33.75 cents per unit, where performance by seller was not shown to have been impossible, and where at time seller's agent signed contract, seller was aware that it would turn to Canadian mine for its principal source of supply. *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. Ill. 1974).

Milk supplier was not entitled to terminate its contract with school district on grounds of "impracticability" as provided by UCC § 2-615 where, even if contingency causing increase of price of raw milk was unexpected, under circumstances, risk of substantial or abnormal price increase would fall on supplier and where, in light of risks assumed by supplier, price increase had not reached point of "impracticability" in commercial sense. *Maple Farms, Inc. v. City Sch. Dist.*, 76 Misc. 2d 1080 (1974).

6. —Failure of source of supply.

In buyer's breach of contract action for seller's failure to deliver truck to be used in buyer's construction business, (1) since possibility that seller would not be able to obtain truck from manufacturer was clearly foreseeable contingency at time seller entered into contract (which contained no escape clause making obligation to deliver truck contingent on seller's obtaining it), manufacturer's cancellation of seller's order for truck was not "a contingency the nonoccurrence of which was a basic assumption on which the contract [between buyer and seller] was made" within meaning of UCC § 2-615(a), governing excuse of nonperformance; (2) buyer was entitled to "cover" damages under UCC § 2-712(1) and (2) for increase in net purchase price incurred in purchasing replacement truck; (3) buyer did not waive right to incidental and consequential damages by failure to cancel order for truck when seller first notified buyer that delivery would not be made on date buyer needed truck; and (4) buyer's loss of use of truck in buyer's business while buyer's old truck was being repaired, and also buyer's depreciation or trade-in value loss on old truck, were properly recoverable items of incidental and consequential damages under UCC § 2-715(1) and (2), since such damages resulted from seller's breach.

Barbarossa & Sons v. Iten Chevrolet, Inc., 265 N.W.2d 655 (Minn. 1978).

Failure of seller of custom designed air conditioning units to make timely delivery was not excused by failure of presupposed conditions under UCC § 2-615 where, although seller knew of supply difficulties prior to contract for purchase of air conditioning units, seller not only failed to provide exculpatory clause in contract, but consistently assured buyer that its requested delivery date would be met, and where seller delayed orders for component parts for about two months. *Heat Exchangers, Inc. v. Map Constr. Corp.*, 34 Md. App. 679, 368 A.2d 1088 (1977).

In action by franchisee against franchisor, alleging that franchisor committed breach of franchise agreement by failing to furnish white acetate plastic ordered by franchisee, failure of franchisor's supplier to maintain adequate supply of good quality white acetate was not such contingency as would excuse franchisor's duty to perform under UCC § 2-615 and to supply plastic required by franchisee under terms of contract. *Center Garment Co. v. United Refrigerator Co.*, 369 Mass. 633, 341 N.E.2d 669 (1976).

7. —Strike or the like.

In action between general contractor for construction of housing project and subcontractor who had agreed to supply all concrete needed on project arising when labor dispute caused general contractor to purchase balance of concrete requirements elsewhere, under UCC §§ 2-306(1) and 2-309(1) agreement was enforceable requirements contract where duration of contract was sufficiently determined by occurrence of completion of project; depending on circumstances, labor dispute may give rise to defense of impossibility of performance under UCC § 2-615. *Mishara Constr. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 310 N.E.2d 363, 70 A.L.R.3d 1259 (1974).

8. —Fire or other casualty.

When there is a mutual rescission of a sales contract following a fire which destroyed the seller's factory, the contract is not revived by the subsequent rebuilding of the factory. *Goddard v. Ishikawajima-*

Harima Heavy Indus. Co., 29 A.D.2d 754 (1st Dep't 1968), aff'd, 24 N.Y.2d 842, 300 N.Y.S.2d 851, 248 N.E.2d 600 (1969).

9. Compliance with government regulations as excuse.

Sewer system installer, possessed with superior knowledge of requirements of Department of Health than was possessed by subdivision owners and developers for whom sewer system was being installed, had duty to obtain necessary approval of plans from Department of Health; lack of such approval was not unforeseen and unusual contingency within Code § 2-615(a). *Security Sewage Equip. Co. v. McFerren*, 14 Ohio St. 2d 251, 237 N.E.2d 898 (1968).

10. Allocation.

In action by oil company against distributor for unpaid debt in which distributor filed counterclaim alleging that plaintiff, in violation of UCC § 2-615(b), had wrongfully terminated jobber sales contract with defendant for distribution of plaintiff's products, defendant's contention that UCC § 2-615(b) required plaintiff, when faced with product shortage, to allocate its limited supplies fairly among all of its jobbers, rather than terminate its contract with defendant, could not be sustained because UCC § 2-615(b) does not apply to termination of a contract by either buyer or seller. Instead, the statute applies to a situation in which it becomes impossible or impracticable for seller to perform during existence of contract, and statute grants defense to seller in such circumstances. *AMOCO v. Columbia Oil Co.*, 88 Wash. 2d 835, 567 P.2d 637 (1977).

Allocation provisions of UCC § 2-615(b) did not apply to contract for sale of harvesting combine with specified accessories where contract was to have been performed completely or not at all. *Olson v. Spitzer*, 257 N.W.2d 459 (S.D. 1977).

In nonperformance case, if allocation of seller's production under UCC § 2-615(b) is not possible, there is no "available quota" of such production that the buyer can accept under UCC § 2-616(1)(b). *Olson v. Spitzer*, 257 N.W.2d 459 (S.D. 1977).

Where contract provided that seller would sell and deliver to buyer latter's

propane gas requirements for 5 year term, seller was permitted to allocate among its customers when gas became in short supply under UCC § 2-615, and parties to contract were bound by rule of allocation absent any affirmative provision in contract that seller would perform contract even though contingencies which permit allocation might occur. *Mansfield Propane Gas Co. v. Folger Gas Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974).

Evidence showed that automobile manufacturer fulfilled its duty under UCC § 2-615(a) and (b) to allocate, during periods of short supply, available production among its dealer-customers on fair and reasonable basis where automobile dealer's own witnesses admitted that during entire period in question manufacturer had furnished it with greater "day's supply" of automobiles than it had generally done with other dealers. *Cecil Corley Motor Co. v. GMC*, 380 F. Supp. 819 (M.D. Tenn. 1974).

Code section requiring seller to make reasonable allocation of supply among customers was intended to partially excuse performance of existing contract when full performance of those contracts became impossible, but was not intended to prevent party from terminating contract in accordance with its terms. *North Penn Oil & Tire Co. v. Phillips Petro. Co.*, 358 F. Supp. 908 (E.D. Pa. 1973), reargument denied, 371 F. Supp. 676 (E.D. Pa. 1974).

Requirement of Code § 2-615 that where availability of adequate supply is contingency the non-occurrence of which was basic assumption on which contract was made and part of seller's capacity to perform is affected, seller must make reasonable allocation of supply among seller's customers did not prohibit express provision excusing performance in event of specified contingency; further, where customer's receipt of less than its marketing needs under seller's allocation formula was result of customer's lack of sales history in preceding year rather than any arbitrary or discriminatory conduct by seller, and there was no evidence that any other customer also lacking requisite sales history received different allocation, customer failed to establish that alloca-

tion program was not fair and reasonable. *Intermar, Inc. v. Atlantic Richfield Co.*, 364 F. Supp. 82 (E.D. Pa. 1973).

11. Notice.

Failure of seller of corn and wheat grown on seller's farms to make complete deliveries to buyer was excusable under UCC § 2-615(a) where jury found (1) that such failure had resulted from unseasonably wet weather contrary to basic assumption on which contracts of sale were made, (2) that seller had seasonably notified buyer of such nondeliveries pursuant to UCC § 2-615(c), and (3) that seller's allocation of corn to seller's own needs was equitable under UCC § 2-615(b). *Campbell v. Hostetter Farms, Inc.*, 251 Pa. Super. 232, 380 A.2d 463 (1977).

Parol evidence rule, UCC § 2-202, did not preclude consideration of understanding between parties to contract for sale and delivery of soybeans as to damages in event of breach where such understanding did not contradict any terms of contract;

seller could not rely on defense of impossibility under UCC § 2-615, notwithstanding seller was farmer and was unable to deliver because his soybean crop failed, where buyer did not contemplate that contract would be filled by beans from any particular crop and where seller did not give seasonable notice of his inability to deliver. *Bunge Corp. v. Miller*, 381 F. Supp. 176 (W.D. Tenn. 1974).

12. Impossibility.

There are no Mississippi cases recognizing the doctrine of impracticability, although the trend with other courts appears to be toward treating the doctrine as similar to the doctrine of impossibility, which Mississippi does recognize; the Mississippi Supreme Court has not recognized frustration of purpose as a defense to a breach of contract action. *City of Starkville v. 4-County Elec. Power Ass'n*, — So. 2d —, 2002 Miss. LEXIS 1 (Miss. Jan. 10, 2002).

RESEARCH REFERENCES

ALR. Labor disputes as excusing, under UCC § 2-615, failure to deliver goods sold. 70 A.L.R.3d 1266.

Impracticability of performance of sales contract as defense under UCC § 2-615. 93 A.L.R.3d 584.

Impracticability of performance of sales contract under UCC § 2-615. 55 A.L.R.5th 1.

Am Jur. 67 Am. Jur. 2d, Sales §§ 591, 596 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:911-2:914 (excuse of seller).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1501 et seq (excuse by failure of presupposed condition).

37 Am. Jur. Trials 597, Trial Report: Defending a Celebrity in a Breach of Employment Contract Case.

24 Am. Jur. Proof of Facts 2d 269, "Impossibility of Performing Contract."

§ 75-2-616. Procedure on notice claiming excuse.

(1) Where the buyer received notification of a material or indefinite delay or an allocation justified under section 75-2-615 he may by written notification to the seller as to any delivery concerned, and where the prospective deficiency substantially impairs the value of the whole contract under the provisions of this chapter relating to breach of installment contracts (Section 2-612) [Section 75-2-612], then also as to the whole.

(a) terminate and thereby discharge any unexecuted portion of the contract; or

(b) modify the contract by agreeing to take his available quota in substitution.

(2) If after receipt of such notification from the seller the buyer fails so to modify the contract within a reasonable time not exceeding thirty (30) days the contract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement except insofar as the seller has assumed a greater obligation under Section 75-2-615.

SOURCES: Codes, 1942, § 41A:2-616; Laws, 1966, ch. 316, § 2-616, eff March 31, 1968.

Cross References — Modification of contract, see § 75-2-209.

Breach of instalment contract, see § 75-2-612.

Performance impracticable by occurrence of unforeseen contingency, see § 75-2-615.

JUDICIAL DECISIONS

1. In general.

In nonperformance case, if allocation of seller's production under UCC § 2-615(b) is not possible, there is no "available

quota" of such production that the buyer can accept under UCC § 2-616(1)(b). *Olson v. Spitzer*, 257 N.W.2d 459 (S.D. 1977).

RESEARCH REFERENCES

Am Jur. 67 Am. Jur. 2d, Sales §§ 490, 491, 598 et seq., 642-655.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:931-2:935 (excuse of seller; notice claiming excuse).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:1511 et seq (procedure on notice claiming excuse).

24 Am. Jur. Proof of Facts 2d 269, "Impossibility of Performing Contract."

43 Am. Jur. Proof of Facts 2d 577, Wrongful Termination of Dealership.

CJS. 77 C.J.S., Sales § 109.

§ 75-2-617. Force majeure.

Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent. If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner. Such deliveries so suspended shall be cancelled without liability, but the contract shall otherwise remain unaffected.

SOURCES: Codes, 1942, § 41A:2-617; Laws, 1966, ch. 316, § 2-617, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general.

Market collapse and changes in regulation in natural gas industry are not within meaning of force majeure provision of § 75-2-617. *Day v. Tenneco, Inc.*, 696 F. Supp. 233 (S.D. Miss. 1988).

In an action by paving contractor against sand and gravel supplier for breach of contract, there was no basis in Mississippi law for paving contractor's attempted distinction between "production" and "delivery," even assuming, *arguendo*, that the distinction between "delivery" and "production" avoided the effect of the contractual exculpatory clause in the contract rendering defendant "not responsible for failure to make delivery when prevented by strikes, labor troubles, accident or necessary repairs to machinery...or by reason of any other causes beyond our control", it did not avoid the effect of this statute. *Noonan Constr. Co. v. Warren Bros. Co.*, 632 F.2d 1189 (5th Cir. 1980).

Where the parties contracted for the purchase and sale of the entire soybean crop to be grown on a particular tract of land, and by reason of drought conditions part of the crop failed, nonperformance to the extent of the failure was excused in the absence of an express condition in the contract to the contrary. *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652 (Miss. 1975).

In action on contract to deliver 4,000 bushels of soybeans by buyer against farmer who as result of drought was able to deliver less than 2,000 bushels, his entire crop, rejection of buyer's evidence relating to custom and usage of soybean trade was proper under UCC § 1-205(6) where offer of evidence came late in trial and probably would have denied seller opportunity to rebut it absent continuance or other disruption of trial. *Paymaster Oil Mill Co. v. Mitchell*, 319 So. 2d 652 (Miss. 1975).

RESEARCH REFERENCES

Am Jur. 1 Am. Jur. 2d, Act of God §§ 1 et seq. **CJS.** 1 C.J.S., Act of God.

PART 7.

REMEDIES.

SEC.

- 75-2-701. Remedies for breach of collateral contracts not impaired.
- 75-2-702. Seller's remedies on discovery of buyer's insolvency.
- 75-2-703. Seller's remedies in general.
- 75-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.
- 75-2-705. Seller's stoppage of delivery in transit or otherwise.
- 75-2-706. Seller's resale including contract for resale.
- 75-2-707. "Person in the position of a seller".
- 75-2-708. Seller's damages for nonacceptance or repudiation.
- 75-2-709. Action for the price.
- 75-2-710. Seller's incidental damages.
- 75-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.
- 75-2-712. "Cover"; buyer's procurement of substitute goods.
- 75-2-713. Buyer's damages for nondelivery or repudiation.
- 75-2-714. Buyer's damages for breach in regard to accepted goods.
- 75-2-715. Buyer's incidental and consequential damages.
- 75-2-716. Buyer's right to specific performance or replevin.

- 75-2-717. Deduction of damages from the price.
- 75-2-718. Liquidation or limitation of damages; deposits.
- 75-2-719. Contractual modification or limitation of remedy.
- 75-2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach.
- 75-2-721. Remedies for fraud.
- 75-2-722. Who can sue third parties for injury to goods.
- 75-2-723. Proof of market price; time and place.
- 75-2-724. Admissibility of market quotations.
- 75-2-725. Statute of limitations in contracts for sale.

§ 75-2-701. Remedies for breach of collateral contracts not impaired.

Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this chapter.

SOURCES: Codes, 1942, § 41A:2-701; Laws, 1966, ch. 316, § 2-701, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general.

Attorneys' fees incurred in action to recover loss of profits and incidental damages upon buyer's repudiation of contract

are not in nature of protective expenses contemplated by Code. *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

RESEARCH REFERENCES

Am Jur. 67A Am. Jur. 2d, Sales §§ 986 et seq., 1164 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:951, 2:952 (remedies).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:1541, 253:1542 (remedies for breach of collateral agreement not impaired).

CJS. 77A C.J.S., Sales §§ 278, 281, 326 et seq., 375 et seq.

§ 75-2-702. Seller's remedies on discovery of buyer's insolvency.

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this chapter (Section 2-705) [Section 75-2-705].

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten (10) days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three (3) months before delivery the ten-day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this

chapter (Section 2-403) [Section 75-2-403]. Successful reclamation of goods excludes all other remedies with respect to them.

SOURCES: Codes, 1942, § 41A:2-702; Laws, 1966, ch. 316, § 2-702; Laws, 1968, ch. 486, § 1, eff from and after March 31, 1968.

Cross References — Title to goods, see § 75-2-401.

Seller's insolvency as affecting buyer's rights with respect to goods not shipped but paid for in whole or in part, see § 75-2-502.

Seller's right to stop delivery, see § 75-2-705.

Seller's resale of goods, see § 75-2-706.

Continuance of rights acquired by holder of negotiable document of title, notwithstanding stoppage of goods represented by document, see § 75-7-502.

JUDICIAL DECISIONS

1. In general; scope.
2. Demand for return.
3. Written misrepresentation of solvency.
4. Effect of bankruptcy or insolvency; decisions prior to Bankruptcy Reform Act of 1978.
5. Priority of seller's claim as against other creditors.
6. Effect of seller's demand that third party withhold delivery.
7. Other matters.

1. In general; scope.

Seller's right to reclaim under UCC § 2-702 was not security interest within purview of Article 9. *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App. 1975), *ref. n.re.* (Apr. 7, 1976).

Where creditor provided service to debtor of reproducing debtor's master tape into saleable units, i.e. cartridges or cassettes, creditor was not a seller and was thus not entitled to a vendor's lien. *North Am. Leisure Corp. v. A & B Dupliators, Ltd.*, 468 F.2d 695 (2d Cir. N.Y. 1972).

An implicit requirement of Code § 2-702(2) permitting reclamation without regard to the 10-day limitation if a written misrepresentation of solvency is made within 3 months before delivery, is that the particular writing relied on as a misrepresentation of solvency be treated as a misrepresentation by the seller and relied on as such; where the seller had in its file a financial statement of the buyer showing a net worth of about \$4000, and nev-

ertheless proceeded to sell the buyer loads of beer in one month to the extent that they claim over \$12,000 for three loads, the seller could show no basis for reliance on previous or current checks as representation of solvency. This type of conduct cannot be regarded as the "good faith" required by Code § 1-203, nor was it any indication of "ordinary prudence". *Theo. Hamm Brewing Co. v. First Trust & Sav. Bank*, 103 Ill. App. 2d 190, 242 N.E.2d 911 (3d Dist. 1968).

The Uniform Commercial Code does not change the rule that a vendor cannot rescind and reclaim the goods as against an attachment or execution on a debt contracted subsequent to the alleged voidable sale. *In re Kravitz*, 278 F.2d 820 (3d Cir. Pa. 1960).

2. Demand for return.

In action involving seller's petition to reclaim furniture sold to insolvent buyer, where (1) seller sold furniture to buyer which buyer accepted, (2) at time of delivery, seller did not know that buyer was insolvent, (3) two days after learning of buyer's insolvency, seller sent telegram to buyer demanding rescission under UCC § 2-702 and, after receiver was appointed for buyer, filed petition to reclaim goods, (4) bankruptcy court denied petition on ground that bankruptcy trustee was entitled to goods under § 70(c) of Bankruptcy Act and that UCC § 2-702 conflicted with §§ 64 and 67(c) of Bankruptcy Act, and (5) district court affirmed bankruptcy court's ruling, court held (1) that issue was whether seller could reclaim

under UCC § 2-702(2) when seller's demand followed filing of bankruptcy petition, (2) that under § 70(c) of Bankruptcy Act, bankruptcy trustee acquired rights of hypothetical lien creditor, (3) that buyer was insolvent when it received goods from seller, (4) that seller had discovered such fact and made demand for reclamation within ten days after buyer received goods, as required by UCC § 2-702(2), (5) that state law controlled rights of bankruptcy trustee as hypothetical lien creditor, (6) that reference in UCC § 2-702(3) to rights of lien creditors directs that those rights be found exclusively in UCC Article 2 or in articles to which Article 2 refers, (7) that lien creditor was not "purchaser for value" under UCC § 2-403 and that bankruptcy trustee acquired no rights under UCC § 2-403 as against reclaiming seller, (8) that under facts of case, bankruptcy trustee also acquired no rights under UCC §§ 2-326 or 9-301, and no lien creditor could cut off seller's right to reclaim under UCC § 2-702(2), (9) that by same token, § 70(c) of Bankruptcy Act did not give trustee right to cut off seller's right to reclaim, (10) that UCC § 2-702(2) created something other than a security interest, (11) that UCC § 2-702(2) was not an unlawful priority that conflicted with § 64 of Bankruptcy Act, (12) that UCC § 2-702(2) was not lien subject to invalidation as statutory lien under § 67(c) of Bankruptcy Act, and (13) that reclamation under UCC § 2-702(2) in instant case did not constitute invalid preferential transfer under § 60 of Bankruptcy Act. *Bassett Furn. Indus., Inc. v. Wear*, 583 F.2d 992 (8th Cir. Mo. 1978).

Seller of cattle did not have superior right to recover unpaid purchase price as against secured creditors of purchaser, where purchaser took immediate possession of cattle and they became part of its inventory, where inventoried cattle and proceeds therefrom were subject to security agreements held by secured creditors, and where seller, who made no attempt to perfect purchase money security interest, failed to make demand for reclamation within ten-day period provided by UCC § 2-702(2). *United States v. Wyoming Nat'l Bank*, 505 F.2d 1064 (10th Cir. Wyo. 1974).

A financing agency cannot exercise seller's right of reclamation under UCC § 2-702(2) as a means of entirely circumventing filing requirements of Article 9. In *re Hardin*, 458 F.2d 938 (7th Cir. Wis. 1972).

In a proceeding by sellers to compel the receivers of insolvent buyer to surrender certain lawnmowers, receivers' contention that seller could not prevail since a physical reclamation is required, whereas sellers had only "demanded" a return of the goods, was rejected. The court, however, refused to order a surrender of the goods on other grounds. *Metropolitan Distribs. v. Eastern Supply Co.*, 21 Pa. D. & C.2d 128 (1959).

3. Written misrepresentation of solvency.

Where seller sought to reclaim goods it had shipped to buyer more than ten days before buyer filed petition for bankruptcy, mere fact that buyer gave seller two checks which were returned for insufficient funds (NSF) did not make buyer "insolvent" as defined by UCC § 1-201(23) nor did the two NSF checks constitute a misrepresentation of solvency "in writing" within three months of buyer's receipt of shipment, entitling seller to reclaim goods under UCC § 2-702(2), where there was evidence to show that seller did not rely upon NSF checks as representations of solvency, but relied primarily, if not entirely, upon representation that payment for shipment would be made out of special escrow account. In *re Creative Bldgs., Inc.*, 498 F.2d 1 (7th Cir. Ill. 1974).

Misrepresentation of solvency, under UCC § 2-702(2), must be presented in writing, not dated, within 3-month period. In *re Bel Air Carpets, Inc.*, 452 F.2d 1210 (9th Cir. Cal. 1971).

An implicit requirement of Code § 2-702(2) permitting reclamation without regard to the 10-day limitation if a written misrepresentation of solvency is made within 3 months before delivery, is that the particular writing relied on as a misrepresentation of solvency be treated as a misrepresentation by the seller and relied on as such; where the seller had in its file a financial statement of the buyer showing a net worth of about \$4000, and nevertheless proceeded to sell the buyer loads of beer in one month to the extent that

they claim over \$12,000 for three loads, the seller could show no basis for reliance on previous or current checks as representation of solvency. This type of conduct cannot be regarded as the "good faith" required by Code § 1-203, nor was it any indication of "ordinary prudence". *Theo. Hamm Brewing Co. v. First Trust & Sav. Bank*, 103 Ill. App. 2d 190, 242 N.E.2d 911 (3d Dist. 1968).

4. Effect of bankruptcy or insolvency; decisions prior to Bankruptcy Reform Act of 1978.

Where seller delivered goods on credit to buyer on August 10, 1972, buyer filed petition in bankruptcy on August 16, 1972, and receiver was appointed on same day; where on August 18, 1972, seller made timely demand under UCC § 2-702(2) for return of goods delivered to buyer; and where it was stipulated that buyer intended to pay for goods at time they were ordered and received, (1) seller under UCC § 2-702(2) had right of reclamation superior to right of insolvent buyer's trustee in bankruptcy, as alleged "lien creditor" under UCC § 2-702(3); (2) rights of trustee in bankruptcy as "lien creditor" could be determined by reference to precode state law, since state's enactment of UCC § 2-702 did not provide express guidance concerning relative priorities of seller under UCC § 2-702(2) and trustee of bankrupt buyer; (3) seller's superior right of reclamation under UCC § 2-702(2) had its antecedents in historical and equitable right of defrauded seller to reclaim goods sold to insolvent buyer and thus did not arise "solely by force of statute" so as to be invalidated by conflict with § 67c(1)(A) of Bankruptcy Act (11 USCS § 107c(1)(A)) and (4) seller's superior right of reclamation as against trustee in bankruptcy also was not invalidated by § 64 of Bankruptcy Act (11 USCS § 104) as being disguised state-created priority that conflicted with § 64 of such act. *Federal's, Inc. v. Matsushita Elec. Corp. of Am.*, 553 F.2d 509 (6th Cir. Mich. 1977).

Seller's right of reclamation under UCC § 2-702(2) was not preempted by federal Bankruptcy Act (11 USCS § 64), and thus seller's right to reclaim was superior to trustee's rights as hypothetical lien creditor under 11 USCS § 70c, and UCC

§ 2-702(3). *Federal's, Inc. v. Matsushita Elec. Corp. of Am.*, 553 F.2d 509 (6th Cir. Mich. 1977).

Where meat packer's operations were financed by secured creditor who had properly perfected security interest in meat packer's assets, including after-acquired property, where cattle sellers delivered cattle to meat packer on "grade and yield basis," where checks were subsequently issued to sellers, but before checks were paid, secured party, believing itself to be insecure, refused to advance more funds to meat packer for operation of plant, and where meat packer then filed petition in bankruptcy, interest of unpaid seller was subordinate to interest of secured creditor, and seller who did not attempt to reclaim cattle until year after filing petition for bankruptcy, was not entitled to either reclamation of cattle or proceeds from sale of slaughtered meat. *Stowers v. Mahon*, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

Seller who sold lifting magnets to buyer on open account did not have right to reclaim magnets under UCC § 2-702(2), dealing with buyer's insolvency, or UCC § 2-609(4), dealing with right to adequate assurance of performance, where (1) seller produced no evidence that buyer was insolvent when it received either first or second shipment of magnets, and seller did not assert its right to reclaim within applicable ten day limitation; (2) there was no evidence that seller had reasonable grounds for insecurity with respect to buyer's performance, nor any demand for adequate assurance made in writing. *National Ropes, Inc. v. National Diving Serv., Inc.*, 513 F.2d 53 (5th Cir. Fla. 1975).

UCC § 2-702(2), permitting seller to reclaim goods received by buyer on credit while insolvent, was not invalid as against buyer's trustee in bankruptcy on grounds that it was statutory lien which first became effective upon insolvency of debtor or that it constituted state-created priority. *In re Telemart Enters., Inc.*, 524 F.2d 761, 20 Fed. R. Serv. 2d 1269, 17 U.C.C. Rep. Serv. 881 (9th Cir. Cal. 1975), cert. denied, 424 U.S. 969, 96 S. Ct. 1466, 47 L. Ed. 2d 736 (1976) and criticized by *Federal's, Inc. v. Matsushita Elec. Corp. of Am.*,

553 F.2d 509, 21 U.C.C. Rep. Serv. 689 (6th Cir. Mich. 1977).

Seller's right to reclaim goods delivered to insolvent buyer under UCC § 2-702 was statutory lien within meaning of federal Bankruptcy Act and since lien conflicted with priorities established by Bankruptcy Act it would not be given effect in bankruptcy proceeding. In re Good Deal Supermarkets Inc., 384 F. Supp. 887 (D.N.J. 1974).

Where the sellers of automobiles to a buyer who disposed of them through an auction company later found the checks received by them from the buyer in payment for the cars were dishonored because of the auction company's actions in stopping payments on checks previously delivered to the buyer and by withholding from him the proceeds derived from the sales of the sellers' cars, the sellers had a right of reclamation of their property had it remained in the buyer's hands either under § 2-702 or § 2-507 because the auction company's action had in effect rendered the car buyer insolvent, and although the cars had been resold at auction the sellers' rights survived the resale and, on equitable principles, attached to the proceeds of the sales in the hands of the auction company. Greater Louisville Auto Auction, Inc. v. Ogle Buick, Inc., 387 S.W.2d 17 (Ky. 1965).

Since subdivision (1)(b) of this section which permits a seller of goods, upon learning of the buyer's insolvency, to reclaim its goods within 10 days after receipt of the goods by the purchaser, might possibly be in conflict with the provisions of the federal Bankruptcy Act pertaining to preferences, rights of a seller seeking a return of lawnmowers from the receivers of an insolvent debtor should be determined by the federal District Court before which bankruptcy proceedings were then pending. Metropolitan Distribs. v. Eastern Supply Co., 21 Pa. D. & C.2d 128 (1959).

5. Priority of seller's claim as against other creditors.

Seller's right of reclamation under UCC § 2-702 was superior to trustee's rights as hypothetical lien creditor. Federal's, Inc. v. Matsushita Elec. Corp. of Am., 553 F.2d 509 (6th Cir. Mich. 1977).

Where seller, as supplier of goods on credit, demanded return of goods from buyer within ten days upon discovery of buyer's insolvency pursuant to UCC § 2-702 and where bank had prior perfected security interest in all of buyer's inventory, then owned or thereafter acquired, bank, under definition of UCC § 1-201(32,33) qualified as good faith purchaser making it exempt from seller's right to reclaim under UCC § 2-702(3) and bank's perfected security interest had priority over seller as seller failed to perfect its claim by filing as required by UCC § 9-312. House of Stainless, Inc. v. Marshall & Ilsley Bank, 75 Wis. 2d 264, 249 N.W.2d 561 (1977).

Although secured party had perfected security interest in after-acquired property of debtor, there is nothing in UCC § 9-301(3) which includes party with such status within definition of "lien creditor," thus, there was nothing to prevent unpaid seller from reclaiming goods sold to debtor-buyer, despite claim of secured party that it was lien creditor entitled to priority under UCC § 2-702(3). Chastain-Roberts Co. v. Better Brands, Inc., 141 Ga. App. 186, 233 S.E.2d 5 (1977).

As to proceeds from sales of slaughtered meat, cash sellers of cattle who failed to make timely demand for reclamation were subordinate not only to finance agency which had prior perfected security interest in bankrupt meat packer's assets (including after-acquired property), but also to packer's trustee in bankruptcy. Stowers v. Mahon, 526 F.2d 1238 (5th Cir. Tex. 1976), cert. denied, 429 U.S. 834, 97 S. Ct. 98, 50 L. Ed. 2d 99 (1976).

UCC § 2-702(2), permitting seller to reclaim goods received by buyer on credit while insolvent, was not invalid as against buyer's trustee in bankruptcy on grounds that it was statutory lien which first became effective upon insolvency of debtor or that it constituted disguised state priority. In re Telemart Enters., Inc., 524 F.2d 761, 20 Fed. R. Serv. 2d 1269, 17 U.C.C. Rep. Serv. 881 (9th Cir. Cal. 1975), cert. denied, 424 U.S. 969, 96 S. Ct. 1466, 47 L. Ed. 2d 736 (1976) and criticized on other grounds by Federal's, Inc. v. Matsushita Elec. Corp. of Am., 553 F.2d 509, 21 U.C.C. Rep. Serv. 689 (6th Cir. Mich. 1977).

Under UCC § 9-301, security interest of cattle seller was subordinate to rights of garnishing lien creditor where debtor purchased cattle from seller and paid for them with check which was subsequently dishonored for insufficient funds, where debtor shipped cattle to livestock auction company for resale and writ of garnishment was served on auction company, where seller and debtor subsequently executed security agreement and financing statement, back-dated, and properly describing cattle in question and where financing statement was filed within ten days after debtor purchased cattle from seller. Seller's right to reclaim under UCC § 2-702 was not security interest within purview of Article 9 on secured transactions and acceptance of check did not change cash sale into credit transaction. Since there was no security agreement between debtor and seller, either oral or written, at time writ of garnishment was served, security interest attached sometime later when security agreement was signed by debtor. *Ranchers & Farmers Livestock Auction Co. v. First State Bank*, 531 S.W.2d 167 (Tex. Civ. App. 1975), *ref. n.re.* (Apr. 7, 1976).

In action between lender who held unperfected security interest in automobiles and car dealer who sold collateral to debtor, seller's right to reclaim goods under UCC § 2-702(3), when buyer's check for purchase price was dishonored by bank, did not have priority over lender's unperfected security interest in automobiles which arose when lender, who qualified as "purchaser" under UCC § 1-201, acquired certificates of title; under UCC § 2-403(1), once certificates of title were delivered, debtor acquired voidable title and could convey enforceable right in automobiles to lender as good faith purchaser for value, even though debtor's check to seller of automobiles was later dishonored. *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 184 Colo. 166, 519 P.2d 354 (1974).

Seller of cattle did not have superior right to recover unpaid purchase price as against secured creditors of purchaser, where purchaser took immediate possession of cattle and they became part of its inventory, where inventoried cattle and

proceeds therefrom were subject to security agreements held by secured creditors, and where seller, who made no attempt to perfect purchase money security interest, failed to make demand for reclamation within ten-day period provided by UCC § 2-702(2). *United States v. Wyoming Nat'l Bank*, 505 F.2d 1064 (10th Cir. Wyo. 1974).

In action by creditor of bankrupt arising out of sale of bar equipment which was originally negotiated as cash sale with payment due on delivery, seller waived his right to reclaim goods under UCC § 2-507(2) by failing to reclaim equipment until it had been in buyer's possession for over 4 months; nor did seller become "reclaiming seller" once transaction became credit sale since UCC § 2-702 requirement that demand for return of goods be made within 10 days of their receipt was not satisfied. Thereafter, actual retaking by seller did not, under UCC § 2-703(f), accomplish cancellation of the sale as a remedy and was not effective to prevent the retaking being a preference under Bankruptcy Act. *In re Colacci's of Am., Inc.*, 490 F.2d 1118 (10th Cir. Colo. 1974).

Where persons selling goods to a debtor who thereafter made an assignment for benefit of creditors assert the right to reclaim the goods on the ground that title was not to pass until payment was made, such sellers have the burden of proving the existence of such a condition to the passage of title and that the goods or their identifiable proceeds were held by the assignee and that the sellers had not waived their right by failure to reclaim the goods. *In re Central Islip Supermarkets, Inc.*, 4 U.C.C. Rep. Serv. 29 (1967, NY Sup).

If the seller makes a cash sale and takes a check in payment but the drawee bank refuses to make payment because a petition in bankruptcy is filed as to the buyer, although there was on deposit sufficient money to pay the check, the seller has the right to reclaim the goods within ten days as against the buyer's trustee in bankruptcy (distinguishing a sale on credit in which the seller would not have a right superior to the trustee in bankruptcy). *In re Mort Co.*, 208 F. Supp. 309 (E.D. Pa. 1962).

The principle that a reclamation seller's interest is subordinate to that of a lien creditor who extended credit subsequent to the sale is not displaced by the particular provisions of § 2-702. In *re Kravitz*, 278 F.2d 820 (3d Cir. Pa. 1960).

Since, under Pennsylvania law, the seller's right of rescission is not an absolute right but is subject to the right of a lien creditor who extended credit subsequent to the sale, and by virtue of § 70, sub c of the Bankruptcy Act, the trustee in bankruptcy has rights of lien creditor, the trustee in bankruptcy has superior rights to the proceeds from the sale of seller's goods, even if the sale of goods on credit has been induced by positive misrepresentation by the bankrupts, and the seller had attempted to rescind the sale. In *re Kravitz*, 278 F.2d 820 (3d Cir. Pa. 1960).

Since subdivision (1)(b) of this section which permits a seller of goods, upon learning of the buyer's insolvency, to reclaim its goods within 10 days after receipt of the goods by the purchaser, might possibly be in conflict with the provisions of the federal Bankruptcy Act pertaining to preferences, rights of a seller seeking a return of lawnmowers from the receivers of an insolvent debtor should be determined by the federal District Court before which bankruptcy proceedings were then pending. *Metropolitan Distribs. v. Eastern Supply Co.*, 21 Pa. D. & C.2d 128 (1959).

6. Effect of seller's demand that third party withhold delivery.

In interpleader action by bailee of zinc, where evidence showed (1) that bailor, who had stored 300 tons of zinc with bailee, ordered bailee to release all of it to bailor's purchaser, (2) that bailor's purchaser then sold such zinc to alleged bona-fide subpurchaser and ordered bailee to release zinc to subpurchaser, (3) that after bailee had delivered 40 tons to subpurchaser, bailor learned of original purchaser's insolvency and ordered bailee to stop delivery to original purchaser, and (4) that on the same day, subpurchaser also ordered bailee to deliver remainder of such zinc (260 tons) to it, district court denied bailor's motion for summary judgment on its alleged right under UCC §§ 7-504(4) and § 2-705(1) and (2) to stop delivery of zinc, since (1) bailor failed to

show, within meaning of UCC § 2-705(2)(b), that bailee had not acknowledged that it was holding the zinc for the subpurchaser, and (2) bailor also had failed to show, within meaning of UCC § 2-705(2)(d), that there had been no negotiation to subpurchaser of any negotiable document of title covering the zinc (applying Illinois UCC; also holding that subpurchaser's claim of bona-fide purchase was not available to it under UCC § 2-702(3) or § 2-403(1)). *Ceres Inc. v. ACLI Metal & Ore Co.*, 451 F. Supp. 921 (N.D. Ill. 1978).

In absence of bailment relationship contemplated by UCC § 2-702(1) and § 2-705(1), third party to whom seller directly ships goods sold to buyer may not be held liable for disregarding seller's demand to withhold delivery of goods from buyer (holding that since defendant, to whom buyer had directed seller to ship goods, held goods under act of accommodation and not under bailment contract, defendant was not liable to seller for delivering goods to bankrupt buyer in disregard of seller's demand not to do so). *H. Lynn White, Inc. v. Leftwich*, 2 Kan. App. 2d 341, 579 P.2d 164 (1978).

In action by common carrier of crude oil against bankrupt buyer of crude oil, title to oil revested in oil producing sellers under UCC § 2-401(4) when buyer refused to accept tender of crude oil from pipeline company conditioned upon buyer's payment of common carrier lien; notice given by seller, prior to buyer's refusal of tender, to stop delivery to buyer based on previous dishonor of buyer's checks for insufficient funds was timely exercise of seller's rights of stoppage under UCC §§ 2-702(1), (2) and 2-705(1) and sellers could reclaim oil upon demand and notice as given. *Amoco Pipeline Co. v. Admiral Crude Oil Corp.*, 490 F.2d 114 (10th Cir. N.M. 1974).

7. Other matters.

In action by unpaid credit seller of oil supplies to debtor against bank, which held perfected security interest in debtor's oil inventory, for lack of good faith in disposing of part of such inventory, court held (1) that under UCC § 2-702(3), plaintiff's right to reclaim oil supplies sold to debtor was subject to bank's right to dis-

pose of such supplies, which were collateral for bank's loan to debtor, as good-faith purchaser for value under UCC § 2-403(1); (2) that under UCC § 1-201(44)(b), bank had given value for debtor's oil inventory which bank obtained under after-acquired property clause in debtor's security agreement; (3) that UCC definition of good-faith purchaser did not, expressly or impliedly, include as element of such definition lack of knowledge of third-party

claims, since good faith is merely defined in UCC § 1-201(19) as "honesty in fact in transaction concerned"; and (4) that under circumstances of case, bank's knowledge that plaintiff was unpaid credit seller to debtor did not impair bank's good faith in disposing of debtor's oil inventory (collateral) to satisfy debtor's obligation to bank. *Shell Oil Co. v. Mills Oil Co.*, 717 F.2d 208 (5th Cir. 1983).

RESEARCH REFERENCES

Am Jur. 67A Am. Jur. 2d, Sales §§ 1018 et seq., 1029 et seq., 1054 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:971-2:977 (remedies of seller on discovery of buyer's insolvency).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1551 et seq (remedies of seller on discovery of insolvency of buyer).

41 Am. Jur. Proof of Facts 2d 337, Damages for Breach of Contract to Lend Money.

Law Reviews. Marshack, The Return of the Reclaiming Seller: New Decisions Under the Bankruptcy Code and the Uniform Commercial Code. 16 UCC L. J. 187, Winter, 1984.

§ 75-2-703. Seller's remedies in general.

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (Section 2-612) [Section 75-2-612], then also with respect to the whole undelivered balance, the aggrieved seller may

- (a) withhold delivery of such goods;
- (b) stop delivery by any bailee as hereafter provided (Section 2-705) [Section 75-2-705];
- (c) proceed under section 75-2-704 respecting goods still unidentified to the contract;
- (d) resell and recover damages as hereafter provided (Section 2-706) [Section 75-2-706];
- (e) recover damages for nonacceptance (Section 2-708) [Section 75-2-708] or in a proper case the price (Section 2-709) [Section 75-2-709];
- (f) cancel.

SOURCES: Codes, 1942, § 41A:2-703; Laws, 1966, ch. 316, § 2-703, eff March 31, 1968.

Cross References — Code remedies liberally administered, see § 75-1-106.

Buyer's failure to furnish agreed letter of credit, see § 75-2-325.

Breach of installment contract, see § 75-2-612.

Person in position of seller, see § 75-2-707.

JUDICIAL DECISIONS

1. In general.
2. Withholding delivery.
3. Stopping delivery.
4. Reselling goods.
5. —Notice of resale.
6. Cancelling contract.

1. In general.

Seller's remedies of UCC do not apply to vendors of oil and gas leases. *Casper v. Neubert*, 489 F.2d 543 (10th Cir. Okla. 1973).

In action by seller of upholstery fabrics against buyer for balance due on unpaid invoices, in which buyer admitted ordering fabrics but alleged that seller had overshipped fabrics to buyer, that buyer had revoked acceptance of overshipped goods and returned them to seller, that seller had allowed credit for returned goods, and that buyer had then paid balance of its account, court held (1) that no overshipments had occurred; (2) that seller had agreed that buyer could return fabrics that buyer could not dispose of at reduced price; (3) that seller never notified buyer that credit memorandum for major part of returned fabrics had been erroneously sent to buyer; (4) that since disputed shipments had conformed to oral orders placed by buyer, buyer's revocation of its prior acceptance of goods under UCC § 2-608(1) was wrongful; (5) that seller was thereafter entitled to remedies provided by UCC § 2-703; (6) that seller's postbreach conduct—which consisted of allowing discount on disputed fabrics, accepting great number of pieces returned to seller, and sending buyer memorandum allowing credit for returned fabrics with no qualification as to memorandum's meaning—showed acquiescence in alleged agreement for return of goods and allowance of discount thereon; and (7) that seller, by failing to exercise diligence in enforcing its rights under the contract, had not exercised good faith required by UCC § 1-203, had seriously misled buyer, and thus was estopped to assert its abandoned rights. *Castle Fabrics, Inc. v. Fortune Furn. Mfrs., Inc.*, 459 F. Supp. 409 (N.D. Miss. 1978).

Where buyer of natural gas under 19 output contracts with producer-seller, af-

ter discovering that charts measuring seller's production and delivery of gas from wells involved in some of such contracts had been altered to show more production and delivery of gas to buyer than was actually the case, stopped payments on all contracts entered into with seller, instead of only those affected by the altered charts, (1) buyer's action constituted under UCC § 2-703 repudiation of whole of each contract that was not affected by altered charts, (2) buyer's action did not constitute repudiation of contracts that were affected by altered charts, and (3) under UCC § 2-103(1)(b), buyer acted in commercially unreasonable manner with regard to all 19 contracts by insisting that it recover all excess payments made to seller, and also all amounts due on unpaid loans made by it to seller, before it would resume paying for seller's deliveries of gas. *Columbia Gas Transmission Corp. v. Larry H. Wright, Inc.*, 12 Ohio Op. 3d 95, 443 F. Supp. 14 (S.D. Ohio 1977).

UCC § 2-703 and Official Comment 1 make it clear that seller's remedies for buyer's breach are cumulative. *Wolpert v. Foster*, 312 Minn. 526, 254 N.W.2d 348, 90 A.L.R.3d 1132 (1977).

Under UCC §§ 2-703 and 2-705 seller's sale of appliances to buyer on credit empowered buyer to pass good title to third party by delivery of appliances, under UCC §§ 2-312, 2-401 and 2-403 buyer did not breach any implied warranty of title when appliances were delivered to third party, and under UCC §§ 2-401(2) and 2-703 third party had no obligation to pay seller or return appliances although buyer failed to pay seller. *Mamber v. Levin*, 4 Mass. App. Ct. 157, 344 N.E.2d 192 (1976).

2. Withholding delivery.

Where buyer and seller allegedly entered into two oral contracts for sale of corn, although seller denied existence of second contract, and where, after seller had partially completed delivery under first contract, buyer refused to promise to pay seller for balance of corn that remained to be delivered under first contract and stated he would instead with-

hold payment as setoff against second contract: (1) buyer wrongfully asserted right of setoff under UCC § 2-717 since there were two separate contracts and (2) seller justifiably withheld delivery under UCC §§ 2-610 and 2-703, having interpreted seller's statement as wrongful refusal to pay on contract and as repudiation thereof. *Jurek v. Thompson*, 308 Minn. 191, 241 N.W.2d 788 (1976).

Code § 2-703 provides that where buyer wrongfully rejects or revokes acceptance of goods or fails to make payment due on or before delivery or repudiates with respect to part or whole, then with respect to any goods directly affected and, if breach is of whole contract, then also with respect to whole undelivered balance, aggrieved seller may withhold delivery of such goods. *Portal Galleries, Inc. v. Tomar Prods., Inc.*, 60 Misc. 2d 523 (1969).

3. Stopping delivery.

Where seller sold two carloads of fertilizer to buyer, received two checks in payment therefore, and shipped goods by railroad under straight, nonnegotiable bills of lading, where buyer resold goods to plaintiff, and where, after bank notified seller there were insufficient funds to cover buyer's checks, seller issued reconsignment order to railroad instructing it to deliver goods to another consignee, neither seller nor railroad was liable to plaintiff for cost of goods: (1) under UCC § 2-703, upon failure of checks presented by buyer to seller, seller was lawfully entitled to possession of goods; (2) under UCC 7-303, since bills of lading were nonnegotiable, railroad was obligated to deliver goods pursuant to instructions of seller, as consignor. *Clock v. Missouri-Kan.-Tex. R.R.*, 407 F. Supp. 448 (E.D. Mo. 1976), *aff'd*, 553 F.2d 102 (8th Cir. Mo. 1977).

4. Reselling goods.

Buyer who bought oil-drilling rig and accessory equipment at public auction by sending agent to make purchase and giving agent blank check to make payment, which was signed by buyer individually and not as representative of corporation of which buyer was president and sole owner, was individually liable to auctioneer under UCC § 2-703(d) and § 2-706(1), following dishonor of buyer's check (which

agent had completed by filling in amount for which equipment was purchased), for difference between resale price of such equipment and price for which agent had purchased it where (1) under UCC § 2-706(1) and (2), resale was made by auctioneer in good faith, in commercially reasonable manner, and on proper and reasonable notice to defendant buyer, and (2) auctioneer, before originally selling equipment to defendant's agent, had exercised due care and reasonable diligence by verifying agent's authority to purchase it. *Miller & Miller Auctioneers, Inc. v. Mersch*, 442 F. Supp. 570 (W.D. Okla. 1977).

Where seller bore risk of casualty to subject of contract, cattle, and was required to feed and shelter cattle for one month beyond date contracted for, and no agreement between parties had been reached as to compensation to seller for his cost, buyer's delay of approximately 30 days before his offer to perform was unreasonable; thus, buyer breached contract by failure to accept goods, and aggrieved seller was within his rights in cancelling contract and selling goods to third party. *Ziebarth v. Kalenze*, 238 N.W.2d 261 (N.D. 1976).

Under UCC § 2-703, seller may retain possession of goods, resell them and recover damages from buyer, where the buyer breaches sales contract by failing to make payment when due on or before delivery and the resale price is less than contract price. *Desbien v. Penokee Farmers Union Coop. Ass'n*, 220 Kan. 358, 552 P.2d 917 (1976).

The term "commercially reasonable" as used in the statute, while not specifically defined, requires that a resale of securities, after buyer's refusal to accept a tender of securities in accordance with a tender offer, should be made as soon as practicable after the breach of the tender offer and the seller should make every effort to minimize his loss, so that, considering the circumstances of the breach, a 30-day period from the day of the breach would be a commercially reasonable time to resell the securities. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

Buyer of goods at auction failed to pay purchase price; held, auctioneer could resell goods and buyer would be liable for any loss arising from resale and for expenses thereof. *French v. Sotheby & Co.*, 470 P.2d 318 (Okla. 1970).

5. —Notice of resale.

Grain elevator company breached agreement to purchase 4,000 bushels of wheat for March delivery where elevator purchased more grain for cash during contract delivery period than amount involved in contract with seller, but refused to accept delivery of seller's grain during contract period and for 2 months thereafter; thus, seller was entitled to cancel contract under UCC § 2-703(6) and resell wheat at private sale; since seller exercised his right to cancel contract under UCC § 2-703, and since he was not seeking to recover damages, he was not required to give notice of his intent to resell under UCC § 2-706, nor was he required to notify elevator under UCC § 2-309 that he was "terminating" contract. *Mott Equity Elevator v. Svihovec*, 236 N.W.2d 900 (N.D. 1975).

6. Cancelling contract.

Right to cancel contract under UCC § 2-703(f) and § 2-106(4) differs from right to terminate under UCC § 2-106(3), and does not arise out of any termination provision in the agreement. Thus, where manufacturer of automobile air conditioners cancelled distributorship agreement with distributor because of distributor's chronic overdue balances and failure to pay note, manufacturer did not have to resort to termination procedures in distributorship agreement, and distributor could not claim unlawful termination of such agreement. *Frigiking, Inc. v. Century Tire & Sales Co.*, 452 F. Supp. 935 (N.D. Tex. 1978).

Evidence that farmer indicated he wished to deliver soy beans during January as specified by his contract with buyer, but was notified delivery date had been extended into February, and that farmer was told reason for extension was buyer's inability to accept soy beans, was sufficient to support determination that buyer

repudiated contract; buyer's repudiation substantially impaired value of contract to farmer under UCC § 2-610 where, although farmer had agreed to deliver 3,000 bushels of soy beans, his soy bean crop came to only 2,000 bushels leaving him 1,000 bushels short, where price of soy beans was increasing daily, and where cost to farmer of making up his 1,000 bushel shortage would have increased materially if he were forced to wait for February delivery date and, thus, pursuant to UCC § 2-703(f), farmer was authorized to cancel agreement. *Pillsbury Co. v. Ward*, 250 N.W.2d 35 (Iowa 1977).

Although UCC § 2-309(1) did not apply where contracts for sale of grain contained specified delivery times, in absence of express statement that time was of essence or unless there were special circumstances, time was not necessarily of essence, and reasonable delay in delivery or acceptance of grain did not constitute breach of contract; unreasonable delay, however, constituted breach and justified remedy of cancellation; thus, where grain elevator buyer delayed acceptance of grain for unreasonable period of time, three months following last delivery date set forth in any of grain sales contracts, buyer breached contracts and seller justifiably cancelled contract under UCC § 2-703(f). *Farmers Union Grain Term. Ass'n v. Hermanson*, 549 F.2d 1177 (8th Cir. N.D. 1977).

In action by creditor of bankrupt arising out of sale of bar equipment which was originally negotiated as cash sale with payment due on delivery, seller waived his right to reclaim goods under UCC § 2-507(2) by failing to reclaim equipment until it had been in buyer's possession for over 4 months; nor did seller become "reclaiming seller" once transaction became credit sale since UCC § 2-702 requirement that demand for return of goods be made within 10 days of their receipt was not satisfied. Thereafter, actual retaking by seller did not, under UCC § 2-703(f), accomplish cancellation of the sale as a remedy and was not effective to prevent the retaking being a preference under

Bankruptcy Act. In re Colacci's of Am., Inc., 490 F.2d 1118 (10th Cir. Colo. 1974).

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ALR. Seller's right to retain down payment on buyer's unjustified refusal to accept goods. 11 A.L.R.2d 701.

Right of action for breach of contract which expressly leaves open for future agreement or negotiation the terms of payment for property. 68 A.L.R.2d 1221.

Uniform Commercial Code: measure of recovery where buyer repudiates contract for goods to be manufactured to special order, before completion of manufacture. 42 A.L.R.3d 182.

Time for revocation of acceptance of goods under UCC § 2-608(2). 65 A.L.R.3d 354.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under UCC § 2-608(1). 65 A.L.R.3d 388.

Am Jur. 67A Am. Jur. 2d, Sales §§ 1018 et seq., 1054 et seq., 1081, 1087 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:961, 2:962 (remedies of seller).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1561 et seq (remedies of seller in general).

11 Am. Jur. Proof of Facts 2d, Reduction or Mitigation of Damages — Sales Contract, §§ 56 et seq. (proof of facts in mitigation of damages; action by seller).

41 Am. Jur. Proof of Facts 2d 337, Damages for Breach of Contract to Lend Money.

CJS. 78 C.J.S., Sales §§ 326 et seq.

§ 75-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.

(1) An aggrieved seller under the preceding section may

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization either complete the manufacture and wholly identify the goods to the contract or cease manufacture and resell for scrap or salvage value or proceed in any other reasonable manner.

SOURCES: Codes, 1942, § 41A:2-704; Laws, 1966, ch. 316, § 2-704, eff March 31, 1968.

Cross References — When goods are conforming, see § 75-2-106.

Repudiation with respect to performance not yet due, see § 75-2-610.

Seller's remedies generally, see § 75-2-703.

Resale by seller, see § 75-2-706.

JUDICIAL DECISIONS

1. In General.

In action by seller of carpeting against buyer, which had repudiated entire contract of purchase, for damages consisting

of difference between resale price and contract price of such goods, court held (1) that conversation and representations as to delivery date of goods, which took place

before signing of purchase order, were properly disregarded by trial court, since terms of written agreement cannot be contradicted under UCC § 2-202 by evidence of prior agreement or contemporaneous oral agreement; (2) that trial court properly received evidence under UCC § 2-202(a) that in carpet industry, term "at once" meant "as soon as possible"; (3) that trial court's failure to find that seller had not identified conforming goods to the contract prior to resale thereof, as required by UCC § 2-704(1)(a), was proper and was supported by the evidence; and (4) that damages assessed against buyer

under UCC § 2-706(1), dealing with seller's resale of the goods, had been properly calculated, since trial court did not include therein amount of carpeting sold at such resale before seller gave notice to buyer. *Action Time Carpets, Inc. v. Midwest Carpet Brokers, Inc.*, 271 N.W.2d 36 (Minn. 1978).

A prerequisite for invoking the remedy of resale under UCC § 2-706(1) is the seller's identification of "conforming goods" to the contract pursuant to UCC § 2-704(1)(a). *Action Time Carpets, Inc. v. Midwest Carpet Brokers, Inc.*, 271 N.W.2d 36 (Minn. 1978).

RESEARCH REFERENCES

Am Jur. 67A *Am. Jur.* 2d, Sales §§ 1081 et seq., 1087 et seq., 1117, 1124, 1125 et seq., 1137.

6 *Am. Jur. Pl & Pr Forms* (Rev ed), Sales, Forms 2:991-2:993 (remedies of seller; identification of goods notwithstanding breach; salvage of unfinished goods).

18 *Am. Jur. Legal Forms* 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:1581 et seq (right of seller to identify goods to the agreement notwithstanding breach or to salvage unfinished goods).

41 *Am. Jur. Proof of Facts* 2d 337, Damages for Breach of Contract to Lend Money.

CJS. 78 C.J.S., Sales §§ 326 et seq.

§ 75-2-705. Seller's stoppage of delivery in transit or otherwise.

(1) The seller may stop delivery of goods in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) [Section 75-2-702] and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.

(2) As against such buyer the seller may stop delivery until

(a) receipt of the goods by the buyer; or

(b) acknowledgments to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering the goods.

(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

SOURCES: Codes, 1942, § 41A:2-705; Laws, 1966, ch. 316, § 2-705, eff March 31, 1968.

Cross References — Tender of delivery generally, see § 75-2-503.

Assurance of due performance, see § 75-2-609.

Seller's right to refuse delivery on buyer's insolvency, see § 75-2-702.

Seller's remedies generally, see § 75-2-703.

Bills of lading, see §§ 75-7-301 et seq.

Carrier's obligations with respect to delivery, see § 75-7-303.

JUDICIAL DECISIONS

1. In general.

In interpleader action by bailee of zinc, where evidence showed (1) that bailor, who had stored 300 tons of zinc with bailee, ordered bailee to release all of it to bailor's purchaser, (2) that bailor's purchaser then sold such zinc to alleged bonafide subpurchaser and ordered bailee to release zinc to subpurchaser, (3) that after bailee had delivered 40 tons to subpurchaser, bailor learned of original purchaser's insolvency and ordered bailee to stop delivery to original purchaser, and (4) that on the same day, subpurchaser also ordered bailee to deliver remainder of such zinc (260 tons) to it, district court denied bailor's motion for summary judgment on its alleged right under UCC §§ 7-504(4) and § 2-705(1) and (2) to stop delivery of zinc, since (1) bailor failed to show, within meaning of UCC § 2-705(2)(b), that bailee had not acknowledged that it was holding the zinc for the subpurchaser, and (2) bailor also had failed to show, within meaning of UCC § 2-705(2)(d), that there had been no negotiation to subpurchaser of any negotiable document of title covering the zinc (applying Illinois UCC; also holding that subpurchaser's claim of bonafide purchase was not available to it under UCC § 2-702(3) or § 2-403(1)). *Ceres Inc. v. ACLI Metal & Ore Co.*, 451 F. Supp. 921 (N.D. Ill. 1978).

To invoke the stoppage-of-delivery remedy provided by UCC § 2-705(2), the seller must show that none of the four

events listed in subsections (a)-(d) of § 2-705(2) have occurred. *Ceres Inc. v. ACLI Metal & Ore Co.*, 451 F. Supp. 921 (N.D. Ill. 1978).

In absence of bailment relationship contemplated by UCC § 2-702(1) and § 2-705(1), third party to whom seller directly ships goods sold to buyer may not be held liable for disregarding seller's demand to withhold delivery of goods from buyer (holding that since defendant, to whom buyer had directed seller to ship goods, held goods under act of accommodation and not under bailment contract, defendant was not liable to seller for delivering goods to bankrupt buyer in disregard of seller's demand not to do so). *H. Lynn White, Inc. v. Leftwich*, 2 Kan. App. 2d 341, 579 P.2d 164 (1978).

Under UCC §§ 2-703 and 2-705 seller's sale of appliances to buyer on credit empowered buyer to pass good title to third party by delivery of appliances, under UCC §§ 2-312, 2-401 and 2-403 buyer did not breach any implied warranty of title when appliances were delivered to third party, and under UCC §§ 2-401(2) and 2-703 third party had no obligation to pay seller or return appliances although buyer failed to pay seller. *Mamber v. Levin*, 4 Mass. App. Ct. 157, 344 N.E.2d 192 (1976).

In action between buyer and seller of aluminum sheets, seller was justified in stopping delivery under UCC § 2-705 where buyer had not paid prior obligations to seller and to others; although

Code does not create duty to promptly notify buyer of decision to stop delivery, duty was imposed based on reasonable commercial standards of fair dealing. *Indussa Corp. v. Reliable Stainless Steel Supply Co.*, 369 F. Supp. 976 (E.D. Pa. 1974).

In action by common carrier of crude oil against bankrupt buyer of crude oil, title to oil reverted in oil producing sellers under UCC § 2-401(4) when buyer refused to accept tender of crude oil from

pipeline company conditioned upon buyer's payment of common carrier lien; notice given by seller, prior to buyer's refusal of tender, to stop delivery to buyer based on previous dishonor of buyer's checks for insufficient funds was timely exercise of seller's rights of stoppage under UCC §§ 2-702(1), (2) and 2-705(1) and sellers could reclaim oil upon demand and notice as given. *Amoco Pipeline Co. v. Admiral Crude Oil Corp.*, 490 F.2d 114 (10th Cir. N.M. 1974).

RESEARCH REFERENCES

Am Jur. 13 *Am. Jur.* 2d, Carriers § 473.

67A *Am. Jur.* 2d, Sales §§ 1051 et seq., 1062 et seq., 1064 et seq., 1069-1071.

6 *Am. Jur.* Pl & Pr Forms (Rev ed), Sales, Forms 2:1001, 2:1002 (remedies of seller; stopping delivery).

18 *Am. Jur.* Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1591 et seq (stoppage by seller of delivery in transit or otherwise).

41 *Am. Jur.* Proof of Facts 2d 337, Damages for Breach of Contract to Lend Money.

§ 75-2-706. Seller's resale including contract for resale.

(1) Under the conditions stated in Section 2-703 [Section 75-2-703] on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this chapter (Section 2-710) [Section 75-2-710], but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one (1) or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one (1) or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (Section 2-707) [Section 75-2-707] or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of Section 2-711) [Section 75-2-711(3)].

SOURCES: Codes, 1942, § 41A:2-706; Laws, 1966, ch. 316, § 2-706, eff March 31, 1968.

Cross References — Sale by auction, see § 75-2-328.

Title to goods, see § 75-2-401.

Right of parties to inspect goods for purpose of ascertaining facts and preserving evidence, see § 75-2-515.

Anticipatory repudiation, see § 75-2-610.

Seller's rights on buyer's insolvency, see § 75-2-702.

Seller's remedies generally, see § 75-2-703.

Person in position of seller, see § 75-2-707.

Measure of damages for buyer's nonacceptance or repudiation, see § 75-2-708.

Seller's recovery of damages following resale, see § 75-2-709.

Incidental damages to aggrieved seller, see § 75-2-710.

Buyer's security interest, see § 75-2-711.

JUDICIAL DECISIONS

1. In general; scope.
2. Good faith.
3. Damages.
4. —Incidental damages.
5. Notice of resale.
6. Commercial reasonableness of resale.
7. Adequacy of sale price.

1. In general; scope.

Buyer who bought oil-drilling rig and accessory equipment at public auction by sending agent to make purchase and giving agent blank check to make payment, which was signed by buyer individually and not as representative of corporation of which buyer was president and sole owner, was individually liable to auctioneer under UCC § 2-703(d) and § 2-706(1), following dishonor of buyer's check (which agent had completed by filing in amount for which equipment was purchased), for difference between resale price of such

equipment and price for which agent had purchased it where (1) under UCC § 2-706(1) and (2), resale was made by auctioneer in good faith, in commercially reasonable manner, and on proper and reasonable notice to defendant buyer, and (2) auctioneer, before originally selling equipment to defendant's agent, had exercised due care and reasonable diligence by verifying agent's authority to purchase it. *Miller & Miller Auctioneers, Inc. v. Mersch*, 442 F. Supp. 570 (W.D. Okla. 1977).

UCC § 2-709 does not incorporate resale requirements of UCC § 2-706. *Wolpert v. Foster*, 312 Minn. 526, 254 N.W.2d 348, 90 A.L.R.3d 1132 (1977).

Seller's remedies of UCC do not apply to vendors of oil and gas leases: (1) remedies provided in UCC §§ 2-703 and 2-706 are inapposite to protect seller of oil and gas lease, (2) definition of "goods" in UCC

§ 2-105(1) clearly excludes interests of oil and gas lessee, and (3) UCC § 2-107(1), dealing with goods to be severed from realty, provides that contract for sale of timber, minerals or like is contract for sale of goods within article 2, if they are to be severed by seller, but both Official Comment and Oklahoma Code Comment to § 2-107 recognize that Code applies only if timber, minerals, etc., are to be severed by seller. *Casper v. Neubert*, 489 F.2d 543 (10th Cir. Okla. 1973).

Where creditor provided service to debtor of reproducing debtor's master tape into saleable units, i.e. cartridges or cassettes, creditor was not a seller and was thus not entitled to a vendor's lien. *North Am. Leisure Corp. v. A & B Duplicators, Ltd.*, 468 F.2d 695 (2d Cir. N.Y. 1972).

Where the purchaser of a conditional sales contract had the right to sell the chattel at either a public or a private sale, and posted a notice stating that the chattel would be sold at auction, but later purchased the chattel for itself at a private sale, after having it appraised by an impartial appraiser and after notice to the vendee of the private sale, the sale was not invalid for failure to comply with the requirements of a public sale. *Commercial Credit Equip. Corp. v. Kilgore*, 221 So. 2d 363 (Miss. 1969).

2. Good faith.

Resale of lot of instruments as an entity and not on an individual basis, although raising some doubts as to the propriety with which the resale was conducted, did not adequately support claim that resale was not in "good faith". *Wurlitzer Co. v. Oliver*, 334 F. Supp. 1009 (W.D. Pa. 1971).

3. Damages.

In action by seller of carpeting against buyer, which had repudiated entire contract of purchase, for damages consisting of difference between resale price and contract price of such goods, court held (1) that conversation and representations as to delivery date of goods, which took place before signing of purchase order, were properly disregarded by trial court, since terms of written agreement cannot be contradicted under UCC § 2-202 by evidence of prior agreement or contempora-

neous oral agreement; (2) that trial court properly received evidence under UCC § 2-202(a) that in carpet industry, term "at once" meant "as soon as possible"; (3) that trial court's failure to find that seller had not identified conforming goods to the contract prior to resale thereof, as required by UCC § 2-704(1)(a), was proper and was supported by the evidence; and (4) that damages assessed against buyer under UCC § 2-706(1), dealing with seller's resale of the goods, had been properly calculated, since trial court did not include therein amount of carpeting sold at such resale before seller gave notice to buyer. *Action Time Carpets, Inc. v. Midwest Carpet Brokers, Inc.*, 271 N.W.2d 36 (Minn. 1978).

A prerequisite for invoking the remedy of resale under UCC § 2-706(1) is the seller's identification of "conforming goods" to the contract pursuant to UCC § 2-704(1)(a). *Action Time Carpets, Inc. v. Midwest Carpet Brokers, Inc.*, 271 N.W.2d 36 (Minn. 1978).

Resale of goods conforming to requirements of UCC § 2-706 entitles seller to damages measured by resale price. Resale that does not conform to requirements of UCC § 2-706 may relegate seller to measurement of his damages based on market price at time and place of tender. An action for the price arises in this situation only when reasonable resale efforts do not dispose of goods, and such remedy is distinct from action for damages under UCC § 2-706 or UCC § 2-708. *Wolpert v. Foster*, 312 Minn. 526, 254 N.W.2d 348, 90 A.L.R.3d 1132 (1977).

In action for breach by seller of contract to repurchase Blonde D'Aquitaine heifers, where contract provided that buyer would buy 16 heifers from seller, that all would be fertile for breeding, that seller would "purchase same heifers" each guaranteed "safe in calf" to purebred Blonde D'Aquitaine bulls, and that contract would be "dissolved" if buyer should resell heifers to another person before July 31, 1974, and where buyer did not resell heifers to another person before such date, but seller refused to repurchase heifers because of drastic drop in their market price, (1) seller's repurchase was not contingent on buyer's providing proof that

heifers were pregnant before tender to seller; (2) buyer was not obligated to have all 16 heifers pregnant at end of period for seller's repurchase, and seller was obligated to repurchase all that had become pregnant by that time; (3) buyer's allegation that seller was guilty of anticipatory repudiation of contract was not based on reasonable grounds within meaning of UCC § 2-609(1); (4) although buyer did not make tender at place agreed on, buyer's tender in telephone call of 11 pregnant heifers sufficiently complied with UCC § 2-503(1) in view of buyer's reasonable belief that seller would not accept heifers if buyer should transport them to place agreed on; and (5) on seller's breach of repurchase agreement, buyer's measure of damages was not difference between resale price and contract price under UCC § 2-706(1)-because of buyer's failure to effect commercially reasonable sale within meaning of UCC § 2-706(1)-but was difference between contract price and market price under UCC 4 2-708(1), plus incidental damages for sheltering and feeding rejected heifers. *Cole v. Melvin*, 441 F. Supp. 193 (D.S.D. 1977).

In an action to recover damages for breach of a tender offer to purchase securities subsequently sold to another, the seller could recover the tender price for the securities, but the proper measure of damages was the difference between the resale price and the contract price, assuming that the resale is made in good faith and in a "commercially reasonable" manner. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

Where the purchaser of a conditional sales contract took possession of a chattel on which the vendee owed a balance of over \$6,000 and purchased the chattel for itself for \$1,500 after having it appraised at approximately that value by an impartial appraiser, it could not be said that the purchase price was so inadequate as to amount to fraud as a matter of law, because while the purchaser of the contract owed the vendee a duty to deal justly with the vendee's equitable rights and to use diligence to obtain the best price possible for the chattel, it was for the jury to determine whether the purchasers of the

contract dealt justly with the vendee's rights and, if not, the extent of damage resulting from such failure. *Commercial Credit Equip. Corp. v. Kilgore*, 221 So. 2d 363 (Miss. 1969).

4. —Incidental damages.

The statute, providing that the seller after breach of an agreement by a buyer, can recover incidental damages, such as any commercially reasonable charges, expenses or commissions incurred in the resale of the goods, applies to actions arising under both § 2-706 and § 2-708 and would permit the seller, after buyer's refusal to accept a tender of securities in accordance with a tender offer, to recover the commissions due him as a result of the breach of the tender offer. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

5. Notice of resale.

A seller's failure to give the buyer of a truck notice of his intent to resell the truck, after the buyer missed several monthly payments, violated the notice requirement of § 75-2-706(3), and therefore the buyer was entitled to a refund of the amount he had previously paid on the truck. *Massey v. Moore*, 633 So. 2d 1044 (Miss. 1994).

A buyer is liable to a seller in the amount of 12½ cents per yard for nonacceptance of merchandise pursuant to section 2-708 of the Uniform Commercial Code, which provides that damages are to be measured by the difference between the market price at the time and place of tender and the unpaid contract price, since the seller upheld the burden of proof of establishing the market price by testimony as to the resale price of the merchandise and the seller is not required to elect between the remedies of section 2-708, market price, and section 2-706, resale price; therefore, the court properly applied the market price as the measure of damages, and it became of no consequence that the seller did not notify the buyer of the resale as required by section 2-706 of the Uniform Commercial Code. *B&R Textile Corp. v. Paul Rothman Indus. Ltd.*, 101 Misc. 2d 98 (1979).

In proceeding based on seller's alleged breach of contract to sell buyer 4,150 tons of Class I steel, which matter was submitted to arbitration governed by Uniform Commercial Code, where court order submitting matter to arbitration stated that buyer would have right to sell and make deliveries of nonconforming steel rejected by buyer; where buyer, prior to such order, had informed seller that it would sell nonconforming steel for seller's account if seller did not give buyer other instructions within reasonable time; and where seller did not give any other instructions to buyer and buyer resold such steel, (1) seller had sufficient notice under UCC § 2-706 of buyer's intent to resell; (2) such resale under UCC § 2-604 did not constitute acceptance of goods; and (3) arbitrators under UCC § 2-715(1) properly allowed buyer sales commission on such resale as damages resulting from seller's breach. *North Am. Steel Corp. v. Siderius, Inc.*, 75 Mich. App. 391, 254 N.W.2d 899 (1977).

Grain elevator company breached agreement to purchase 4,000 bushels of wheat for March delivery where elevator purchased more grain for cash during contract delivery period than amount involved in contract with seller, but refused to accept delivery of seller's grain during contract period and for 2 months thereafter; thus, seller was entitled to cancel contract under UCC § 2-703(6) and resell wheat at private sale; since seller exercised his right to cancel contract under UCC § 2-703, and since he was not seeking to recover damages, he was not required to give notice of his intent to resell under UCC § 2-706, nor was he required to notify elevator under UCC § 2-309 that he was "terminating" contract. *Mott Equity Elevator v. Svihovec*, 236 N.W.2d 900 (N.D. 1975).

Sale of laundry and drycleaning business which was nothing more than sale of equipment, furniture, and other movables of business and which did not involve non-goods such as goodwill or real property, was a transaction in goods and came within scope of Article 2 of UCC; thus, where buyer breached contract to purchase laundry and drycleaning business and seller elected to resell business at

private sale, but failed to give buyer notice of intention to resell, of time, place and manner of resale or of seller's intention to sue buyer for difference between contract price and amount ultimately realized on resale, seller was not entitled to recover difference between resale price and contract price as provided in UCC § 2-706, but was entitled to measure of damages prescribed by UCC § 2-708(1). *Miller v. Belk*, 23 N.C. App. 1, 207 S.E.2d 792 (1974).

Resale of securities at time more than 30 days after breach was not sale within commercially reasonable time under UCC § 2-706(2); public sale of securities made on national securities exchange satisfied UCC § 2-706(4) notice of resale requirement, since any prior notification to defendant would not have given it any greater purchase opportunities. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

Unshipped balance of paintings under contract between parties was sold at private sale and seller was under obligation to give buyer reasonable notification of its intention to resell. *Portal Galleries, Inc. v. Tomar Prods., Inc.*, 60 Misc. 2d 523 (1969).

Where the purchaser of a conditional sales contract had the right to sell the chattel at either a public or a private sale, and posted a notice stating that the chattel would be sold at auction, but later purchased the chattel for itself at a private sale, after having it appraised by an impartial appraiser and after notice to the vendee of the private sale, the sale was not invalid for failure to comply with the requirements of a public sale. *Commercial Credit Equip. Corp. v. Kilgore*, 221 So. 2d 363 (Miss. 1969).

When the seller improperly makes a resale without notice to the buyer, the latter is entitled to recover the full amount of his down payment, so that where a television set was purchased with the understanding that it would be delivered when the buyer's new house was completed, the seller was required to notify the buyer that he was making a resale although the buyer had notified the seller that the completion of the house was delayed and the seller was holding the tele-

vision set in storage for the buyer. *Wood v. Downing*, 243 Ark. 120, 418 S.W.2d 800 (1967).

The seller who resells goods must give notice of a private sale and if he fails to do so he cannot recover the difference between the contract price and the resale price, even though the contract expressly states that in case of breach by the buyer damages shall be so determined. *Foster v. Colorado Radio Corp.*, 381 F.2d 222 (10th Cir. N.M. 1967).

Where husband and wife are the buyers of the property a question arises as to whether notice of resale is sufficient when given to the husband only. *Meadowbrook Nat'l Bank v. Markos*, 3 U.C.C. Rep. Serv. 854 (1966, NY Sup).

On making a resale the seller should properly describe the goods since this relates to its exercise of reasonable care and judgment in making the sale. *Dadourian Export Corp. v. United States*, 291 F.2d 178 (2d Cir. N.Y. 1961).

6. Commercial reasonableness of resale.

In action by seller, who had bought fishing equipment for sale to defendant buyer pursuant to express contract between parties, to recover for equipment that seller, after buyer's breach, was unable to resell, (1) where seller, instead of seeking damages for equipment that he was able to resell, sought under UCC § 2-709 to recover contract price for equipment that he could not resell, and (2) where seller had satisfied requirements of UCC § 2-709 as to bringing action for contract price of such unsold equipment, seller was entitled to recover contract price therefor, even though his earlier resale of some equipment did not comply with all requirements concerning "commercially reasonable resale" under UCC § 2-706, since (1) seller's net proceeds from resold equipment were less than contract price of such equipment and (2) seller was unable, after reasonable efforts, to resell unsold equipment at reasonable price. Moreover, on payment of contract price, buyer was entitled to unsold equipment in seller's possession. *Wolpert v. Foster*, 312 Minn. 526, 254 N.W.2d 348, 90 A.L.R.3d 1132 (1977).

Sale of property of bankrupt cosmetic manufacturer for purpose of liquidation was commercially reasonable where it was adequately advertised, conducted by experienced auctioneer, and 14 people registered their presence at the auction, despite fact that it resulted in \$3,000 bid for property having a much higher cost value. *In re Zsa Zsa, Ltd.*, 352 F. Supp. 665 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 1393 (2d Cir. N.Y. 1973).

The term "commercially reasonable" as used in the statute, while not specifically defined, requires that a resale of securities, after buyer's refusal to accept a tender of securities in accordance with a tender offer, should be made as soon as practicable after the breach of the tender offer and the seller should make every effort to minimize his loss, so that, considering the circumstances of the breach, a 30-day period from the day of the breach would be a commercially reasonable time to resell the securities. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

The seller making a resale must act in a commercially reasonable manner and must exercise good faith. *Meadowbrook Nat'l Bank v. Markos*, 3 U.C.C. Rep. Serv. 854 (1966, NY Sup).

Trial court's finding that resale of fish at private sale was for a fair and reasonable market price considering the time of day and the fact that fish are a perishable commodity, was in substance a finding that sale was made in good faith and in a commercially reasonable manner. *Reis v. Ronny & Dannie Corp.*, 24 Mass. App. Dec. 107 (1962).

7. Adequacy of sale price.

In instructing jury as to what constitutes commercially reasonable resale within UCC § 2-706, court should mention seller's duty to realize as high a price as possible under all the circumstances. *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. Va. 1971).

Where the purchaser of a conditional sales contract took possession of a chattel on which the vendee owed a balance of over \$6,000 and purchased the chattel for itself for \$1,500 after having it appraised at approximately that value by an impar-

tial appraiser, it could not be said that the purchase price was so inadequate as to amount to fraud as a matter of law, because while the purchaser of the contract owed the vendee a duty to deal justly with the vendee's equitable rights and to use diligence to obtain the best price possible

for the chattel, it was for the jury to determine whether the purchasers of the contract dealt justly with the vendee's rights and, if not, the extent of damage resulting from such failure. *Commercial Credit Equip. Corp. v. Kilgore*, 221 So. 2d 363 (Miss. 1969).

RESEARCH REFERENCES

Am Jur. 7 Am. Jur. 2d, Auctions and Auctioneers § 60.

22 Am. Jur. 2d, Damages §§ 509, 510.

67A Am. Jur. 2d, Sales §§ 1081 et seq., 1087 et seq., 1109, 1124 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1011 et seq (remedies of seller; resale).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1601 et seq. (resale by seller including agreement for resale).

41 Am. Jur. Proof of Facts 2d 337, Damages for Breach of Contract to Lend Money.

§ 75-2-707. “Person in the position of a seller”.

(1) A “person in the position of a seller” includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this chapter withhold or stop delivery (Section 2-705) [Section 75-2-705] and resell (Section 2-706) [Section 75-2-706] and recover incidental damages (Section 2-710) [Section 75-2-710].

SOURCES: Codes, 1942, § 41A:2-707; Laws, 1966, ch. 316, § 2-707, eff March 31, 1968.

Cross References — Rights of financing agency, see § 75-2-506.
Letters of credit, see §§ 75-5-101 et seq.

RESEARCH REFERENCES

Am Jur. 67A Am. Jur. 2d, Sales §§ 1055, 1081.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1071, 2:1072 (recovery of damages or price; incidental damages).

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1001-2:1031 (remedies of seller; stopping delivery).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1621 et seq (person in the position of seller).

41 Am. Jur. Proof of Facts 2d 337, Damages for Breach of Contract to Lend Money.

CJS. 78 C.J.S., Sales §§ 326 et seq.

§ 75-2-708. Seller's damages for nonacceptance or repudiation.

(1) Subject to subsection (2) and to the provisions of this chapter with respect to proof of market price (Section 2-723) [Section 75-2-723], the measure

of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (Section 2-710) [Section 75-2-710], but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (Section 2-710) [Section 75-2-710], due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

SOURCES: Codes, 1942, § 41A:2-708; Laws, 1966, ch. 316, § 2-708, eff March 31, 1968.

Cross References — Delivery under F.A.S. contracts, see § 75-2-319.

Seller's duties under C.I.F. and C. & F. contracts, see §§ 75-2-320, 75-2-321, 75-2-323. "Delivery of goods ex-ship", see § 75-2-322.

Delivery under F.O.B. contracts, see § 75-2-323.

Seller's duties and tender under "no arrival, no sale" term, see § 75-2-324.

Manner, time and place for tender, see § 75-2-503.

Action for price, see § 75-2-709.

Seller's incidental damages, see § 75-2-710.

Proof of market price, see § 75-2-723.

Admissibility in evidence of market quotations, see § 75-2-724.

JUDICIAL DECISIONS

1. In general.
2. Difference between market value and contract price as damages.
3. Lost profit as damages.
4. —Profit defined.
5. —Particular applications.
6. Lost volume sellers.
7. Incidental damages.
8. Burden of proof as to damages.
9. Other matters.

1. In general.

Where (1) seller sold computer system under purchase agreement which provided that seller would retain security interest in goods until balance of purchase price was paid, (2) buyer, after taking possession of goods on January 14, 1975, advised seller on January 30, 1975 to repossess them for seller's protection because buyer was in financial difficulty, and (3) seller, after repossessing goods on February 3, 1975, subsequently returned part of them to seller's new-equipment inven-

tory without separately identifying such goods from goods already in inventory and also, without notifying buyer, resold some of the repossessed goods to third persons, court held (1) that seller was limited to remedy of security-interest holder under UCC § 9-504, which governed seller's right to repossess the goods in suit, dispose of them, and apply their proceeds, and (2) that because seller, on reselling some of the goods after their repossession, had failed to give buyer notice of sale required by UCC § 9-504(3), seller under California construction of UCC § 9-504(3) could not recover deficiency on unpaid purchase price from buyer (applying California law; observing that if buyer had repudiated contract before delivery and acceptance of computer system, seller could have invoked seller's remedies under Uniform Commercial Code and could have sold system and sought damages as provided in UCC § 2-708). Nixdorf Com-

puter, Inc. v. Jet Forwarding, Inc., 579 F.2d 1175 (9th Cir. Cal. 1978).

Under UCC § 2-708(1), the seller's measure of damages for nonacceptance or repudiation is the difference between the contract price and the market price. However, if this relief is inadequate to put the seller in as good a position as if the contract had been fully performed, the measure of damages prescribed by UCC § 2-708(2) then applies and includes the profit, plus reasonable overhead, that the seller would have made from full performance by the buyer. But if the seller's overhead—that is, his fixed expenses—is not affected by the buyer's breach, no deduction should be made in calculating the profit that the seller would have made if the contract had not been breached. *Coast Trading Co. v. Parmac, Inc.*, 21 Wash. App. 896, 587 P.2d 1071 (1978).

Resale of goods conforming to requirements of UCC § 2-706 entitles seller to damages measured by resale price. Resale that does not conform to requirements of UCC § 2-706 may relegate seller to measurement of his damages based on market price at time and place of tender. An action for the price arises in this situation only when reasonable resale efforts do not dispose of goods, and such remedy is distinct from action for damages under UCC § 2-706 or UCC § 2-708. *Wolpert v. Foster*, 312 Minn. 526, 254 N.W.2d 348, 90 A.L.R.3d 1132 (1977).

A retail dealer, in an action against buyer for nonacceptance of goods, can recover loss of profits and incidental damages upon buyer's repudiation of contract; this is substantial change from pre-Code law whereby damages were ordinarily limited to the difference between the contract price and the current or market price. *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

The UCC allows the seller actual damages where liquidated damages have not been stipulated and there has been a default by the buyer. *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

2. Difference between market value and contract price as damages.

A buyer is liable to a seller in the amount of 12½ cents per yard for nonac-

ceptance of merchandise pursuant to section 2-708 of the Uniform Commercial Code, which provides that damages are to be measured by the difference between the market price at the time and place of tender and the unpaid contract price, since the seller upheld the burden of proof of establishing the market price by testimony as to the resale price of the merchandise and the seller is not required to elect between the remedies of section 2-708, market price, and section 2-706, resale price; therefore, the court properly applied the market price as the measure of damages, and it became of no consequence that the seller did not notify the buyer of the resale as required by section 2-706 of the Uniform Commercial Code. *B&R Textile Corp. v. Paul Rothman Indus. Ltd.*, 101 Misc. 2d 98 (1979).

Under UCC § 2-708(1), the seller's measure of damages for nonacceptance or repudiation is the difference between the contract price and the market price. However, if this relief is inadequate to put the seller in as good a position as if the contract had been fully performed, the measure of damages prescribed by UCC § 2-708(2) then applies and includes the profit, plus reasonable overhead, that the seller would have made from full performance by the buyer. But if the seller's overhead—that is, his fixed expenses—is not affected by the buyer's breach, no deduction should be made in calculating the profit that the seller would have made if the contract had not been breached. *Coast Trading Co. v. Parmac, Inc.*, 21 Wash. App. 896, 587 P.2d 1071 (1978).

On buyer's anticipatory repudiation of contract to purchase steel after about half of steel ordered had been fabricated and delivered, court held (1) that seller was entitled to resort to any available seller's remedy for such breach, (2) that UCC § 2-708(2) applied to the case, (3) that trial court's instruction, which was based on UCC § 2-708(2) and broadly provided that seller's measure of damages was net profit that it would have made from full performance of the contract if there had been no anticipatory repudiation thereof, was proper, and (4) that seller's proof was sufficient to make a prima facie showing that its net profit from full performance

would have been amount alleged by seller. *Capital Steel Co. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978).

In action for breach by seller of contract to repurchase Blonde D'Aquitaine heifers, where contract provided that buyer would buy 16 heifers from seller, that all would be fertile for breeding, that seller would "purchase same heifers" each guaranteed "safe in calf" to purebred Blonde D'Aquitaine bulls, and that contract would be "dissolved" if buyer should resell heifers to another person before July 31, 1974, and where buyer did not resell heifers to another person before such date, but seller refused to repurchase heifers because of drastic drop in their market price, (1) seller's repurchase was not contingent on buyer's providing proof that heifers were pregnant before tender to seller; (2) buyer was not obligated to have all 16 heifers pregnant at end of period for seller's repurchase, and seller was obligated to repurchase all that had become pregnant by that time; (3) buyer's allegation that seller was guilty of anticipatory repudiation of contract was not based on reasonable grounds within meaning of UCC § 2-609(1); (4) although buyer did not make tender at place agreed on, buyer's tender in telephone call of 11 pregnant heifers sufficiently complied with UCC § 2-503(1) in view of buyer's reasonable belief that seller would not accept heifers if buyer should transport them to place agreed on; and (5) on seller's breach of repurchase agreement, buyer's measure of damages was not difference between resale price and contract price under UCC § 2-706(1)-because of buyer's failure to effect commercially reasonable sale within meaning of UCC § 2-706(1)-but was difference between contract price and market price under UCC § 2-708(1), plus incidental damages for sheltering and feeding rejected heifers. *Cole v. Melvin*, 441 F. Supp. 193 (D.S.D. 1977).

In action for damages for anticipatory breach of contract to purchase livestock, UCC § 2-708 did not foreclose use of former measure of damages as difference between contract price and market value at time of breach in instances of anticipatory breach, but supplied additional option to seller to await time for perfor-

mance by buyer and prove difference as of that time between market price and contract price as measure of damages to which seller was entitled. *Harris v. Gunner*, 545 S.W.2d 856 (Tex. Civ. App. 1976).

Sale of laundry and drycleaning business which was nothing more than sale of equipment, furniture, and other movables of business and which did not involve non-goods such as goodwill or real property, was a transaction in goods and came within scope of Article 2 of UCC; thus, where buyer breached contract to purchase laundry and drycleaning business and seller elected to resell business at private sale, but failed to give buyer notice of intention to resell, of time, place and manner of resale or of seller's intention to sue buyer for difference between contract price and amount ultimately realized on resale, seller was not entitled to recover difference between resale price and contract price as provided in UCC § 2-706, but was entitled to measure of damages prescribed by UCC § 2-708(1). *Miller v. Belk*, 23 N.C. App. 1, 207 S.E.2d 792 (1974).

The difference between the agreed price and the market value of the goods in the city where the purchaser conducted his business at the time the goods would have been delivered if a delivery date was specified, or at the time when purchaser refused to issue delivery instructions if no delivery date was specified, is the measure of the seller's damages for purchaser's failure to accept the merchandise. *L.W. Foster Sportswear Co. v. Goldblatt Bros.*, 356 F.2d 906 (7th Cir. Ill. 1966).

3. Lost profit as damages.

On buyer's anticipatory repudiation of contract to purchase steel after about half of steel ordered had been fabricated and delivered, court held (1) that seller was entitled to resort to any available seller's remedy for such breach, (2) that UCC § 2-708(2) applied to the case, (3) that trial court's instruction, which was based on UCC § 2-708(2) and broadly provided that seller's measure of damages was net profit that it would have made from full performance of the contract if there had been no anticipatory repudiation thereof, was proper, and (4) that seller's proof was sufficient to make a prima facie showing

that its net profit from full performance would have been amount alleged by seller. *Capital Steel Co. v. Foster & Creighton Co.*, 264 Ark. 683, 574 S.W.2d 256 (1978).

Under Code section providing that loss of profits rather than difference between market price and contract price is proper measure of damages where no market exists for goods in question, "market" means market which, if availed of, would have substantially mitigated seller's damages. *Timber Access Indus. Co. v. U.S. Plywood-Champion Papers, Inc.*, 263 Or. 509, 503 P.2d 482 (1972).

In an action not controlled by the UCC, the court observed that the provisions of subsec. (2) to the effect that if the measure of damages provided in subsec. (1) is inadequate then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance was persuasive because it embodied the foremost legal thought concerning commercial transactions. *Vitex Mfg. Corp. v. Caribtex Corp.*, 377 F.2d 795 (3d Cir. V.I. 1967).

Where the difference between the market price, at the time and place for tender, and the unpaid contract price, together with incidental damages, would be inadequate to put a seller in as good a position as performance of the contract would have done, the measure of damages should be the profit (including reasonable overhead) which the seller would have made from full performance by the buyer. *Coast Indus., Inc. v. Noonan*, 4 Conn. Cir. Ct. 333, 231 A.2d 663 (1966).

4. —Profit defined.

The phrase "profit (including reasonable overhead)" in § 2-708 of GL c. 106 is intended to mean the equivalent of "gross profit" which includes fixed costs but not costs saved as a result of the breach. *Jericho Sash & Door Co. v. Building Erectors, Inc.*, 362 Mass. 871, 286 N.E.2d 343 (1972).

5. —Particular applications.

Where city repudiated contract for purchase of parking meters, parking meter manufacturer was entitled to recover, in addition to contract price for meters already manufactured, gross profit, including overhead, which it would have made

upon each meter sold during contract period. *City of Louisville v. Rockwell Mfg. Co.*, 482 F.2d 159 (6th Cir. Ky. 1973).

Where the defendant repudiated the undelivered balance of an assortment of window sash and the plaintiff presented evidence showing "weighted average sale price per pair" and the "weighted average direct cost per pair" of the delivered sash, it was not error to subtract the cost from the price giving "lost profit and overhead per unit" and multiplying by the number of undelivered units giving "total lost profit and overhead" and in making an award on that account. *Jericho Sash & Door Co. v. Building Erectors, Inc.*, 362 Mass. 871, 286 N.E.2d 343 (1972).

Seller who could not resell returned goods salvaged them and credited buyer with reasonable value of salvaged goods; held, seller was entitled to recover its lost profits together with the expense or cost incurred in salvaging the goods. *Chicago Roller Skate Mfg. Co. v. Sokol Mfg. Co.*, 185 Neb. 515, 177 N.W.2d 25 (1970).

Plaintiff had entered into contract to act as middleman and supply defendant with mirrors and tub and shower enclosures; defendant decided to do business with another firm; held, plaintiff's measure of damages for breach of contract were profit which would have been earned, including reasonable overhead. *Distribu-Dor, Inc. v. Karadanis*, 11 Cal. App. 3d 463 (3d Dist. 1970).

6. Lost volume sellers.

Since manufacturer of steel strand had capacity to supply both defendant manufacturer of prestressed concrete and third parties usual contract-market damages for breach of contract set forth in UCC § 2-708(1) is inadequate to put plaintiff in as good position as performance would have done and therefore no setoff against lost profits on contract with defendant will be allowed for profits earned by plaintiff through sales to third parties. *Nederlandse Draadindustrie NDI B.V. v. Grand Pre-Stressed Corp.*, 466 F. Supp. 846 (E.D.N.Y. 1979), *aff'd*, 614 F.2d 1289 (2d Cir. N.Y. 1979).

"Lost-volume status," which entitles seller to measure of damages in UCC § 2-708(2), rather than measure of damages in UCC § 2-708(1), is logically incon-

sistent with allowing credit to buyer, under "due credit for ...proceeds of resale" provision contained in UCC § 2-708(2), for proceeds of seller's resale of goods wrongfully rejected by buyer, since whole concept of "lost-volume status" is that sale of goods to resale purchaser could have been made with other goods had there been no breach of contract by original buyer. Therefore, where seller of carpeting sued buyer for buyer's wrongful cancellation of agreement, seller was entitled to lost-profits measure of damages rule set forth in UCC § 2-708(2), and seller's damages under such rule would not be reduced by allowing buyer credit for proceeds of seller's resale of carpeting that buyer wrongfully rejected if seller should sustain, on remand of case to trial court, his burden of proving that he was a "lost-volume" seller (observing that "due-credit" provision in UCC § 2-708(2) was intended to affect rights of class of sellers other than "lost-volume" sellers). *Snyder v. Herbert Greenbaum & Assocs.*, 38 Md. App. 144, 380 A.2d 618 (1977).

In action for breach of contract for sale and installation of carpeting, lost-profit rule of UCC § 2-708(2) was proper measure of seller's damages for buyer's cancellation of contract because (1) on remand of case to trial court, seller might be found to be "lost-volume" seller, and (2) regardless of whether seller could qualify as a "lost-volume" seller, he was entitled to recover under lost-profit rule of UCC § 2-708(2) as result of mixed nature of contract sued on, which was for both sale and installation of carpeting in large apartment complex (holding that resale of carpeting by seller and his recovery of contract-market differential under UCC § 2-708(1) would not put seller in same position that he would have occupied if buyer had performed contract). *Snyder v. Herbert Greenbaum & Assocs.*, 38 Md. App. 144, 380 A.2d 618 (1977).

Upon breach by the buyer of a contract for the purchase of a boat, the seller, being a dealer with an inexhaustible supply of such goods, even though later successful in selling the boat to another for the original price agreed upon between buyer and seller, was nevertheless damages by the consummation of only one sale instead

of two and was thus entitled, under Uniform Commercial Code § 2-708 which represented a substantial departure from former contract law, to recover the lost profit occasioned by the buyer's breach, together with such incidental expenses as storage, upkeep, finance charges and insurance incurred during the period the boat remained unsold. *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

7. Incidental damages.

The statute, providing that the seller after breach of an agreement by a buyer, can recover incidental damages, such as any commercially reasonable charges, expenses or commissions incurred in the resale of the goods, applies to actions arising under both § 2-706 and § 2-708 and would permit the seller, after buyer's refusal to accept a tender of securities in accordance with a tender offer, to recover the commissions due him as a result of the breach of the tender offer. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

Where there has been nonacceptance under UCC § 2-708, seller's incidental damages under UCC § 2-710 include recovery of commissions due him as a result of defendant's breach of stock tender offer. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

Attorneys' fees incurred in action to recover loss of profits and incidental damages upon buyer's repudiation of contract are not in nature of protective expenses contemplated by Code. *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

Retail dealer was entitled to recover loss of profits and incidental damages, but not attorney's fees, upon buyer's repudiation of contract for purchase and sale of new boat, even though dealer was able to find another buyer for same price as that negotiated with plaintiff buyer. *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

8. Burden of proof as to damages.

Seller cannot benefit from either UCC § 2-708(1) or (2) if he produces no evi-

dence of the market price or profit loss that he seeks. *Acuri v. Figliolli*, 91 Misc. 2d 831 (1977).

In action for recovery of damages based on UCC § 2-708, seller failed to sustain his burden of proof as to extent of damages to which he was entitled; in using resale price of equipment and land to determine difference between market value at time of breach and unpaid contract price in measurement of seller's loss by reason of buyer's unjustified revocation of acceptance, seller had ultimate burden to show nonlikelihood of change in market value of property involved between date of breach and that of resale, and also that resale was fair and made in good faith. *Dehahn v. Innes*, 356 A.2d 711 (Me. 1976).

Under UCC § 2-708(2), proof concerning amount of lost profits, including reasonable overhead, need only be reasonably certain to permit recovery thereof. *Tech Corp. v. Permutit Co.*, 321 So. 2d 562 (Fla. App. 1975).

9. Other matters.

In action for breach of contract by city to purchase specified number of refuse-con-

tainer units, trial court erred in failing to instruct jury on damages that seller can recover for lost profits under UCC § 2-708(2). *Vagabond Container, Inc. v. City of Miami Beach*, 356 So. 2d 1266 (Fla. App. 1978), cert. denied, 364 So. 2d 882 (Fla. 1978).

Security agreement provided that rights under chattel mortgage with respect to repossession and resale of truck and disposition of proceeds were to include rights under South Dakota UCC § 2-708; held, chattel mortgage could recover on default from chattel mortgagor's insurer for damage to insured truck pay-off price plus interest charges for 5 months until resale was accomplished. *White Motor Corp. v. Northland Ins. Co.*, 315 F. Supp. 689 (D.S.D. 1970).

For a breach of contract for the sale of a personal chattel, yet to be manufactured, the vendor is entitled to recover the difference between the selling price and the market value at the time and place of delivery. *Jagger Bros. v. Technical Textile Co.*, 202 Pa. Super. 639, 198 A.2d 888 (1964).

RESEARCH REFERENCES

Am Jur. 22 Am. Jur. 2d, Damages §§ 509, 510, 642, 644-647.

67A Am. Jur. 2d, Sales §§ 1109, 1114 et seq., 1124.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1031-2:1038 (recovery of damages or price; nonacceptance or repudiation).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1631 et seq (damages of seller for nonacceptance or repudiation).

41 Am. Jur. Proof of Facts 2d 337, Damages for Breach of Contract to Lend Money.

§ 75-2-709. Action for the price.

(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price

(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to

the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (Section 2-610) [Section 75-2-610], a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under section 75-2-708.

SOURCES: Codes, 1942, § 41A:2-709; Laws, 1966, ch. 316, § 2-709, eff March 31, 1968.

Cross References — Identification of goods to contract, see §§ 75-2-501, 75-2-704.

Risk of loss, see §§ 75-2-509, 75-2-510.

Code remedies liberally administered, see § 75-1-106.

Damage for nonacceptance, see § 75-2-708.

When security interest attaches, see § 75-9-204.

JUDICIAL DECISIONS

1. In general.
2. Recovery in absence of resale.
3. Recovery in event of resale.
4. Recovery after rejection or repudiation by buyer.
5. Recovery after nonpayment by buyer.
6. Recovery of incidental and other damages.
7. Effect of loss or destruction of goods.
8. Deduction of expense saved by buyer's breach.

1. In general.

In action by seller under UCC § 75-2-709(1) for price of defective lawnmower bags sold to defendant buyer, court held (1) that buyer had accepted bags (a) under UCC § 75-2-606(1)(a) by conduct that signified to seller that buyer was accepting bags despite knowledge of their nonconformity, and (b) under UCC § 75-2-606(1)(b) by conduct, such as continuing to try to sell bags and destruction of defective bags, that was inconsistent with effective rejection of bags; (2) that buyer did not effectively revoke acceptance of bags under UCC § 75-2-608(1) because (a) its acts of dominion over bags, including continuing efforts to sell them, were inconsistent with its claim of revocation of acceptance, and (b) buyer also did not comply with notice requirement of UCC § 75-2-608(2) for revocation of acceptance; (3) that seller's damages under

UCC § 75-2-709(1)(b) for specially manufactured goods included damages for cost of materials, labor and overhead, administrative and sales expenses, and incidental damages; and (4) that although buyer satisfied burden of proof under UCC § 75-2-607(4) with regard to seller's breach of warranty, buyer's breach-of-warranty counterclaim was foreclosed by failure to give seller adequate notice of breach required by UCC § 75-2-607(3)(a) and Official Comment 4. C.R. Daniels, Inc. v. Yazoo Mfg. Co., 641 F. Supp. 205 (S.D. Miss. 1986).

Where seller sought to recover total amount of purchase price (see UCC § 2-709(1)(a)) of pipe and did not seek recovery on check given by buyer in partial payment as to which payment had been stopped, trial court incorrectly held that buyer's personal liability for purchase price was governed by UCC § 3-403(2)(b), dealing with circumstances under which authorized representative can be held personally liable on commercial paper (ovrld on other grounds Reams v. Tulsa Cable Television, Inc. (Okla) 604 P2d 373; stating, on remand of cause, that issue was not who was legally liable on check, but who was liable on contract to purchase the pipe). Culpepper v. Lloyd, 583 P2d 500 (Okla. 1978), overruled on other grounds, Reams V. Tulsa Cable Television, Inc., 604 P.2d 373 (Okla. 1979).

Where seller of tractor, who did not obtain security interest therein, reclaimed tractor without benefit of judicial process on buyer's default in making payments, returned tractor to firm from which seller had purchased it, and sued buyer for money owing on tractor by reason of buyer's breach of contract, seller was not entitled to recover as damages amount that buyer owed as down payment on tractor, since (1) Uniform Commercial Code contains no provision for reclamation of goods by unsecured seller after buyer's acceptance of goods under contract, and (2) the code also contains no provision allowing unsecured seller to recover damages after reclaiming contract goods that buyer had accepted (holding that plaintiff seller, in repossessing tractor without judicial process, fashioned his own remedy which, when combined with his failure to sue for price of tractor as provided by UCC § 2-709(1)(a), precluded him from recovering damages for any loss sustained as result of buyer's breach). *Kelly v. Miller*, 575 P.2d 1221 (Alaska 1978).

Where equipment is sold to and accepted by purchaser who then repudiates the sale, seller has no obligation to repossess the equipment and resell it in order to mitigate purchaser's damages. On the contrary, the seller may sue for the price of the equipment under UCC § 2-709(1)(a). *Equilease Corp. v. D'Annolfo*, 6 Mass. App. Ct. 919, 379 N.E.2d 1130 (1978).

In an action under UCC § 2-709(1) for the price of goods sold, the seller has the burden of proof as to four elements: (1) the acceptance of the goods by the buyer, (2) the price of the goods accepted, (3) the past due date of the price, and (4) the failure of the buyer to pay. *Leviton Mfg. Co. v. Butch Mfg. Co.*, 37 N.C. App. 726, 247 S.E.2d 1 (1978), appeal dismissed, review denied, 295 N.C. 734, 248 S.E.2d 864 (1978).

Prior to the adoption of the Uniform Commercial Code, actual delivery was an essential element of the seller's proof in an action to recover the price of goods shipped to the buyer. At that time, actual delivery determined in whom title to the goods vested. Under the Uniform Commercial Code, however, as is reflected in

UCC § 2-606(1) and § 2-709(1)(a), acceptance is the concept that is utilized to determine the rights of the seller in an action for the price of goods. *Montana Seeds, Inc. v. Holliday*, 178 Mont. 119, 582 P.2d 1223 (1978).

UCC § 2-709 does not incorporate resale requirements of UCC § 2-706. *Wolpert v. Foster*, 312 Minn. 526, 254 N.W.2d 348, 90 A.L.R.3d 1132 (1977).

Where buyer paid for used automobiles with check which was dishonored after buyer executed "trust receipts" agreement which specified that bank would hold security interest in automobiles as collateral for loan, bank had unperfected security interest in automobiles which was superior to seller's right to reclaim cars, seller's remedy being an action against buyer for price of delivered goods under Code § 2-709. *Guy Martin Buick, Inc. v. Colorado Springs Nat'l Bank*, 32 Colo. App. 235, 511 P.2d 912 (1973), *aff'd*, 184 Colo. 166, 519 P.2d 354 (1974).

A buyer is liable for the contract price where he has received the goods and has failed to prove or offered to prove nonacceptance, effective rejection, or revocation of acceptance within a reasonable time. *Marble Card Elec. Corp. v. Maxwell Dynamometer Co.*, 10 Chest. Co. 145 (Pa. 1961).

2. Recovery in absence of resale.

In seller's action for buyer's breach of contract to purchase seller's product line of floor sweepers and also, on "pay-as-used basis," inventory for such product line, (1) seller's oral acceptance by telephone of buyer's written offer, in conjunction with seller's written confirmation of its acceptance and buyer's failure to object in writing to contents of confirmation within ten days after it was received, satisfied exception to statute of frauds contained in UCC § 2-201(2) and rendered contract enforceable, (2) contract was binding, even though both parties expected that it would be reduced to formal writing by their attorneys, (3) seller was entitled to recover contract price under UCC § 2-709(1)(b) because seller, after buyer refused to perform, was unable to resell sweeper line at reasonable price to another person, and (4) buyer's liability for sweeper-line inventory, which buyer had purchased on "pay-as-used basis," was

analogous to good-faith liability of a buyer under a requirements contract provided for in UCC § 2-306(1). *Lambert Corp. v. Evans*, 575 F.2d 132 (7th Cir. Wis. 1978).

In action by seller, who had bought fishing equipment for sale to defendant buyer pursuant to express contract between parties, to recover for equipment that seller, after buyer's breach, was unable to resell, (1) where seller, instead of seeking damages for equipment that he was able to resell, sought under UCC § 2-709 to recover contract price for equipment that he could not resell, and (2) where seller had satisfied requirements of UCC § 2-709 as to bringing action for contract price of such unsold equipment, seller was entitled to recover contract price therefor, even though his earlier resale of some equipment did not comply with all requirements concerning "commercially reasonable resale" under UCC § 2-706, since (1) seller's net proceeds from resold equipment were less than contract price of such equipment and (2) seller was unable, after reasonable efforts, to resell unsold equipment at reasonable price. Moreover, on payment of contract price, buyer was entitled to unsold equipment in seller's possession. *Wolpert v. Foster*, 312 Minn. 526, 254 N.W.2d 348, 90 A.L.R.3d 1132 (1977).

When the seller abandons manufacture of goods not readily resellable upon repudiation by the buyer, the seller may not recover the purchase price but may recover only damages represented by the difference between the cost of performance and the contract price and shall include losses sustained, such as payments for labor and materials reasonably made in part performance of the contract to the extent that they are wasted if performance is abandoned. *E-Z Roll Hdwe. Mfg. Co. v. H. & H. Prods. & Finishing Corp.*, 4 U.C.C. Rep. Serv. 1045 (1968, NY Sup.).

Where because of style change the goods can no longer be resold at a reasonable price, the seller is entitled to recover the contract price from the buyer. *Jacobson v. Donnkenney, Inc.*, 4 U.C.C. Rep. Serv. 850 (1967, NY Sup.).

Where a petite size mink jacket was altered at the purchaser's request and

made even smaller, it was not as suitable for sale as before the alterations, and this circumstance indicated that a reasonable effort to resell the jacket at a reasonable price, following the purchaser's refusal to accept and pay for it, would be unavailing; and the seller was entitled to judgment for the purchase price. *Ludwig, Inc. v. Tobey*, 28 Mass. App. Dec. 6 (1964).

3. Recovery in event of resale.

In action to recover balance of purchase price of machine which was returned to seller several months after installation, if buyer accepted goods under UCC § 2-606(1)(b) and did not revoke acceptance within reasonable time by notifying seller under UCC § 2-608(2) or reject machine under UCC § 2-602(1), seller would be entitled to recover unpaid purchase price under UCC §§ 2-607(1) and 2-709(1)(a); even if transaction was "sale on approval" under UCC § 2-326(1)(a), buyer's failure to seasonably notify seller of election to return goods was acceptance under UCC § 2-327(1)(b) and reservation of title by seller was limited in effect to reservation of security interest under UCC § 2-401(1); UCC § 2-709(2) provision allowing seller to resell goods did not require seller to make resale over objection of original buyer, but if machine were resold, net proceeds would be credited to seller. *Akron Brick & Block Co. v. Moniz Eng'g Co.*, 365 Mass. 92, 310 N.E.2d 128 (1974).

4. Recovery after rejection or repudiation by buyer.

Manufacturer of parking meters was entitled to contract price for meters which were manufactured pursuant to order but delivery of which was declined when contract was repudiated by city; but payment of judgment would entitle city to delivery of meters. *City of Louisville v. Rockwell Mfg. Co.*, 482 F.2d 159 (6th Cir. Ky. 1973).

When the contract gives the buyer the right to make alternative purchases and he repudiates the entire contract, the "contract price" for the purpose of determining the seller's damages will be the lowest price that the buyer could have paid had he adhered to the contract. *E-Z Roll Hdwe. Mfg. Co. v. H. & H. Prods. & Finishing Corp.*, 4 U.C.C. Rep. Serv. 1045 (1968, NY Sup.).

5. Recovery after nonpayment by buyer.

Where pipe supplier contracted to sell substantial quantity of pipe to public works contractor, where contract called for delivery of pipe in instalments, for invoicing delivered pipe and for payment for delivered pipe by twenty-fifth of each month after invoice, and where contractor failed to pay contract price as it fell due, under UCC § 2-709(1) supplier had right to sue at once not only for past due payments but also for price of all goods then delivered and accepted, notwithstanding contract did not contain acceleration clause. *Gantry Constr. Co. v. American Pipe & Constr. Co.*, 49 Cal. App. 3d 186 (2d Dist. 1975).

6. Recovery of incidental and other damages.

In action by seller under UCC § 75-2-709(1) for price of defective lawnmower bags sold to defendant buyer, court held (1) that buyer had accepted bags (a) under UCC § 75-2-606(1)(a) by conduct that signified to seller that buyer was accepting bags despite knowledge of their nonconformity, and (b) under UCC § 75-2-606(1)(b) by conduct, such as continuing to try to sell bags and destruction of defective bags, that was inconsistent with effective rejection of bags; (2) that buyer did not effectively revoke acceptance of bags under UCC § 75-2-608(1) because (a) its acts of dominion over bags, including continuing efforts to sell them, were inconsistent with its claim of revocation of acceptance, and (b) buyer also did not comply with notice requirement of UCC § 75-2-608(2) for revocation of acceptance; (3) that seller's damages under UCC § 75-2-709(1)(b) for specially manufactured goods included damages for cost of materials, labor and overhead, administrative and sales expenses, and incidental damages; and (4) that although buyer satisfied burden of proof under UCC § 75-2-607(4) with regard to seller's breach of warranty, buyer's breach-of-warranty counterclaim was foreclosed by failure to give seller adequate notice of breach required by UCC § 75-2-607(3)(a) and Official Comment 4. *C.R. Daniels, Inc. v. Yazoo Mfg. Co.*, 641 F. Supp. 205 (S.D. Miss. 1986).

Under UCC § 2-709, wheat sellers were entitled to recover interest on amount of purchase price from date payment was due to time buyer's check was received, where buyer failed to pay contract price on date payments were due. *Desbien v. Penokee Farmers Union Coop. Ass'n*, 220 Kan. 358, 552 P.2d 917 (1976).

In action by seller of low sulphur fuel oil, for unpaid balance of purchase price, commercially reasonable variation in contract as to date of payment was not allowed to impair existence of true CIF contract under UCC § 2-320; in addition to action for price under UCC § 2-709, seller was also allowed to recover "incidental damages" under UCC §§ 2-709 and 2-710, but "consequential damages" were not recoverable under Code. *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503 (E.D.N.Y. 1974).

7. Effect of loss or destruction of goods.

In action by diamond wholesaler against retailer to recover price of goods shipped under "all-risk" memorandum, custom and usage of industry established liability of consignee for full memorandum price of merchandise stolen while in his possession. *Lipschutz v. Gordon Jewelry Corp.*, 373 F. Supp. 375 (S.D. Tex. 1974).

Where approximately 10 days after defendant received diamonds as part of "sale or return" transaction, diamonds were stolen from his jewelry store, plaintiff was entitled to contract price of diamonds, regardless of binding effect of memorandum which accompanied shipment of diamonds and provided that jewels were delivered at defendant's risk from all hazards regardless of negligence. *Harold Klein & Co. v. Lopardo*, 113 N.H. 400, 308 A.2d 538, 66 A.L.R.3d 187 (1973).

The total destruction of a roadside diner following the passage of title to the buyer under a conditional sales contract did not relieve the buyer of any part of his liability to the seller under the terms of the contract. *Conte v. Styli*, 26 Mass. App. Dec. 73 (1963).

8. Deduction of expense saved by buyer's breach.

UCC § 2-709 mandates seller's crediting to buyer resale proceeds only of goods

still held for buyer at time of seller's bringing action for price of remaining goods; statute does not mandate crediting to buyer resale proceeds of goods amenable to sale by reasonable efforts and for which no action for the price would lie. *Wolpert v. Foster*, 312 Minn. 526, 254 N.W.2d 348, 90 A.L.R.3d 1132 (1977).

Since finding of acceptance of delivered restaurant equipment was implicit within finding of no effective rejection, damages against buyer for price of specially manufactured equipment could only be assessed in accordance with Code § 2-709 which contains no provision for crediting expenses saved by seller in consequence of

buyer's breach; plaintiff-seller's proffered curative tender reasonably precluded application of damage remedy of Code § 2-708 for nonacceptance or repudiation, in absence of any showing that time was of essence of contract. *Beco, Inc. v. Minnechaug Golf Course, Inc.*, 5 Conn. Cir. Ct. 444, 256 A.2d 522 (1968).

Where seller did not dye wool as required by contract because of breach by buyer, the dyeing cost thus saved is to be deducted from the damages to which the seller is entitled. *Jacobson v. Donnkenny, Inc.*, 4 U.C.C. Rep. Serv. 850 (1967, NY Sup).

RESEARCH REFERENCES

ALR. Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent. 24 A.L.R.2d 1008.

Seller's recovery of price of goods from buyer under UCC § 2-709. 90 A.L.R.3d 1141.

Am Jur. 67A Am. Jur. 2d, Sales §§ 1109, 1114 et seq., 1124.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1031 et seq (recovery of damages or price; nonacceptance or repudiation).

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1051-2:1061 (recovery of damages or price; price).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1641 et seq (action for the price).

41 Am. Jur. Proof of Facts 2d 337, Damages for Breach of Contract to Lend Money.

CJS. 77A C.J.S., Sales §§ 724 et seq.

§ 75-2-710. Seller's incidental damages.

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach.

SOURCES: Codes, 1942, § 41A:2-710; Laws, 1966, ch. 316, § 2-710, eff March 31, 1968.

Cross References — Stoppage of delivery, see § 75-2-705.

Person in position of seller, see § 75-2-707.

Seller's damages for non-acceptance or repudiation, see § 75-2-708.

JUDICIAL DECISIONS

1. In general.

A plaintiff cannot charge attorneys' fees to defendant in the absence of statute or special agreement; accordingly, plaintiff is

not entitled to attorneys' fees where the terms regarding such fees were on printed sales slips, said slips being signed by defendant's employees who had authority

to do no more than obtain equipment from plaintiff and acknowledge its receipt at defendant's expense, since there was no agreement for the payment of attorneys' fees and section 2-710 of the Uniform Commercial Code is inapplicable inasmuch as the incidental damages referred to in that statute are restricted to commercially reasonable charges and its meaning may not be expanded to include attorneys' fees. *Brownie's Army & Navy Store, Inc. v. E.J. Burke, Jr., Inc.*, 72 A.D.2d 171 (4th Dep't 1980).

In an action to collect money owed on a delinquent account, plaintiff may not require defendant to pay plaintiff's general litigation expenses pursuant to section 2-710 of the Uniform Commercial Code since there is no basis in the statutes for such an award; moreover, defendant offered to pay the principal sum due without interest or attorneys' fees, both being items of damages to which plaintiff was not entitled, and, under such circumstances, most of plaintiff's attorneys' fees were incurred in an effort to collect attorneys' fees for services performed after the tender of payment and, in the absence of a contract or a special statute, a plaintiff may not be allowed attorneys' fees incurred in collecting attorneys' fees. *Brownie's Army & Navy Store, Inc. v. E.J. Burke, Jr., Inc.*, 72 A.D.2d 171 (4th Dep't 1980).

Seller which materially breached contract to sell and install office modules in buyer's building could not, in action for price of such goods, claim benefits of contract and thus was not entitled to either purchase price of goods or incidental damages under UCC § 2-710 for shipping and storage charges on them. *S.G. Adams Printing & Stationery Co. v. Central Hdwe. Co.*, 572 S.W.2d 625 (Mo. Ct. App. 1978).

Seller's incidental damages under UCC § 2-710 include financing charges incurred incidentally to the breach of the contract, as distinguished from consequential damages resulting from relations with third parties (applying New York law; holding that seller was entitled to recover financing charges actually incurred as result of buyer's breach). *Intermeat, Inc. v. American Poultry Inc.*, 575 F.2d 1017 (2d Cir. N.Y. 1978).

In action against issuer of irrevocable letter of credit which was dishonored on presentation, seeking damages including attorneys' fees, where no provision for attorneys' fees was found in letter of credit, UCC §§ 5-115 and 2-710 were not intended to afford vehicle for award of attorneys' fees either as costs or as "commercially reasonable charges, expenses or commissions." *Florida Nat'l Bank v. Alfred & Ann Goldstein Found., Inc.*, 327 So. 2d 110 (Fla. App. 1976).

In action by seller of low sulphur fuel oil, for unpaid balance of purchase price, commercially reasonable variation in contract as to date of payment was not allowed to impair existence of true CIF contract under UCC § 2-320; in addition to action for price under UCC § 2-709, seller was also allowed to recover "incidental damages" under UCC §§ 2-709 and 2-710, but "consequential damages" were not recoverable under Code. *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.*, 372 F. Supp. 503 (E.D.N.Y. 1974).

Retail dealer was entitled to recover loss of profits and incidental damages, but not attorney's fees, upon buyer's repudiation of contract for purchase and sale of new boat, even though dealer was able to find another buyer for same price as that negotiated with plaintiff buyer. *Neri v. Retail Marine Corp.*, 30 N.Y.2d 393, 285 N.E.2d 311 (1972).

The statute, providing that the seller after breach of an agreement by a buyer, can recover incidental damages, such as any commercially reasonable charges, expenses or commissions incurred in the resale of the goods, applies to actions arising under both § 2-706 and § 2-708 and would permit the seller, after buyer's refusal to accept a tender of securities in accordance with a tender offer, to recover the commissions due him as a result of the breach of the tender offer. *Bache & Co. v. International Controls Corp.*, 339 F. Supp. 341 (S.D.N.Y. 1972), *aff'd*, 469 F.2d 696 (2d Cir. N.Y. 1972).

In an action brought by a stockbroker to recover damages for breach of a tender offer to purchase securities, commissions due to broker are incidental damages within contemplation of UCC § 2-710.

Bache & Co. v. International Controls Corp., 339 F. Supp. 341 (S.D.N.Y. 1972), aff'd, 469 F.2d 696 (2d Cir. N.Y. 1972).

A seller cannot recover storage charges unless he has taken steps to minimize the loss under §§ 2-706 and 2-709. E-Z Roll Hdwe. Mfg. Co. v. H. & H. Prods. & Finishing Corp., 4 U.C.C. Rep. Serv. 1045 (1968, NY Sup).

The UCC allows the seller actual damages where liquidated damages have not been stipulated and there has been a default by the buyer. Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp., 16 N.Y.2d 344, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

RESEARCH REFERENCES

ALR. Recoverability of compensatory damages for mental anguish or emotional distress for breach of service contract. 54 A.L.R.4th 901.

Am Jur. 67A Am. Jur. 2d, Sales §§ 1109, 1114 et seq., 1124.

5 Am. Jur. Pl and Pr Forms (Rev ed), Carriers, Forms 291, 292 (stoppage in transit).

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1071, 2:1072 (incidental

damages to seller for expense of stopping delivery, transporting, storing, and reselling).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1651 et seq (incidental damages of seller).

41 Am. Jur. Proof of Facts 2d 337, Damages for Breach of Contract to Lend Money.

§ 75-2-711. Buyer's remedies in general; buyer's security interest in rejected goods.

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2-612) [Section 75-2-612], the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under Section 75-2-712 as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for nondelivery as provided in this chapter (Section 2-713) [Section 75-2-713].

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this chapter (Section 2-502) [Section 75-2-502]; or

(b) in a proper case obtain specific performance or replevy the goods as provided in this chapter (Section 2-716) [Section 75-2-716].

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (Section 2-706) [Section 75-2-706].

SOURCES: Codes, 1942, § 41A:2-711; Laws, 1966, ch. 316, § 2-711, eff March 31, 1968.

Cross References — Liberal administration of code remedies, see § 75-1-106.

Cure or replacement by seller in case of nonconforming tender or delivery, see § 75-2-508.

Buyer's options on nonconforming tender or delivery, see § 75-2-601.

Revocation of acceptance, see § 75-2-608.

Buyer's damages for breach with respect to accepted goods, see § 75-2-714.

JUDICIAL DECISIONS

1. In general.
2. Alternative or concurrent remedies.
3. Conditions justifying revocation of contract by buyer.
4. Conditions justifying revocation of acceptance by buyer.
5. Notice of rejection or revocation.
6. Necessity of offer to return goods.
7. Recovery of purchase price.
8. —Buyer's security interest in rejected goods.
9. Cover.
10. Damages for nondelivery.
11. Resale of goods by buyer.
12. Recovery of other elements of damages.
13. Other matters.

1. In general.

The evidence was insufficient to show that purchasers of a used vehicle properly revoked acceptance of the vehicle in a manner sufficient to trigger damage entitlement pursuant to § 75-2-711, where the purchasers turned the vehicle over to the bank to which their financing documents were assigned, rather than returning the vehicle to the dealer from which they purchased it, the bank was not a party to the litigation, and the purchasers neither pled nor proved an agency relationship between the bank and the dealer; the purchasers' actions in declining to make the necessary payments and delivering the vehicle to the bank for sale with application of the sales proceeds to their benefit were contrary to any justifiable revocation of acceptance. Additionally, the purchasers' action in turning the vehicle over to the bank, and its subsequent sale, did not constitute notice of revocation, which is an essential element for recovery under § 75-2-711, since the record did not reflect that the dealer was aware of this transaction. Moreover, this action was inconsistent with the seller's ownership, and therefore could not constitute notice

of revocation; such action confirmed acceptance under § 75-2-606(1)(c). *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725 (Miss. 1991).

In most instances, the Uniform Commercial Code has abandoned use of the term "rescission" in favor of such terms as "cancellation" or "termination." However, "rescission" and "revocation of acceptance" (see UCC § 2-608(1)) are generally viewed as amounting to the same thing under the code, especially since "cancellation," under UCC § 2-711(1), is a remedy that is available to a buyer who has established justifiable grounds for "revocation of acceptance." *Peckham v. Larsen Chevrolet-Buick-Oldsmobile, Inc.*, 99 Idaho 675, 587 P.2d 816 (1978).

In action for seller's breach of contract to sell and install at buyer's lumber plant two "super drying kilns" and two lumber-handling systems, where (1) contract contained performance guarantee that super kilns would reduce drying schedules for buyer's lumber by 50 per cent and that if they did not do so, seller would provide adequate production capacity equal to that of four conventional dry kilns at no additional cost to buyer, (2) buyer paid down payment of \$24,000, which was accepted by seller, (3) seller repudiated contract because it could not comply with performance guarantee, and (4) buyer thereafter purchased four conventional dry kilns and also a lumber "stacker-unstacker" from another seller, court held (1) that contract's performance guarantee was sufficiently definite and certain, (2) that because contract was breached by seller before installation of super kilns, liquidated damages provision of performance guarantee was inapplicable to measure buyer's damages and district court should have measured such damages under UCC §§ 2-712 and 2-713, (3) that regardless of whether district court, on remand of case, should apply cover

provisions of UCC § 2-712 or contract-market price damages rule of UCC § 2-713 to case, court should base either cost of cover or market price of dry kilns on installed cost of conventional dry kilns with holding capacity twice that of the super kilns contracted for, since parties intended, by their performance guarantee, that super kilns' productivity was to be equivalent of conventional dry kilns with twice the holding capacity of such kilns, (4) that under UCC § 2-711(1), buyer was entitled to recover its down payment, (5) that since the Uniform Commercial Code did not provide remedy for seller's recovery of value of equipment shipped by seller to buyer before seller's breach of contract, UCC § 1-103 was applicable and seller, under common-law and equitable principles, was entitled to recover value of equipment still in buyer's possession, together with fair value of equipment that buyer had disposed of, and (6) that district court should compute under UCC § 2-713 damages caused by buyer by seller's failure to deliver and install the lumber-handling systems. *Mann & Parker Lumber Co. v. Wel-Dri*, 579 F.2d 973 (6th Cir. Tenn. 1978).

Notice that a party intends to consider a contract at an end or terminated amounts to a revocation of acceptance, and preserves to the buyer the remedies afforded by this section. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

This section, providing that a buyer may both revoke acceptance and recover damages, changed the former rule that a buyer could not retain some of the benefits under a contract of sale and at the same time rescind the agreement. *Hahn v. Andrews*, 182 Pa. Super. 338, 126 A.2d 519 (1956).

2. Alternative or concurrent remedies.

Before enactment of Uniform Commercial Code, breach of warranty and rescission were considered alternate remedies. The code, however, which is much more comprehensive and explicit than precode law, generally avoids use of ambiguous term "rescission" and provides in UCC § 2-608 specific remedy that permits buyer, under proper conditions, to force seller to retake nonconforming goods,

even though buyer has already accepted them. Under the code, buyer's revocation of acceptance is distinct course of action that is not to be confused with rescission by mutual consent. Nor is revocation of acceptance an alternative remedy for breach of warranty. Under UCC § 2-711(1), when buyer justifiably revokes acceptance, he may cancel and recover as much of purchase price as he has paid. On the other hand, under UCC § 2-714(2), basic measure of damages for breach of warranty is difference between value of goods accepted and value that they would have had if they had been as warranted. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

In cases involving sale of goods, election of remedies doctrine is no bar to pursuit of alternate remedies so long as plaintiff would not have double recovery and defendant is not seriously prejudiced thereby. Thus, judgment of rescission and restitution was proper in action by purchaser of new automobile against dealer, although purchaser's complaint sought damages arising from breach of warranty, where dealer could not have been misled by complaint since prayer for relief requested full purchase price of automobile as damages (i.e., it requested restitution of purchase price of automobile and, a fortiori, rescission), and where, further, there was no evidence indicating defendant was prejudiced by judgment of rescission as opposed to damages. *Melby v. Hawkins Pontiac, Inc.*, 13 Wash. App. 745, 537 P.2d 807 (1975).

In action by purchaser of new car against automobile dealer alleging that dealer's failure to disclose, prior to sale, that automobile had been damaged in transit and repaired constituted misrepresentation and breach of warranty, purchaser had choice of remedies: He could have disaffirmed contract and sought rescission; or he could have affirmed contract and claimed monetary damages based either on (1) difference in value between car he received and "new" car, or (2) cost of repairing alleged defects. However, purchaser was not entitled to recover damages for amounts expended in making repairs on car where purchaser failed to establish necessary causal connection be-

tween repairs and alleged fraud or breach of warranty. *Witters v. Daniels Motors, Inc.*, 524 P.2d 632 (Colo. Ct. App. 1974).

Under UCC buyer can seek damages for anticipatory repudiation of contract and for breach of warranty. *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. Tex. 1973).

Remedies of cancellation and damages are available concurrently and not in the alternative. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

3. Conditions justifying revocation of contract by buyer.

Where new car with paint chipped off on front end and improper difference in color between paint on front end and paint on rear end was delivered to buyer in darkness, buyer on observing such defects on the next day demanded either new car or return of purchase price from dealer, dealer in compliance with manufacturer's firm policy refused buyer's demand and attempted to repair paint defects, and car after being stripped down to bare metal and repainted three times still had paint defects that marred its appearance and value for buyer, (1) buyer justifiably revoked acceptance of car under UCC § 2-608(1)(b), (2) such revocation of acceptance was timely under UCC § 2-608(2), and (3) buyer under UCC § 2-711(1) was entitled to rescind contract of sale and be returned purchase price of car, less specified offset for buyer's use of car (stating that buyer is no longer barred from remedy of rescission because of his continued use of substantially impaired goods which are a necessity to him). *Pavesi v. Ford Motor Co.*, 155 N.J. Super. 373, 382 A.2d 954 (Ch. Div. 1978).

In action against seller of rebuilt deisel engine for breach of implied warranty of fitness for particular purpose, buyer was not entitled to relief under UCC §§ 2-711(1) and 2-715(1), (2)(a), where there was insufficient evidence as to what caused engine to "seize up," rendering it inoperable. *Industrial Contract Carriers, Inc. v. Pacific Diesel Power Co.*, 277 Or. 677, 562 P.2d 164 (1977).

Although Uniform Commercial Code does not specifically provide remedy of rescission of contract, rescission and revocation of acceptance under UCC § 2-

608(1) amount to the same thing, particularly since cancellation of contract under UCC § 2-711(1) is remedy that is available to buyer who has established a justifiable revocation of acceptance. *Werner v. Montana*, 117 N.H. 721, 378 A.2d 1130 (1977).

Where contract between owner of commercial tennis courts and defendant manufacturer and seller of air structures for sale and installation of three such structures to cover owner's tennis courts by November 15, 1975, was entered into on October 7, 1975, and became unconditional obligation on part of defendant on October 28, 1975, when owner obtained financing for such purchase, admission by defendant's employees on October 29, 1975, that defendant could not complete installation on November 15, 1975, as promised, constituted anticipatory repudiation of contract by defendant under UCC § 2-610 and Comment 1, so as to justify owner's purchase of substitute equipment from different manufacturer. Moreover, defendant's failure to deliver and complete installation of air structures by November 15, 1975, constituted breach of contract sued on, so as to justify under UCC § 2-711(1) owner's cancellation of contract on November 20, 1975 (applying Pennsylvania law; also holding that letter from defendant to owner on November 17, 1975, in which defendant offered to complete installation, could not serve under UCC § 2-611(1) as retraction of defendant's earlier repudiation because letter was written two days after defendant's complete performance was due). *Tennisland, Inc. v. Precision Tennis Sys.*, 437 F. Supp. 339 (W.D. Pa. 1977).

Purchaser of cash registers had reasonable grounds for insecurity within meaning of UCC § 2-609 where seller projected delivery of 23 units by first half of 1969 but later rescheduled delivery to January, 1970, where buyer learned in March, 1969, that work had not commenced and pilot unit would not be ready until July, 1969, where seller's own personnel were concerned about design of model and attempted to reduce buyer's order, and where prototype unit furnished buyer performed unsatisfactorily. Written demand for adequate assurance of performance

was not necessary where evidence established that buyer and seller had clear understanding that buyer had suspended performance until receipt of adequate assurance of performance from seller and thus seller's failure to give adequate assurance entitled buyer to suspend its performance and cancel order pursuant to UCC § 2-610 and UCC § 2-711. *AMF, Inc. v. McDonald's Corp.*, 536 F.2d 1167 (7th Cir. Ill. 1976).

Where seller never tendered delivery of automobile under installment sales contract, not only did risk of loss remain on seller under UCC § 2-509(3), but buyer had right to cancel contract. *Schleimer v. Gooze*, 50 A.D.2d 944 (2d Dep't 1975).

The agent of a seller who is a party to the misrepresentation of a race horse is not jointly and severally liable with his principal in an action for a rescission of the contract and a recovery of the purchase money paid for the horse; however, a different result would have been reached had the purchasers sued to recover damages consequent upon the misrepresentation. *Grandi v. LeSage*, 74 N.M. 799, 399 P.2d 285 (1965).

4. Conditions justifying revocation of acceptance by buyer.

Buyers of mobile home, who counter-claimed for amount they paid on sales contract when sued in detinue by bank after buyers ceased making payments, did not rightfully "reject" or "justifiably revoke acceptance" of mobile home under UCC § 2-711, where buyers continued to use mobile home after ceasing payments and giving notice, no evidence existed that value was impaired by defects, mobile home was purchased with knowledge of some of the defects, and buyers refused to permit bank's repairman to inspect or repair the mobile home. *Gigandet v. Third Nat'l Bank*, 333 So. 2d 557 (Ala. 1976).

Right to revoke acceptance of automobile does not arise from every breach of warranty; to revoke acceptance defect must substantially impair value of car to plaintiff, and each case must be carefully examined on its own merits to determine what is substantial impairment of value. *Collum v. Fred Tuch Buick*, 6 Ill. App. 3d 317, 285 N.E.2d 532 (1st Dist. 1972).

Where a ring did not live up to an express warranty that it would appraise for \$30,000, the buyer had a right to revoke her acceptance of the ring under Code §§ 2-711(1) and 2-608(1). However, a perhaps more accurate characterization of the facts in this case involved the right given to all buyers under Code § 2-513(1) to inspect goods before purchase. Inspection in a case involving valuable gems entails an appraisal by an expert. Therefore the court concluded that the sale in this case was made subject to the right of the buyer to have the ring appraised and that if the ring did not live up to expectation she had the right to revoke her acceptance under Code § 2-608(1)(b). *Lawner v. Engelbach*, 433 Pa. 311, 249 A.2d 295 (1969).

When the seller has made a material breach of an obligation to repair, the buyer may revoke his acceptance, cancel, and sue for a money recovery, it being unnecessary that the buyer seek rescission in equity on the ground of fraud of the seller. *Casey v. Philadelphia Auto Sales Co.*, 428 Pa. 155, 236 A.2d 800 (1968).

5. Notice of rejection or revocation.

Notice by initiation of legal proceedings does not satisfy the notice of revocation requirement under § 75-2-711. *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725 (Miss. 1991).

Where organ was delivered to buyers' home on December 7, 1972, shortly thereafter two bass pedals and two keys on keyboard failed to play, buyer called seller on December 27, 1972, but nothing was done until March 13, 1973, when seller repaired organ, where, following repairs, one key in every octave in both keyboards failed to play, buyer called seller on May 11, 1973, and told seller that she was still having difficulty with organ and that she wanted refund of purchase price, where buyers agreed to permit seller to bring out replacement organ on condition that if it did not work seller would take it back and refund purchase price of first organ, rhythm system on replacement organ began to malfunction, seller was unable to remedy problem and, during last service call serviceman removed rhythm system component from replacement organ following which lower keyboard failed to

play, and where some time after June, 1 1973, seller's employees attempted to return original organ, but were prevented from doing so by buyers who insisted on return of purchase price of organ: (1) evidence was sufficient to establish that defects in organ substantially impaired its value to buyers within meaning of UCC § 2-608(1), thus justifying revocation of acceptance and recovery of purchase price; (2) under all circumstances, buyers notified seller within reasonable time after learning of defects in organ that they intended to revoke their acceptance and ask for refund of purchase price. *Schumaker v. Ivers*, 90 S.D. 75, 238 N.W.2d 284 (1976).

6. Necessity of offer to return goods.

Tender back of defective mobile home was not prerequisite to buyers' action for cancellation of contract, return of purchase price and incidental and consequential damages resulting from seller's breach, where buyers justifiably revoked their acceptance under UCC § 2-711(1) but seller never made request to have mobile home returned; after revocation of acceptance, buyers had security interest in mobile home for purchase price and they had not only right to retain mobile home, but under certain circumstances had right, after having given notice of revocation of acceptance and no response having been received, to hold mobile home with reasonable care and to sell it if necessary in order to acquire money to get back purchase price; thus, buyers by living in home and maintaining it to best of their ability were also preserving it for benefit of seller as well as holding it for their own security. *Mobile Home Sales Mgt. Inc. v. Brown*, 115 Ariz. 11, 562 P.2d 1378 (Ct. App. 1977).

Where defendants had been fully paid for services in covering plaintiffs' house with artificial stone, a lien arose in plaintiffs' favor entitling them to keep the stone until the purchase price had been refunded, and plaintiffs were not required to offer to return the stone in order to maintain their action to rescind the contract and to be made whole again. *Marks v. Lehigh Brickface, Inc.*, 19 Pa. D. & C.2d 666 (1960).

Under the Uniform Commercial Code, an offer by the buyer to return the goods after notice of rescission is given is no longer necessary. *Marks v. Lehigh Brickface, Inc.*, 19 Pa. D. & C.2d 666 (1960).

7. Recovery of purchase price.

Where jury could reasonably have concluded that buyer's revocation of acceptance of new 1970 Lincoln Continental automobile was timely and justifiable, buyer under UCC § 2-711(1) was entitled to recover amount of purchase price that he had already paid. Moreover, such recovery was not limited by warranty provision, incorporated in sales contract, that buyer was entitled only to repair and replacement of defective parts. The Uniform Commercial Code expressly declares in UCC § 1-102(1) that it is to be liberally construed, and it also recognizes in Official Comment 1 to UCC § 2-719 that the very essence of a sales contract is that minimum adequate remedies at least be available. In present case, however, limited remedy of warranty in sales contract failed to achieve its essential purpose, since even after numerous attempts at repairs, vehicle purchased by buyer did not operate as new automobile should operate. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

Cotton merchant made express warranties of quantity by stating on its 3 invoices number of bales of cotton sold thereby; and when merchant sold nonexistent cotton to broker, it breached both express and implied warranties and thereby rendered itself liable to broker for at least amount he paid therefor. *Simon v. Estate of Allen*, 497 S.W.2d 800 (Tex. Civ. App. 1973), *ref. n.r.e.*, *cert. denied*, 419 U.S. 843, 95 S. Ct. 76, 42 L. Ed. 2d 71 (1974).

Where buyer returned auto to seller after seller's refusal to meet warranty of repair and refusal, buyer was entitled to return of purchase price on proof of rightful return of auto; instruction that buyer may recover purchase price only if returned auto was worthless was error. *Jacobs v. Metro Chrysler-Plymouth, Inc.*, 125 Ga. App. 462, 188 S.E.2d 250 (1972).

Upon cancellation of a contract for the purchase of a used airplane the buyer is entitled to recover so much of the pur-

chase price as has been paid, incidental damages for expenses such as the cost of repairs reasonably incurred as a result of the seller's breach, and the cost of the care and custody of the plane. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

When a buyer is entitled to rescind for breach of contract by the seller, the buyer is not required to bring an equitable action for rescission as he has the right to rescind by his unilateral action and sue the seller for the return of the purchase price less credit for any use obtained from the goods. *Byrd v. Moore Ford Co.*, 116 Ga. App. 292, 157 S.E.2d 41 (1967).

8. —Buyer's security interest in rejected goods.

Tender back of defective mobile home was not prerequisite to buyers' action for cancellation of contract, return of purchase price and incidental and consequential damages resulting from seller's breach, where buyers justifiably revoked their acceptance under UCC § 2-711(1) but seller never made request to have mobile home returned; after revocation of acceptance, buyers had security interest in mobile home for purchase price and they had not only right to retain mobile home, but under certain circumstances had right, after having given notice of revocation of acceptance and no response having been received, to hold mobile home with reasonable care and to sell it if necessary in order to acquire money to get back purchase price; thus, buyers by living in home and maintaining it to best of their ability were also preserving it for benefit of seller as well as holding it for their own security. *Mobile Home Sales Mgt. Inc. v. Brown*, 115 Ariz. 11, 562 P.2d 1378 (Ct. App. 1977).

Purchaser of nonconforming mobile home under installment sales contract rightfully rejected unit and notified seller of rejection within reasonable time under UCC §§ 2-601 and 2-602, but purchaser's security interest in goods under UCC § 2-711 did not give him right to continued use of goods until security interest was satisfied; and where purchaser, instead of storing, reshipping, or reselling goods as provided by UCC § 2-604, moved into unit and corrected deficiencies, he accepted goods under UCC § 2-606 and became

obligated to pay contract price under UCC § 2-607, retaining only his rights for damages under UCC §§ 2-714 and 2-715; although exclusion of expressed and implied warranties in dark print which was underlined complied with UCC § 2-316, purchaser could nevertheless recover for breach of express warranty under UCC § 2-313 should trier of fact conclude that dealer made express warranties that mobile home would conform to sample or model shown purchaser on dealer's lot. *Bowen v. Young*, 507 S.W.2d 600, 67 A.L.R.3d 354 (Tex. Civ. App. 1974).

In action between purchaser of nonconforming mobile home and assignee of security agreement, purchaser's revocation of acceptance occurred within reasonable time under UCC §§ 2-608 and 1-204(2) where purchaser relied on dealer's promises to make corrections while retaining option of cancellation; under UCC § 2-711(1) and (3) purchaser retained security interest in price paid and was allowed to recover so much of price as had been paid. *Frontier Mobile Home Sales, Inc. v. Trigleth*, 256 Ark. 101, 505 S.W.2d 516 (1974).

Where buyer of cattle justifiably revoked acceptance of 398 steers, because of buyer's previous partial payment, under UCC § 2-711 buyer acquired security interest in steers in his possession for amount of partial payment and for any expenses he reasonably incurred in care and custody of those steers; under UCC § 2-706, buyer was entitled to resell steers at public or private sale in order to protect security interest. *Johnsrud v. Lind*, 219 N.W.2d 181 (N.D. 1974).

Buyers of an ice cream freezer and refrigeration compressor unit who failed to assert in seller's replevin action a lien based on their right to rescind the contract and receive the return of the down payment could not, by instituting an action in assumpsit to recover the down payment and their expenses, demand that a judgment by confession obtained by sellers be opened so that the claim on which the judgment was based could be litigated together with their action in assumpsit, especially where assumpsit action was instituted more than two years after sellers obtained possession of the equipment.

F.W. Lang Co. v. Fleet, 193 Pa. Super. 365, 165 A.2d 258 (1960).

9. Cover.

Under UCC § 2-711(1)(a), cover is available to buyer where (1) seller fails to make delivery, (2) seller repudiates, (3) buyer rightfully rejects the goods, or (4) buyer justifiably revokes acceptance. *D & H Co. v. Shultz*, 579 P.2d 821 (Okla. 1978).

Where seller of cotton represented to buyer that seller would sell and deliver all cotton produced by specified number of growers during particular year at specified price per pound, and where seller failed to obtain one grower's consent to sale of that grower's cotton at price specified in seller's contract with buyer, seller's failure to deliver such cotton constituted breach of contract with buyer which justified buyer, under UCC § 2-711(1)(a) and § 2-712(1), in covering for such cotton by promptly buying the same undelivered cotton directly from the nonconsenting grower at a higher but reasonable price therefor. Moreover, in buyer's action for seller's breach, buyer under UCC § 2-712(2) was entitled to recover as damages difference between cost of cover purchase from the nonconsenting grower and price at which seller had contracted to sell such cotton to buyer. *W.B. Dunavant & Co. v. Southmost Growers, Inc.*, 561 S.W.2d 578 (Tex. Civ. App. 1978), *ref. n.r.e.* (Apr. 26, 1978).

Where buyer and seller entered into contract for sale of wheat on July 31, 1973, and seller thereafter repudiated contract by letter on August 21, 1973, which was received by buyer on August 24, 1973; and where buyer, after seller's anticipatory repudiation on August 24, 1973, continued to urge seller to perform until September 6, 1973, when seller informed buyer that seller would not perform and buyer thereupon cancelled contract, buyer had reasonable time under UCC § 2-713, after seller's anticipatory repudiation on August 24, to "cover" such wheat (make reasonable purchase of substitute wheat), and such reasonable time expired on September 6, when contract was cancelled by buyer. On remand of case, if buyer, who did not "cover" wheat (or sue for specific performance of contract, but instead sought damages for nondelivery under

UCC § 2-711 pursuant to measurement of damages rule contained in UCC § 2-713) should present no valid reason for failing to "cover," damages should be based on difference between market price of wheat on date contract was made (July 31) and date on which contract was cancelled by buyer (September 6); but if buyer should present valid reason for not "covering," damages should be based on difference between market price on date contract made (July 31) and last date for its performance (September 30). *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. Colo. 1977).

In action arising out of contract for sale of grain, buyer did not "cover" under UCC §§ 2-711 and 2-712 after seller failed to deliver on schedule, where delivery date was extended and buyer bought grain on open market to meet its own sales commitments without purchasing grain specifically for seller's account under contract. *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285 (8th Cir. N.D. 1977).

In action by buyer to recover damages from seller based upon seller's breach of contract for sale of soybeans, where there was no evidence of "cover," trial court properly submitted issue of damages to jury under UCC § 2-713; furthermore, trial court properly excluded evidence of expenses saved by buyer in consequence of seller's breach where buyer relied solely upon measure of market price and did not attempt to collect any incidental or consequential damages. *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. N.C. 1977).

Buyer of air structures purchased to cover commercial tennis courts, so that courts could be rented to tennis players during cold weather, was not entitled to damages for cover under UCC § 2-711(1)(a) and UCC § 2-712(2) on defendant seller's repudiation of contract where cost to buyer of substitute air structures purchased from different manufacturer was less than cost of structures purchased from defendant. *Tennisland, Inc. v. Precision Tennis Sys.*, 437 F. Supp. 339 (W.D. Pa. 1977).

Where seller breached contract to deliver corn on June 4, 1973, buyer acted

reasonably in making first installment of cover purchase on June 13, 1973, in absence of evidence that cover was immediately available; although remaining purchase on June 26, 1973, may have been unreasonable, in view of lack of evidence why cover could not have been fully effected on earlier date, seller was not prejudiced by additional delay since June 26 purchase was at cost of 5 cents per bushel less than June 13 purchase. *Farmers Elevator Co. v. Lyle*, 90 S.D. 86, 238 N.W.2d 290 (1976).

Since farmer's repudiation in June of contract for future delivery of grain was unequivocal and "cover" easily and immediately was available to grain dealer, dealer's commercially reasonable time to await performance by repudiating farmer expired on date repudiation was made, and he should at that time have resorted to remedies provided for in Code § 2-711. *Oloffson v. Coomer*, 11 Ill. App. 3d 918, 296 N.E.2d 871 (3d Dist. 1973).

10. Damages for nondelivery.

Where contract for sale of grain omitted delivery date, such omission did not involve statute of frauds problem as parties orally agreed that seller had option to deliver within 2 months period; where seller refused to deliver corn, buyer's remedy for nondelivery under UCC § 2-711 was for damages, this being difference between contract price for corn and market price at date of breach. *Cargill, Inc. v. Pickbohm*, 252 N.W.2d 739 (Iowa 1977).

Buyer of automobile was entitled to revoke acceptance under UCC § 2-608 when seller was unable to furnish clear title certificate as required; under UCC §§ 2-711 and 2-713, buyer was entitled to recover purchase price plus difference between purchase price and market value of vehicle with clear title as "non-delivery" damages; fact that automobile was delivered to and used by buyer did not impair buyer's right to revoke acceptance or to recover "non-delivery" damages. *Gawlick v. American Bldrs. Supply, Inc.*, 86 N.M. 77, 519 P.2d 313 (Ct. App. 1974).

11. Resale of goods by buyer.

Although revocation of acceptance could be inferred from the fact that automobile purchaser left car at dealer's lot, removed

license plates and surrendered them, where purchaser did not present transfer stub to dealer, nor tender certificate of title, purchaser was relegated to second remedy under UCC § 2-711 after revocation of acceptance he could have sold car, since he retained ownership, and obtained damages amounting to difference between proceeds of sale and purchase price. *Curtis v. Fordham Chrysler Plymouth, Inc.*, 81 Misc. 2d 566 (1975).

In breach of warranty action by crane purchaser who had rightfully revoked acceptance, evidence failed to establish that price received upon sale of crane by purchaser two years after notice of revocation of acceptance had been refused by manufacturer represented fair value of crane at time of revocation of acceptance. *Uganski v. Little Giant Crane & Shovel, Inc.*, 35 Mich. App. 88, 192 N.W.2d 580 (1971).

In *Walter E. Heller & Co. v. Hammond Appliance Co.* (1959) 29 NJ 589, 151 A2d 537, the court referred to § 2-711(3), although not yet effective, in reaching the conclusion that where the seller had agreed to retake the goods after the buyer's rescission but took no action for more than a year thereafter the buyer was entitled to storage charges on the goods and could resell them in good faith sale. *Walter E. Heller & Co. v. Hammond Appliance Co.*, 29 N.J. 589, 151 A.2d 537 (1959).

12. Recovery of other elements of damages.

Purchaser of conveyor-stacker, on justifiably revoking acceptance of equipment after giving defendant manufacturer-seller ample time to correct problems causing equipment not to function properly, was entitled under UCC § 2-711(1) to recover, as damages for defendant's breach of both express warranty and implied warranties of merchantability and fitness for particular purpose, price paid for equipment and also, under UCC § 2-715(1) and (2), incidental and consequential damages resulting from seller's breach, including purchaser's loss of profit in resale of equipment. *Barney Mach. Co. v. Continental M.D.M., Inc.*, 434 F. Supp. 596 (W.D. Pa. 1977).

In action against seller of carpet for rescission of contract and damages, buyer

was properly awarded damages for freight, handling and storage charges following discovery of nonconformity, pre-judgment interest on purchase price, and loss of profits under UCC §§ 2-711 to 2-715. *La Villa Fair v. Lewis Carpet Mills, Inc.*, 219 Kan. 395, 548 P.2d 825 (1976).

13. Other matters.

In action for breach of implied warranties of merchantability and fitness for particular purpose of trailer that was dangerously unroadworthy, (1) trailer's condition demonstrated that implied warranties under UCC § 2-314(1) and § 2-315 were breached, (2) buyer accepted trailer by offering to pay balance of contract price on assumption that trailer could be repaired, (3) under UCC § 2-608(1)(a), buyer was entitled to revoke acceptance on discovering structural defects in trailer's welding and design that he could not have known about without aid of an expert, (4) buyer's revocation of acceptance was timely under UCC § 2-608(2), and (5) under UCC § 2-711(1), buyer was not required to prove that damages were inadequate remedy before obtaining right to rescind contract. *McCormick v. Ornstein*, 119 Ariz. 352, 580 P.2d 1206 (Ct. App. 1978).

In action by mobile home purchasers against seller and manufacturer for rescission of purchase agreement, although purchasers' revocation of acceptance was effective, their continued occupancy of mobile home as their residence for approximately six months after revocation of acceptances was wrongful and manufacturer and seller were entitled to offset amount of fair and reasonable use value of mobile home for this period. *Stroh v. American Recreation & Mobile Home*

Corp., 35 Colo. App. 196, 530 P.2d 989 (1975).

In action on contract under which buyer agreed to purchase minimum amount of liquid chemicals per month and seller agreed to make available for purchase maximum amount of such chemicals per month, provision requiring either party to cancel agreement prior to seeking damages for breach was unenforceable under UCC § 2-719(2), on grounds that it failed to serve its essential purpose, and agreement was governed by general remedy provisions of UCC § 2-711(1) where seller breached contract by failing to meet its minimum monthly commitments, where buyer in reliance on agreement had entered into continuing resale obligations with third parties, and where operation of provision would have deprived buyer of substantial value of its bargain, i. e., guaranteed source of product availability. *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245 (N.D. Ill. 1974), aff'd, 522 F.2d 469 (7th Cir. Ill. 1975).

Seller stated quasi-contract cause of action to recover from defaulting buyer the price quantum valebant of one knitting machine delivered under express contract for sale of 2 such machines. *Singer Co. v. Alka Knitting Mills, Inc.*, 41 A.D.2d 856 (2d Dep't 1973).

When the seller makes an unreasonable demand for payment which constitutes a breach of contract, his action so varies the contract that any surety or person secondarily liable is released thereby. *United States ex rel. Industrial Instrument Corp. v. Paul Hardeman, Inc.*, 202 F. Supp. 124 (N.D. Tex. 1962), aff'd, 320 F.2d 115 (5th Cir. Tex. 1963).

RESEARCH REFERENCES

ALR. Seller's waiver of sales contract provision limiting time within which buyer may object to or return goods. 24 A.L.R.2d 717.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty. 41 A.L.R.2d 812.

Use of article by buyer as waiver of right to rescind for fraud, breach of war-

ranty, or failure of goods to comply with contract. 41 A.L.R.2d 1173.

Buyer's right to "cover" by purchasing goods elsewhere on seller's breach under UCC § 2-712. 64 A.L.R.3d 246.

Measure and elements of buyer's recovery upon revocation of acceptance of goods under UCC § 2-608(1). 65 A.L.R.3d 388.

Am Jur. 67A Am. Jur. 2d, Sales §§ 1164 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1081-2:1086 (remedies of buyer; security interest in rejected goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1661 et seq (remedies of buyer in general; security interest of buyer in rejected goods).

11 Am. Jur. Proof of Facts 2d, Reduction or Mitigation of Damages — Sales Contract, §§ 65 et seq (proof of facts in mitigation of damages; action by buyer).

29 Am. Jur. Proof of Facts 2d 521, Cancellation or Reformation of Real Property Lease for Mistake.

43 Am. Jur. Proof of Facts 2d 577, Wrongful Termination of Dealership.

CJS. 78 C.J.S., Sales §§ 375 et seq.

Law Reviews. 1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L. J. 467, August, 1987.

§ 75-2-712. “Cover”; buyer’s procurement of substitute goods.

(1) After a breach within section 75-2-711 the buyer may “cover” by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715) [Section 75-2-715], but less expenses saved in consequence of the seller’s breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

SOURCES: Codes, 1942, § 41A:2-712; Laws, 1966, ch. 316, § 2-712, eff March 31, 1968.

Cross References — Obligation of good faith, see § 75-1-203.

When action taken within reasonable time or seasonably, see § 75-1-204.

Seller’s equivalent right to resell, see § 75-2-706.

Buyer’s remedies generally, see § 75-2-711.

Damages for seller’s nondelivery or repudiation generally, see § 75-2-713.

Consequential damages limited to loss which could not reasonably be prevented by cover, see § 75-2-715.

Right to specific performance or replevin where goods unique or in other proper circumstances, see § 75-2-716.

JUDICIAL DECISIONS

1. In general; scope.
2. Buyer’s duty to mitigate damages.
3. Reasonableness of time of cover.
4. Buyer’s cover in particular cases.
5. Purchase of substitute goods which does not amount to cover.
6. Damages.
7. —Incidental and consequential damages.
8. Availability of other remedies.

1. In general; scope.

In buyer’s suit for specific performance,

where seller, after agreeing to sell all cotton produced by him during 1973 crop year, cancelled contract two months later for buyer’s failure to furnish required performance bond within two-week deadline set by seller and buyer thereafter furnished seller with letter of credit (which would expire before cotton was picked) in amount of such bond before buyer finally sent bond itself, (1) since written contract between parties did not specify time bond was to be furnished, UCC § 2-309(1) applied and required that bond be furnished

within reasonable time; (2) in determining what was reasonable time, Comment 6 to UCC § 2-309(1) would be followed; (3) under Comment 6, effective communication of proposed time limit calls for response, and failure to reply constitutes acquiescence in such time limit; (4) although buyer did not acquiesce in seller's proposed time limit which was sufficient for answering, new trial would be necessary on issue as to whether buyer furnished bond within reasonable time because buyer's response communication did not answer such issue; and (5) if at new trial buyer should be found to have furnished bond within reasonable time, buyer's remedy would not be suit for specific performance under UCC § 2-716(1), but would be suit under UCC § 2-712(2) for damages for breach of contract, since buyer could have purchased other cotton on open market as cover for cotton not furnished by seller. *Weathersby v. Gore*, 556 F.2d 1247 (5th Cir. 1977).

In general construction contractor's action against subcontractor for breach of contract to construct and install grain dryer, correct measure of damages under UCC § 2-712(2) to compensate plaintiff for its loss was reasonable cost of substitute dryer and additional expenses incidental to its installation, less contract price for purchase and installation of dryer. *Cooper v. Kruse-Reed, Inc.*, 554 S.W.2d 45 (Tex. Civ. App. 1977).

It was not necessary under UCC § 2-712 that buyer establish market price and where buyer complied with requirements of § 2-712, his purchase was presumed proper and burden of proof was on seller to show that "cover" was not properly obtained. *Laredo Hides Co. v. H & H Meat Prods. Co.*, 513 S.W.2d 210 (Tex. Civ. App. 1974), ref. n.re. (Feb. 5, 1975).

2. Buyer's duty to mitigate damages.

In action by subcontractor against supplier of ready-mixed concrete for latter's failure to deliver adequate supplies of concrete at scheduled times, where subcontractor's opportunities for effecting cover, as required by UCC §§ 2-712(1) and 2-715(2)(a), were all subject to drawbacks, subcontractor's decision to continue with its existing supplier, in order to avoid even greater losses that might result from at-

tempting to get concrete from another supplier whose ability to perform was uncertain, was justified since in such circumstances, mitigation of damages might well be best served by continuing existing arrangements. *S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524 (3d Cir. Pa. 1978).

Generally, when a seller refuses to deliver goods, the buyer, under UCC §§ 2-712(1) and 2-715(2)(a), must attempt to secure similar goods elsewhere as a prerequisite to the recovery of consequential damages. *S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524 (3d Cir. Pa. 1978).

The requirement of "cover" (see UCC §§ 2-712(1) and 2-715(2)(a)), or mitigation of damages, is not absolute and unyielding, but is subject to the circumstances of the case. The test of proper cover is whether, at the time and place, the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or the most effective. *S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524 (3d Cir. Pa. 1978).

3. Reasonableness of time of cover.

Where broker, pursuant to customer's order, sold shares of stock for customer's account but customer never delivered stock certificates for transfer to buyers, broker could recover difference between amount it expended to purchase covering stock and amount received for stock that customer ordered to be sold. In such case, however, broker's damages could not be determined without considering, as required by UCC § 2-712(1), reasonableness of time that broker permitted to elapse before making its cover purchase. *Reynolds Sec., Inc. v. Underwriters Bank & Trust Co.*, 44 N.Y.2d 568, 378 N.E.2d 106 (1978).

In action for damages for breach of oral contracts to sell anhydrous ammonia, buyer's contention that it should have been granted directed verdict for higher award of damages than award made by jury was not sustainable where (1) parties disputed both dates on which breaches occurred and whether buyer's delay in making cover purchases of ammonia from other sources was reasonable under UCC

§ 2-712(1), and (2) such factual disputes controlled applicable measure of damages in case, *Transammonia Export Corp. v. Conserv, Inc.*, 554 F.2d 719 (5th Cir. Fla. 1977).

Where seller repudiated contract for sale of grain before time for full performance, buyer failed to establish as matter of law that it elected to pursue contractual remedy by purchasing substitute grain which constituted "cover" within purview of UCC § 2-712 where buyer did not purchase substitute grain on open market but rather purchased company-owned grain, and where it was not shown that cover purchase was perfected within time period agreed upon by parties; mere showing that buyer purchased substitute goods from himself at some price, without more, did not establish good faith. *Kiser v. Lemco Indus., Inc.*, 536 S.W.2d 585 (Tex. Civ. App. 1976).

Where seller breached contract to deliver corn on June 4, 1973, buyer acted reasonably in making first installment of cover purchase on June 13, 1973, in absence of evidence that cover was immediately available; although remaining purchase on June 26, 1973, may have been unreasonable, in view of lack of evidence why cover could not have been fully effected on earlier date, seller was not prejudiced by additional delay since June 26 purchase was at cost of 5 cents per bushel less than June 13 purchase. *Farmers Elevator Co. v. Lyle*, 90 S.D. 86, 238 N.W.2d 290 (1976).

4. Buyer's cover in particular cases.

Where (1) buyer contracted to buy 30,000 pounds of large pecans from seller at \$1.49 per pound, (2) seller, prior to specified delivery date, informed buyer that seller would be unable to fulfill buyer's order, and (3) buyer thereafter purchased 30,000 pounds of large pecans elsewhere at \$1.67 per pound, court held (1) that buyer had right to cover his loss and then recover damages from seller for difference between contract price and cover price (see UCC § 2-712(2)) and (2) that jury's verdict for \$5,400, which represented difference between contract price and cover price of pecans in suit, was supported by the evidence. *Wander, Ltd. v. Krouse & Co.*, 368 So. 2d 235 (Miss. 1979).

In action for seller's breach of contract to sell and install at buyer's lumber plant two "super drying kilns" and two lumber-handling systems, where (1) contract contained performance guarantee that super kilns would reduce drying schedules for buyer's lumber by 50 per cent, and that if they did not do so, seller would provide adequate production capacity equal to that of four conventional dry kilns at no additional cost to buyer, (2) buyer paid down payment of \$24,000, which was accepted by seller, (3) seller repudiated contract because it could not comply with performance guarantee, and (4) buyer thereafter purchased four conventional dry kilns and also a lumber "stacker-unstacker" from another seller, court held (1) that contract's performance guarantee was sufficiently definite and certain, (2) that because contract was breached by seller before installation of super kilns, liquidated damages provision of performance guarantee was inapplicable to measure buyer's damages and district court should have measured such damages under UCC §§ 2-712 and 2-713, (3) that regardless of whether district court, on remand of case, should apply cover provisions of UCC § 2-712 or contract-market price damages rule of UCC § 2-713 to case, court should base either cost of cover or market price of dry kilns on installed cost of conventional dry kilns with holding capacity twice that of the super kilns contracted for, since parties intended, by their performance guarantee, that super kilns' productivity was to be equivalent of conventional dry kilns with twice the holding capacity of such kilns, (4) that under UCC § 2-711(1), buyer was entitled to recover its down payment, (5) that since the Uniform Commercial Code did not provide remedy for seller's recovery of value of equipment shipped by seller to buyer before seller's breach of contract, UCC § 1-103 was applicable and seller, under common-law and equitable principles, was entitled to recover value of equipment still in buyer's possession, together with fair value of equipment that buyer had disposed of, and (6) that district court should compute under UCC § 2-713 damages caused buyer by seller's failure to deliver and

install the lumber-handling systems. *Mann & Parker Lumber Co. v. Wel-Dri*, 579 F.2d 973 (6th Cir. Tenn. 1978).

Where seller breached agreement for sale of investment securities, broker was entitled to recover difference between contract price and cover price, plus interest cost incurred for delay in fulfilling broker's contract with ultimate purchaser; fact that broker reaped benefits by trading its interest in securities before breach was of no relevance to measure of damages. *G.A. Thompson & Co. v. Wendell J. Miller Mtg. Co.*, 457 F. Supp. 996 (S.D.N.Y. 1978).

Where seller of cotton represented to buyer that seller would sell and deliver all cotton produced by specified number of growers during particular year at specified price per pound, and where seller failed to obtain one grower's consent to sale of that grower's cotton at price specified in seller's contract with buyer, seller's failure to deliver such cotton constituted breach of contract with buyer which justified buyer, under UCC § 2-711(1)(a) and § 2-712(1), in covering for such cotton by promptly buying the same undelivered cotton directly from the nonconsenting grower at a higher but reasonable price therefor. Moreover, in buyer's action for seller's breach, buyer under UCC § 2-712(2) was entitled to recover as damages difference between cost of cover purchase from the nonconsenting grower and price at which seller had contracted to sell such cotton to buyer. *W.B. Dunavant & Co. v. Southmost Growers, Inc.*, 561 S.W.2d 578 (Tex. Civ. App. 1978), *ref. n.r.e.* (Apr. 26, 1978).

In buyer's breach of contract action for seller's failure to deliver truck to be used in buyer's construction business, (1) since possibility that seller would not be able to obtain truck from manufacturer was clearly foreseeable contingency at time seller entered into contract (which contained no escape clause making obligation to deliver truck contingent on seller's obtaining it), manufacturer's cancellation of seller's order for truck was not "a contingency the nonoccurrence of which was a basic assumption on which the contract [between buyer and seller] was made" within meaning of UCC § 2-615(a), gov-

erning excuse of nonperformance; (2) buyer was entitled to "cover" damages under UCC § 2-712(1) and (2) for increase in net purchase price incurred in purchasing replacement truck; (3) buyer did not waive right to incidental and consequential damages by failure to cancel order for truck when seller first notified buyer that delivery would not be made on date buyer needed truck; and (4) buyer's loss of use of truck in buyer's business while buyer's old truck was being repaired, and also buyer's depreciation or trade-in value loss on old truck, were properly recoverable items of incidental and consequential damages under UCC § 2-715(1) and (2), since such damages resulted from seller's breach. *Barbarossa & Sons v. Iten Chevrolet, Inc.*, 265 N.W.2d 655 (Minn. 1978).

In action by buyer to recover damages from seller based upon seller's breach of contract for sale of soybeans, where there was no evidence of "cover", trial court properly submitted issue of damages to jury under UCC § 2-713; furthermore, trial court properly excluded evidence of expenses saved by buyer in consequence of seller's breach where buyer relied solely upon measure of market price and did not attempt to collect any incidental or consequential damages. *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. N.C. 1977).

In buyer's action for seller's breach of contract to sell wheat, where seller failed to deliver 5,138 bushels of total amount of 125,801 bushels contracted for; where buyer resold 125,000 bushels to third-party purchaser and covered for all but 801 bushels that seller did not deliver; and where buyer, instead of seeking damages under cover provision of UCC § 2-712, sought to recover under UCC § 2-713 which allows damages based on difference between market price of goods at date of breach and contract price, (1) since market price of wheat at date of seller's breach was less than cost of covering undelivered wheat, buyer was entitled to damages based on market-price rule in UCC § 2-713 for all wheat that seller did not deliver, and (2) such recovery was not barred by fact that buyer did not cover entire amount of wheat that seller did not deliver. *Interior Elevator Co. v. Limmeroth*, 278 Or. 589, 565 P.2d 1074 (1977).

In action by cotton broker against cotton handler for breach of contract for sale of cotton to broker, trial court erred in using figure of 40 cents per pound, in absence of evidence of market price of cotton at time of handler's breach, as measure of broker's damages under UCC § 2-712(2) where broker covered cotton which handler failed to deliver and where uncontradicted testimony of witness established that broker paid average price of 78 cents per pound for covered cotton, which more nearly reflected actual damages sustained by broker; specific evidence as to cost of cover were not necessary and near average was adequate. *R.N. Kelly Cotton Merchant, Inc. v. Cox*, 295 Ala. 94, 323 So. 2d 426 (1976).

Where dealer in lighting fixtures agreed to furnish fixtures to electric subcontractor at lump-sum price, subject to additions or reductions as required by subcontractor, subcontractor had option under UCC § 2-610, when dealer repudiated agreement, to "cover" in accord with UCC § 2-712(1) by purchasing required items from another supplier; hence, subcontractor was entitled to recover from dealer excess of cost of "cover" over contract price as provided in UCC § 2-712(2). *Robert Mfg. Co. v. South Bay Corp.*, 82 Misc. 2d 250 (1975).

5. Purchase of substitute goods which does not amount to cover.

In action arising out of contract for sale of grain, buyer did not "cover" under UCC §§ 2-711 and 2-712 after seller failed to deliver on schedule, where delivery date was extended and buyer bought grain on open market to meet its own sales commitments without purchasing grain specifically for seller's account under contract. *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285 (8th Cir. N.D. 1977).

Buyer of air structures purchased to cover commercial tennis courts, so that courts could be rented to tennis players during cold weather, was not entitled to damages for cover under UCC § 2-711(1)(a) and UCC § 2-712(2) on defendant seller's repudiation of contract where cost to buyer of substitute air structures purchased from different manufacturer was less than cost of structures

purchased from defendant. *Tennisland, Inc. v. Precision Tennis Sys.*, 437 F. Supp. 339 (W.D. Pa. 1977).

Plaintiffs were not entitled to recover cost of "cover", where evidence indicated that expenses saved by them in purchasing cords of already cut wood were more than difference between cost of cover and contract price. *Melms v. Mitchell*, 266 Or. 208, 512 P.2d 1336, 65 A.L.R.3d 376 (1973).

6. Damages.

In action for seller's breach of contract to sell investment securities that buyer had contracted to resell to third person, which breach caused buyer to make "cover" purchase of other securities to effect such resale, court held (1) that although UCC Art 8 contains no provision for buyer's remedies against seller for breach of contract to purchase securities, and although UCC § 2-105(1) expressly excludes investment securities from definition of "goods" for purposes of UCC Art 2, nevertheless, as indicated by Official Comment 1 to UCC § 2-105, buyer's remedies in Art 2 for breach of contract also apply by analogy to investment security transactions; (2) that under UCC § 2-712(2), buyer was entitled to recover as damages difference between cost of cover and contract price of securities in suit, plus incidental and consequential damages; and (3) that benefits that had accrued to buyer as result of its trading of its interest in securities in suit before seller's breach were not relevant to buyer's measure of damages for such breach. *G.A. Thompson & Co. v. Wendell J. Miller Mtg. Co.*, 457 F. Supp. 996 (S.D.N.Y. 1978).

Evidence which showed that buyer's business was buying and selling petroleum products and that at time buyer learned of seller's breach of contract to sell fuel oil, price of oil was \$2.30 per barrel higher than contract price, was legally sufficient under UCC § 2-713(1) (dealing with buyer's damages for seller's repudiation of contract) and § 2-712(3) (providing that buyer's failure to effect cover does not bar him from any other remedy) to support trial court's presumed finding that buyer had sustained damages from seller's repudiation of contract. *La Jet, Inc. v.*

United Petro. Distribs., Inc., 570 S.W.2d 192 (Tex. Civ. App. 1978).

In view of Code provision declaring measure of damages for nondelivery or repudiation by seller to be difference between market price at time when buyer learned of breach and contract price, court's instruction that purchaser of color television broadcasting equipment was entitled to damages for repudiation of contract equal to loss of value of buyer's television station business, taking into account loss of value between value of business and its future potential before station ceased operation and value of business after it ceased operation, lost its network affiliation and became insolvent, was improper. *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. Tex. 1973).

7. —Incidental and consequential damages.

The loss by plaintiff, Mississippi corporation operating jewelry counters in department stores throughout southeast, of corollary sales as result of a breach of contract by defendant seller of wrist-watches, was a foreseeable consequence of the breach, inasmuch as very purpose of a "loss leader" promotion, in which plaintiff intended to engage by selling watches provided by the defendant at a sale price, was to increase the amount of corollary sales in plaintiff's establishment on the basis of increased patronage attracted by the sale, and plaintiff showed that defendant knew the watches would be used for this purpose. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

Loss may be determined in any manner which is reasonable under the circumstances, and does not require mathematical precision, therefore a plaintiff who has produced the best evidence available to him should not be denied recovery because the amount cannot be ascertained with the same precision as an ordinary claim for damages. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

In action for breach of purchase contract by manufacturer of PVC pipe against supplier of resin used in such pipes, manufacturer was entitled to consequential damages where evidence

showed that it had made reasonable attempts to "cover" by seeking to purchase substitute resin elsewhere. *H & W Indus., Inc. v. Occidental Chem. Corp.*, 911 F.2d 1118 (5th Cir. 1990).

In action for seller's breach of contract to sell investment securities that buyer had contracted to resell to third person which breach caused buyer to make "cover" purchase of other securities to effect such resale, court held (1) that although UCC Art 8 contains no provision for buyer's remedies against seller for breach of contract to purchase securities, and although UCC § 2-105(1) expressly excludes investment securities from definition of "goods" for purposes of UCC Art 2, nevertheless, as indicated by Official Comment 1 to UCC § 2-105, buyer's remedies in Art 2 for breach of contract also apply by analogy to investment security transactions; (2) that under UCC § 2-712(2), buyer was entitled to recover as damages difference between cost of cover and contract price of securities in suit, plus incidental and consequential damages; and (3) that benefits that had accrued to buyer as result of its trading of its interest in securities in suit before seller's breach were not relevant to buyer's measure of damages for such breach. *G.A. Thompson & Co. v. Wendell J. Miller Mtg. Co.*, 457 F. Supp. 996 (S.D.N.Y. 1978).

In action by buyer, a manufacturer of cup boosters, against seller of aluminum blanks used in manufacture of cup boosters for breach of option authorizing buyer to increase original order by 100 per cent, buyer was entitled to consequential damages pursuant to UCC § 2-715 for costs attributable to extra freight for blanks obtained from substitute supplier, and loss of profits in connection with contract for sale of finished cup boosters to United States which resulted from change in delivery schedule caused by seller's breach; however, buyer could not recover under UCC § 2-715 for transportation of its agent in seeking substitute blanks, and for down time of machinery due to seller's breach, where those damages were not satisfactorily proved. *R.L. Pohlman Co. v. Keystone Consol. Indus., Inc.*, 399 F. Supp. 330 (E.D. Mo. 1975).

Buyer's failure to effect cover under UCC § 2-712 does not bar buyer's recover

for incidental and consequential damages under UCC § 2-715. *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972).

8. Availability of other remedies.

On breach by seller, buyer under UCC § 2-712(3) is not required to cover as means of minimizing damages, and his failure to cover will not bar him from any other remedy. Thus on seller's breach, buyer is free to choose between damages based on difference between contract price and cost of cover under UCC § 2-712(2)

and damages for nondelivery based on difference between market price at time when buyer learned of breach and contract price under UCC § 2-713(1) (citing annotation; holding that in action for damages for breach of contract to sell grain sorghum, buyer pleaded and proved measure of damages for nondelivery under UCC § 2-713(1)). *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743, 1 A.L.R.4th 512 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Apr. 5, 1978).

RESEARCH REFERENCES

ALR. Buyer's right to "cover" by purchasing goods elsewhere on seller's breach under UCC § 2-712. 64 A.L.R.3d 246.

What constitutes "cover" upon breach by seller under UCC sec. 2-712(1). 79 A.L.R.4th 844.

Am Jur. 22 Am. Jur. 2d, Damages §§ 642. 644-647.

67A Am. Jur. 2d, Sales §§ 1171, 1173, 1174, 1177, 1289.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1103-2:1105 (remedies of

buyer; cover; procurement of substitute goods).

6 Am. Jur. Pl & Pr Forms, Sales, Forms 2:1081 et seq (remedies of buyer; security interest in rejected goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1671 et seq (cover; procurement by buyer of substitute goods).

43 Am. Jur. Proof of Facts 2d 577, Wrongful Termination of Dealership.

§ 75-2-713. Buyer's damages for nondelivery or repudiation.

(1) Subject to the provisions of this chapter with respect to proof of market price (Section 2-723) [Section 75-2-723], the measure of damages for nondelivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this chapter (Section 2-715) [Section 75-2-715], but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

SOURCES: Codes, 1942, § 41A:2-713; Laws, 1966, ch. 316, § 2-713, eff March 31, 1968.

Cross References — Liberal administration of code remedies, see § 75-1-106.

Buyer's right to cover, as alternative remedy, see § 75-2-712.

Specific performance where goods unique or in other proper circumstances, see § 75-2-716.

Proof of market price, see § 75-2-723.

JUDICIAL DECISIONS

1. In general.
2. Date on which market value is determined.
3. Evidence of market value.
4. Particular applications.
5. Joint and several liability.
6. Disclaimer or exclusion.

1. In general.

In action for breach of purchase contract by manufacturer of PVC pipe against supplier of resin used in such pipes, manufacturer was entitled to consequential damages where evidence showed that it had made reasonable attempts to "cover" by seeking to purchase substitute resin elsewhere. *H & W Indus., Inc. v. Occidental Chem. Corp.*, 911 F.2d 1118 (5th Cir. 1990).

In buyer's action for damages for seller's breach of contract to sell unique porcelain animal figures and also specific performance of such contract under UCC § 2-716(1), district court ruled, on denying buyer's motion for preliminary injunction to restrain seller from disposing of figures remaining in its possession, (1) that since seller had distributed all but 50 figures to other buyers, plaintiff had already sustained major part of its business injury, (2) that plaintiff was not entitled to specific performance, since it had not demonstrated existence of any special circumstances that would justify penalizing other good-faith purchasers of such figures in order to grant specific performance to plaintiff, (3) that plaintiff's lost profits from seller's breach were susceptible of ascertainment for purpose of computing damages for nondelivery under UCC § 2-713(1) and incidental and consequential damages under UCC § 2-715(1) and (2), and (4) that plaintiff's total damage claim of nearly nine million dollars was an adequate remedy at law. *Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197 (S.D.N.Y. 1978).

In action by grain dealer to recover damages for defendant's breach of contract to sell and deliver wheat, jury should have been fully instructed on provisions of UCC §§ 2-713 and 2-723 where there was evidence of expenses incurred by seller for

handling grain in and out of warehouse and possibly for taxes. *Pendleton Grain Growers v. Pedro*, 271 Or. 24, 530 P.2d 85 (1975).

Section 2-713 has been cited as authority for the proper measure of damages in a case involving the liability of a subcontractor for damages for breach of its subcontract to manufacture and install equipment. *Seifert & Son v. Bernheim*, 75 York Leg. Rec. 138 (Pa. 1961).

2. Date on which market value is determined.

UCC § 2-610(a) and § 2-713(1) should be interpreted in a consistent manner. Thus, since under UCC § 2-610(a), an aggrieved party may, for a commercially reasonable time, await performance, UCC § 2-713(1) should be interpreted to measure damages within a commercially reasonable time after learning of the repudiation. *First Nat'l Bank v. Jefferson Mtg. Co.*, 576 F.2d 479 (3d Cir. N.J. 1978).

In action by bank against mortgage company for breach of contract to sell bank mortgage-backed securities guaranteed by Government National Mortgage Association (GNMA), where evidence showed (1) that such sale was orally arranged by mortgage broker, (2) that mortgage company did not authorize broker to make contract with bank, but contemplated solicitation of offer to buy at specified price, subject to acceptance of proposed written commitment, and (3) that mortgage company repudiated oral contract made by broker on October 1, 1973, long before date fixed for contract's performance, court held (1) that mortgage company was not liable to bank, since it did not authorize broker to make oral contract in suit and did not subsequently ratify it, (2) broker, because of breach of its implied warranty of authority, was liable to bank for all damages resulting from such breach, (3) letter sent by bank to confirm oral contract satisfied statute of frauds provision in UCC § 8-319(c), since it was written promptly, was received by party against whom enforcement was sought (mortgage company), and was not objected to in writing within ten days, (4) securities

involved were investment securities within meaning of UCC § 8-102(1)(a), (5) bank did not attempt to “cover” such securities by independent purchases on the market, (6) bank’s damages were to be measured by damages that bank could have recovered from nonperforming seller for breach of an authorized contract, (7) under UCC § 2-713(1), such measure of damages was difference between market price of securities at time when bank, as purchaser thereof, learned of breach and contract price of securities, (8) phrase “at the time when the buyer learned of the breach” in UCC § 2-713(1) means, in present suit, “at the time the buyer learned of the repudiation,” and (9) UCC § 2-713(1) would be interpreted to measure bank’s damages as occurring “within a commercially reasonable time” after bank learned of repudiation of oral contract (applying New Jersey law; holding that because of circumstances in GNMA securities market at time of mortgage company’s anticipatory repudiation of oral contract in suit a commercially reasonable time for bank to await performance, as provided by UCC § 2-610(a), did not extend substantially beyond date on which repudiation occurred). *First Nat’l Bank v. Jefferson Mtg. Co.*, 576 F.2d 479 (3d Cir. N.J. 1978).

In action for breach of oral contract to sell and deliver by end of 1973 10,000 bushels of corn to plaintiff grain dealer, who in reliance on such contract resold the corn for delivery on or before January 1, 1974, course of performance by parties justified finding that parties had agreed that tender of payment by plaintiff prior to delivery of corn, which would ordinarily be required under UCC § 2-511(1), was not condition precedent to defendant’s duty to tender and complete deliveries of corn contracted for. Furthermore, even assuming that plaintiff could have treated defendant’s silence, after delivering and receiving payment for 2,700 bushels of corn by March, 1973, as repudiation of contract, plaintiff’s waiting until December 28, 1973 before considering contract breached was not unreasonable under UCC § 2-610(a) (noting that earliest date on which plaintiff could have learned of defendant’s breach was August 14, 1973,

and also holding that under UCC § 2-713(1), use of December 28, 1973 as date for determining, with respect to plaintiff’s damages, market value of undelivered corn was proper). *Carson v. Mulnix*, 263 N.W.2d 701 (Iowa 1978).

Under UCC § 2-713, buyer may urge continued performance of contract for reasonable time. At end of reasonable time, he should “cover” goods covered by contract if substitute goods are readily available. If substitute goods are readily available, but buyer does not cover within reasonable time, buyer’s damages should be based on market price of goods at end of such reasonable time, rather than on market price when performance of contract is due. But if valid reason exists for buyer’s failure or refusal to cover, buyer’s damages may be calculated from time performance of contract is due. *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. Colo. 1977).

Where buyer and seller entered into contract for sale of wheat on July 31, 1973, and seller thereafter repudiated contract by letter on August 21, 1973, which was received by buyer on August 24, 1973; and where buyer, after seller’s anticipatory repudiation on August 24, 1973, continued to urge seller to perform until September 6, 1973, when seller informed buyer that seller would not perform and buyer thereupon cancelled contract, buyer had reasonable time under UCC § 2-713, after seller’s anticipatory repudiation on August 24, to “cover” such wheat (make reasonable purchase of substitute wheat), and such reasonable time expired on September 6, when contract was cancelled by buyer. On remand of case, if buyer, who did not “cover” wheat (or sue for specific performance of contract, but instead sought damages for nondelivery under UCC § 2-711 pursuant to measurement of damages rule contained in UCC § 2-713), should present no valid reason for failing to “cover,” damages should be based on difference between market price of wheat on date contract was made (July 31) and date on which contract was cancelled by buyer (September 6); but if buyer should present valid reason for not “covering,” damages should be based on difference between market price on date contract

made (July 31) and last date for its performance (September 30). *Cargill, Inc. v. Stafford*, 553 F.2d 1222 (10th Cir. Colo. 1977).

In buyer's action for damages for seller's failure to deliver towable sprinkler, where evidence showed (1) that parties had contracted for sale and delivery of three towable sprinklers to buyer, (2) that after two sprinklers had been delivered, parties extended time for delivery of third sprinkler, and (3) that on new date fixed for delivery of third sprinkler, seller refused to make delivery at contract price because of intervening increase in cost of such sprinklers, seller's repudiation of contract occurred when it refused to deliver a third sprinkler on new date for its delivery, and buyer under UCC § 2-713(1) was entitled to difference between contract price of sprinkler and market price thereof on such new date of delivery, plus interest. *Wilson v. Gifford-Hill & Co.*, 570 P.2d 624 (Okla. Ct. App. 1977).

In buyer's action for seller's breach of contract to sell wheat, where seller failed to deliver 5,138 bushels of total amount of 125,801 bushels contracted for; where buyer resold 125,000 bushels to third-party purchaser and covered for all but 801 bushels that seller did not deliver; and where buyer, instead of seeking damages under cover provision of UCC § 2-712, sought to recover under UCC § 2-713 which allows damages based on difference between market price of goods at date of breach and contract price, (1) since market price of wheat at date of seller's breach was less than cost of covering undelivered wheat, buyer was entitled to damages based on market-price rule in UCC § 2-713 for all wheat that seller did not deliver, and (2) such recovery was not barred by fact that buyer did not cover entire amount of wheat that seller did not deliver. *Interior Elevator Co. v. Limmeroth*, 278 Or. 589, 565 P.2d 1074 (1977).

UCC § 2-713 does not affect rule that measure of damages for breach of contract for sale of goods, when delivery is extended to indefinite time, is difference between contract price and market price at reasonable time after performance is demanded. *Olsen v. Scholl*, 38 Ill. App. 3d 340, 347 N.E.2d 195 (2d Dist. 1976).

3. Evidence of market value.

The time when the buyer learned of the breach of contract for purposes of the measure of damages based on market value under § 75-2-713(1) was the last possible date for timely performance of the contract rather than the date of the buyer's letter requesting performance. *Gooch v. Farmers Mktg. Ass'n*, 519 So. 2d 1214 (Miss. 1988).

In action for dealer's breach of contract to deliver new car to plaintiff in exchange for plaintiff's old car plus \$3,100, plaintiff's damages were governed by UCC § 2-713(1), and plaintiff was required, in order to obtain any damages at all, to show that in the open market he would have been required to pay, for a comparable new car at the same time, his old car and a sum of money in excess of \$3,100. *Greenberg v. Beckwith Motors, Inc.*, 136 Vt. 285, 388 A.2d 426 (1978).

In action by buyer to recover damages from seller based upon seller's breach of contract for sale of soybeans, where there was no evidence of "cover", trial court properly submitted issue of damages to jury under UCC § 2-713; furthermore, trial court properly excluded evidence of expenses saved by buyer in consequence of seller's breach where buyer relied solely upon measure of market price and did not attempt to collect any incidental or consequential damages. *Ralston Purina Co. v. McFarland*, 550 F.2d 967 (4th Cir. N.C. 1977).

Where buyers entered into contract to purchase three combines on November 30, 1973, for price of \$2,200, but where on February 20, 1974, buyers had not taken delivery, seller notified buyers that their down payment was being returned, and on same day sold three combines, plus haybailer, to third party for total price of \$3,400, buyers did not prove their damages in accordance with standard contained in UCC § 2-713 since there was no competent opinion evidence offered to show particular condition of these combines and what market price would have been at place of delivery when buyers learned of breach. *Burgess v. Curly Olney's, Inc.*, 198 Neb. 153, 251 N.W.2d 888 (1977).

Where seller of cotton repudiated contract and sold his cotton crop to another

buyer, seller's testimony as to price received for cotton was sufficient to establish market price as of date of breach for purpose of determining buyer's measure of recovery, i.e., difference between contract price and market price, pursuant to UCC § 2-713. *Tennell v. Esteve Cotton Co.*, 546 S.W.2d 346 (Tex. Civ. App. 1976), ref. n.r.e. (June 1, 1977).

In action by buyer of soybeans at specified price against seller for alleged repudiation of agreement and failure to deliver, appropriate measure of damages was as specified by UCC § 2-713(1); thus, evidence of price of soybeans on January 2, 1973, was admissible where evidence was conflicting as to whether buyer learned of breach on January 2, 1973, or another date. *Anderson v. Gold Kist, Inc.*, 138 Ga. App. 19, 225 S.E.2d 487 (1976).

In action by buyer against seller for repudiation of contract for sale of fill and other earth materials, buyer failed to prove damages claimed under UCC § 2-713 where buyer failed to prove market price of fill material at place of tender as of time when buyer learned of breach of contract. *Willametz v. Goldfeld*, 171 Conn. 622, 370 A.2d 1089 (1976).

4. Particular applications.

In action for seller's breach of contract to sell 525,000 board feet of lumber, where (1) superseding confirmation of sale dated January 29, 1973 provided for price of lumber and stated that delivery would be made between January and June, 1973, (2) buyer received one shipment of 15,000 board feet in May, 1973, (3) parties renegotiated contract in June, 1973 to provide for still higher price and for complete delivery by December, 1973, subject to availability of vessels for shipping purposes, (4) buyer received only one more shipment of 46,000 board feet in November, 1973, leaving approximately 463,000 board feet undelivered, and (5) seller cancelled contract in December, 1973 because of its alleged inability to complete delivery before end of December, 1973, court held (1) that evidence showing that seller had another shipping company that could have provided cargo space to ship lumber in suit, although at a higher price, justified jury in rejecting seller's defense of commercial impracticability, (2) that

proper measure of damages was contract price-market price difference prescribed by UCC § 2-713(1), and (3) that June, 1973 renegotiated contract, instead of original January, 1973 contract (as held by district court), should be basis of buyer's damages award. *Fratelli Gardino, S.p.A. v. Caribbean Lumber Co.*, 587 F.2d 204 (5th Cir. Ga. 1979), reh'g denied, 590 F.2d 333 (5th Cir. Ga. 1979).

In action for seller's breach of contract to sell and install at buyer's lumber plant two "super drying kilns" and two lumber-handling systems, where (1) contract contained performance guarantee that super kilns would reduce drying schedules for buyer's lumber by 50 per cent and that if they did not do so, seller would provide adequate production capacity equal to that of four conventional dry kilns at no additional cost to buyer, (2) buyer paid down payment of \$24,000, which was accepted by seller, (3) seller repudiated contract because it could not comply with performance guarantee, and (4) buyer thereafter purchased four conventional dry kilns and also a lumber "stacker-unstacker" from another seller, court held (1) that contract's performance guarantee was sufficiently definite and certain, (2) that because contract was breached by seller before installation of super kilns, liquidated damages provision of performance guarantee was inapplicable to measure buyer's damages and district court should have measured such damages under UCC §§ 2-712 and 2-713, (3) that regardless of whether district court, on remand of case, should apply cover provisions of UCC § 2-712 or contract-market price damages rule of UCC § 2-713 to case, court should base either cost of cover or market price of dry kilns on installed cost of conventional dry kilns with holding capacity twice that of the super kilns contracted for, since parties intended, by their performance guarantee, that super kilns' productivity was to be equivalent of conventional dry kilns with twice the holding capacity of such kilns, (4) that under UCC § 2-711(1), buyer was entitled to recover its down payment, (5) that since the Uniform Commercial Code did not provide remedy for seller's recovery of value of equipment

shipped by seller to buyer before seller's breach of contract, UCC § 1-103 was applicable and seller, under common-law and equitable principles, was entitled to recover value of equipment still in buyer's possession, together with fair value of equipment that buyer had disposed of, and (6) that district court should compute under UCC § 2-713 damages caused buyer by seller's failure to deliver and install the lumber-handling systems. *Mann & Parker Lumber Co. v. Wel-Dri*, 579 F.2d 973 (6th Cir. Tenn. 1978).

Evidence which showed that buyer's business was buying and selling petroleum products and that at time buyer learned of seller's breach of contract to sell fuel oil, price of oil was \$2.30 per barrel higher than contract price, was legally sufficient under UCC § 2-713(1) (dealing with buyer's damages for seller's repudiation of contract) and § 2-712(3) (providing that buyer's failure to effect cover does not bar him from any other remedy) to support trial court's presumed finding that buyer had sustained damages from seller's repudiation of contract. *La Jet, Inc. v. United Petro. Distribs., Inc.*, 570 S.W.2d 192 (Tex. Civ. App. 1978).

Under UCC § 2-713, buyer's measure of damages for seller's repudiation of contract for sale of popcorn was difference between contract price and market price at time buyer learned of seller's nondelivery and repudiation. *Baker v. Ratzlaff*, 1 Kan. App. 2d 285, 564 P.2d 153 (1977).

On breach by seller, buyer under UCC § 2-712(3) is not required to cover as means of minimizing damages, and his failure to cover will not bar him from any other remedy. Thus on seller's breach, buyer is free to choose between damages based on difference between contract price and cost of cover under UCC § 2-712(2) and damages for nondelivery based on difference between market price at time when buyer learned of breach and contract price under UCC § 2-713(1) (citing annotation; holding that in action for damages for breach of contract to sell grain sorghum, buyer pleaded and proved

measure of damages for nondelivery under UCC § 2-713(1)). *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743, 1 A.L.R.4th 512 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Apr. 5, 1978).

Buyer of automobile was entitled to revoke acceptance under UCC § 2-608 when seller was unable to furnish clear title certificate as required; under UCC §§ 2-711 and 2-713, buyer was entitled to recover purchase price plus difference between purchase price and market value of vehicle with clear title as "non-delivery" damages; fact that automobile was delivered to and used by buyer did not impair buyer's right to revoke acceptance or to recover "non-delivery" damages. *Gawlick v. American Bldrs. Supply, Inc.*, 86 N.M. 77, 519 P.2d 313 (Ct. App. 1974).

5. Joint and several liability.

The agent or a seller who is a party to the misrepresentation of a race horse is not jointly and severally liable with his principal in an action for a rescission or the contract and recovery of the purchase money paid for the horse; however, a different result would have been reached had the purchasers sued to recover damages consequent upon the misrepresentation. *Grandi v. LeSage*, 74 N.M. 799, 399 P.2d 285 (1965).

6. Disclaimer or exclusion.

Buyer of turbine generator was not entitled to recover consequential damages allegedly resulting from failure and breakage of turbine blades based on breach of implied warranties where, as authorized by UCC § 2-316(2), contract expressly excluded implied warranty claims, including specifically warranties of merchantability and fitness for particular purpose, where, as authorized by UCC § 2-316(4), contract expressly limited remedy for breach of warranty to repair or replacement of nonconforming parts and where, as authorized by UCC § 2-713(3), contract expressly excluded liability for consequential damages. *Avenell v. Westinghouse Elec. Corp.*, 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

RESEARCH REFERENCES

ALR. Necessity that buyer, relying on market price as measure of damages for seller's breach of sale contract, show that goods in question were available for market at price shown. 20 A.L.R.2d 819.

Am Jur. 22 Am. Jur. 2d, Damages §§ 509, 510.

67A Am. Jur. 2d, Sales §§ 1290 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:1111 et seq. (remedies of buyer; damages).

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Form 2:1117 (damages; allegation; nondelivery or repudiation by seller).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1681 et seq (damages of buyer for nondelivery or repudiation).

43 Am. Jur. Proof of Facts 2d 577, Wrongful Termination of Dealership.

§ 75-2-714. Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (subsection (3) of Section 2-607) [Section 75-2-607] he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under Section 75-2-715 may also be recovered.

SOURCES: Codes, 1942, § 41A:2-714; Laws, 1966, ch. 316, § 2-714, eff March 31, 1968.

Cross References — "Goods" within scope of sales transactions, see § 75-2-105.

When goods are conforming, see § 75-2-106.

Warranties by seller, see §§ 75-2-312 et seq.

Buyer's acceptance of goods and incidental rights and liabilities, see § 75-2-607.

When revocation of acceptance must occur, see § 75-2-608.

Buyer's remedies generally, see § 75-2-711.

Damages for non-delivery or repudiation, see § 75-2-713.

Incidental or consequential damages, see § 75-2-715.

Deduction of damages from price still due, see § 75-2-717.

JUDICIAL DECISIONS

1. In general; scope.
2. Tort actions compared.
3. Notice of breach.
4. —Continued use of goods or failure to revoke acceptance.
5. —Acceptance of performance in violation of contract terms.
6. Difference in value between goods as warranted and goods received as measure of damages.
7. —Particular applications.
8. Cost of repair as measure of damages.
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12. —Particular applications.
13. Pleading.
14. Evidence of value or damage.

15. Burden of proof.
16. Instructions to jury.

1. In general; scope.

Under § 75-2-714, the measure of damages for a breach of warranty is the difference between the value of the goods at the time they were accepted and the value of the goods if there had been no breach. *Puckett Mach. Co. v. Edwards*, 641 So. 2d 29 (Miss. 1994).

Plaintiff who successfully proves fraud is entitled to traditional remedies under tort law, to rescind contract and be put in status quo by recovery of purchase price, and may also invoke provisions of UCC. *Beck Enters., Inc. v. Hester*, 512 So. 2d 672 (Miss. 1987).

Buyer's demand for the replacement cost of a defective heat pump exceeded the damages they were entitled to recover from the heat pump manufacturer for breach of implied warranty of merchantability. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

Nowhere in UCC §§ 2-714 and 2-715 is there indication that punitive damages are element of recovery in breach of warranty cases. *Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541 (N.D.N.Y. 1978).

Since UCC §§ 2-714(2) and 2-715(1) and (2), dealing with buyer's damages for breach of warranty and his recovery of incidental and consequential damages, nowhere contain any indication that punitive damages are an element of recovery in breach-of-warranty cases, the absence of any such provision reflects the established rule that punitive damages are generally not recoverable in contract actions. *Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541 (N.D.N.Y. 1978).

Where manufacturer breached express warranty attaching to sale of truck by failing to repair within reasonable time recurring problems in truck steering, transmission, and air-conditioning systems, and also did not remedy truck's overheating problem and loss of engine power, express limitation of manufacturer's warranty remedy to repair and replacement of defective parts failed in its essential purpose, and under UCC § 2-719(2), all other contractual remedies were available to buyer (holding, however,

that difference-in-value rule of damages in UCC § 2-714(2) was inappropriate to case, since buyer no longer had truck (which had been sold) and all claims for deficiency judgment on balance due had been forgiven; that buyer had not presented evidence of consequential damages recoverable under UCC § 2-715(2)(a); and that buyer had only proved \$200 in incidental damages recoverable under UCC § 2-715(1). *Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 2 A.L.R.4th 567 (Mo. Ct. App. 1978).

The Uniform Commercial Code is ambiguous with respect to the effect that the failure of a limited remedy under UCC § 2-719(2) has on other contractual provisions. UCC § 2-719(2) provides that if a remedy fails of its essential purpose, "remedy may be had as provided in this act." The Official Comment to this section states that if a remedy fails of its purpose, "it must give way to the general remedy provisions" of Article 2. The general remedy provisions of Article 2 provide not only for the recovery of consequential damages (see UCC § 2-714(3) and § 2-715(2)), but also for their exclusion where this is not unconscionable (see UCC § 2-719(3)). In cases involving the failure of an exclusive remedy in a warranty provision that also excludes liability for consequential damages, the provisions that limit liability also fail, and the plaintiff is entitled to the full array of remedies provided by the Uniform Commercial Code, including the recovery of consequential and incidental damages (see UCC § 2-715(1) and (2)) (where seller's "New Equipment Warranty," given on sale of tractor to buyer, stated that warranty was in lieu of all warranties, including liability for incidental and consequential damages, and court stated that if buyer was able to prove existence of defect in tractor and also that limited remedy contained in seller's new equipment warranty had failed in its essential purpose, buyer would be entitled to full array of remedies provided by Uniform Commercial Code, including recovery of consequential and incidental damages under UCC § 2-714(3) and § 2-715(1) and (2)). *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

In action by buyer of new pickup truck for damages for breach of express warranty against dealer, manufacturer, and credit company to which buyer's installment-purchase contract was assigned, evidence supported trial court's finding that express warranty extended to buyer by dealer and manufacturer had been breached and on remand of case, applicable measure of damages set forth in UCC § 2-714(2) for breach of warranty should be applied. *Arnold v. Ford Motor Co.*, 90 N.M. 549, 566 P.2d 98 (1977).

Where buyer rescinded or abandoned contract to purchase housemoving business, equipment and public service commission certificate of authority, buyer could not recover for breach of warranty under contract. *Allen Housemovers, Inc. v. Allen*, 135 Ga. App. 837, 219 S.E.2d 489 (1975).

Buyer of combine that was repossessed by seller and sold at public sale after buyer defaulted on payments was not precluded from recovering damages for breach of warranty from seller notwithstanding buyer did not revoke his acceptance (*ovrlg* *Hudspeth Motors, Inc. v. Wilkinson*, 238 Ark 410, 382 SW2d 191, 2 UCCRS 273, to extent it holds that buyer was precluded from recovering damages for breach of warranty where there was no rejection or revocation by buyer). *Stimson Tractor Co. v. Heflin*, 257 Ark. 263, 516 S.W.2d 379 (1974).

This section does not apply to a contract for the sale of the capital stock of a corporation and its subsidiaries which provided as a condition precedent to acceptance of the contract that the financial condition of such corporations at the time of closing should not be less favorable than the statements as of a given prior date, so as to permit the buyer, after acceptance, to recover damages by reason of the diminution in net worth of the corporations. In *re Carter*, 390 Pa. 365, 134 A.2d 908 (1957).

2. Tort actions compared.

Damages for economic losses can be recovered in an action for breach of warranty, but not in an action based on strict liability in tort (stating that Uniform Commercial Code contains comprehensive mechanism for dealing with right of parties to sales transaction to recover dam-

ages for economic losses). *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

In action against manufacturer of poultry meal for damages resulting from injury to poultry producer's chickens in that chickens fed with feed that included meal manufactured by defendant failed to achieve normal growth, gravamen of cause of action was breach of warranty of sale under UCC §§ 2-313 and 2-314 and damages sought were permissible under and governed by UCC §§ 2-714 and 2-715, even though tortious breach on part of defendants was alleged. *Mid-South Milling Co. v. Loret Farms, Inc.*, 521 S.W.2d 586 (Tenn. 1975).

In action for breach of express warranty by purchaser of drive-in business for damage caused by collapse of canopy, method of computing damages which granted plaintiff value of used canopy was reasonable under circumstances. *Rose v. Helm*, 501 P.2d 753 (Colo. Ct. App. 1972).

3. Notice of breach.

Failure of buyer of car with defective engine to reject vehicle within reasonable time was not bar to buyer's claim under UCC § 2-714(1) for damages for breach of warranty where buyer promptly asserted claim for breach of warranty (holding that Uniform Commercial Code does not require written notice of claim for breach of warranty). *Smart Chevrolet Co. v. Davis*, 262 Ark. 500, 558 S.W.2d 147 (1977).

The institution of proceedings before an alderman for breach of warranty did not constitute sufficient notice to the seller of the breach, since by beginning the action the buyers were exercising a remedy rather than giving notice, and hence a complaint not alleging notice of the breach and the time of such notice was demurrable. *Solomon & Son v. Thomas*, 45 Luz. Legal Reg. Rep. 269 (Pa. 1955).

4. —Continued use of goods or failure to revoke acceptance.

Purchaser of nonconforming mobile home under installment sales contract rightfully rejected unit and notified seller of rejection within reasonable time under UCC §§ 2-601 and 2-602, but purchaser's security interest in goods under UCC § 2-711 did not give him right to continued

use of goods until security interest was satisfied; and where purchaser, instead of storing, reshipping, or reselling goods as provided by UCC § 2-604, moved into unit and corrected deficiencies, he accepted goods under UCC § 2-606 and became obligated to pay contract price under UCC § 2-607 retaining only his rights for damages under UCC §§ 2-714 and 2-715; although exclusion of expressed and implied warranties in dark print which was underlined complied with UCC § 2-316, purchaser could nevertheless recover for breach of express warranty under UCC § 2-313 should trier of fact conclude that dealer made express warranties that mobile home would conform to sample or model shown purchaser on dealer's lot. *Bowen v. Young*, 507 S.W.2d 600, 67 A.L.R.3d 354 (Tex. Civ. App. 1974).

When a plaintiff retains possession of and uses the goods in spite of the breach of warranty he thereby is limited to the remedy of recovering damages, as measured by the difference in the value of the goods accepted, at the time and place of acceptance, and the value they would have had if they had been as warranted. *Walters v. Garson*, 24 Fayette Legal J. 99 (Pa. 1942).

5. —Acceptance of performance in violation of contract terms.

The provisions of the Uniform Commercial Code, with respect to the buyer's remedies when he accepts goods and does not revoke his acceptance but sues for damages because the goods are not as warranted, are codified in UCC § 2-714(1) and (2), and also, under appropriate circumstances, in UCC § 2-714(3) and UCC § 2-715(1) and (2). The statutory scheme, as apparent from all of these provisions which should be read as a whole, is as follows: (1) where the buyer has accepted the goods and given notification, he may recover damages which can be determined in any way that is reasonable; (2) the measure of damages is the difference, at the time and place of acceptance, between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages in a different amount; and (3) in a proper case, incidental and consequential damages

also may be recovered. *Carlson v. Rysavy*, 262 N.W.2d 27 (S.D. 1978).

Buyer's acceptance of nonconforming earth-mover tires did not foreclose its ultimate recourse to remedies otherwise available under Uniform Commercial Code where appropriate notice of breach was given to seller in compliance with UCC § 2-714(1). *Edwards-Warren Tire Co. v. J.J. Blazer Constr. Co.*, 565 F.2d 401 (6th Cir. Ohio 1977).

Inspection clause contained in contract for manufacture, sale and delivery of railroad hopper cars did not bar manufacturer's liability for delivery of defective cars where clause provided that waiver of inspection by purchaser entitled manufacturer to perform its own inspection and such inspection would have constituted acceptance of railcars, where, in any event, provisions of contract neither expressly provided nor even implied that failure to exercise right of inspection constituted waiver of any other contractual remedy, and where purchaser notified manufacturer of faults or defects when they were first discovered and afforded manufacturer opportunity to verify and repair or replace faults or defects; under UCC §§ 2-607(2), when right to inspect arises after creation of contract, acceptance of goods, even with knowledge that they do not conform to contract, may preclude rejection but it does not impair any other remedy and, under UCC §§ 2-714(1), buyer's right to recover damages for goods that have been accepted but do not conform to contract was expressly reserved. *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. Minn. 1977).

Acceptance of additional nonconforming hog fence panels did not in itself bar buyer's right to counterclaim, in action by seller for price of additional panels, for damages resulting from nonconformity either or panels initially received by him or of additional panels. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

Lessee of television broadcasting equipment which used equipment for more than one year before entering novation contract and making substantial payments on revised lease lost any express or implied warranty rights it might have possessed by accepting goods and by failing to give

lessor notification of breach of warranty within reasonable time. *KLPR TV, Inc. v. Visual Elecs. Corp.*, 465 F.2d 1382 (8th Cir. Ark. 1972).

Buyer may accept late deliveries, without waiving its right to damages. *Beacon Plastic & Metal Prods., Inc. v. Corn Prods. Co.*, 57 Misc. 2d 634 (1968).

6. Difference in value between goods as warranted and goods received as measure of damages.

Heat pump manufacturer's liability for breach of implied warranty of merchantability was the difference in actual value of the heat pump at the time it was accepted by the buyers and its value had there been no breach of warranty. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

In breach-of-warranty action by buyer against manufacturer of defective heat pump that was installed by defendant's dealer in plaintiff's new house, court held (1) that case involved breach of binding compromise settlement between plaintiff and defendant; (2) that defendant's attempt in its limited express warranty to limit its liability respecting any implied warranties was invalid under both Mississippi statute abolishing privity requirement between buyer and manufacturer and also Mississippi UCC § 2-719(4); (3) that defendant was "seller" within meaning of Mississippi privity statute; (4) that because of defendant's breach of implied warranty of merchantability that attached to heat pump under Mississippi UCC § 2-314(1) and (2)(c), plaintiff was entitled to recover (a) damages under Mississippi UCC § 2-714(2) for difference between actual value of heat pump at time plaintiff accepted it and its value in absence of defendant's breach of warranty, and (b) consequential damages under Mississippi UCC § 2-715(2)(a) for additional expenses incurred in purchasing one wood heater and two kerosene heaters; and (5) that case did not justify award of punitive damages for defendant's breach. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

In buyer's action for damages for breach of warranty in sale of three-year-old used car, court held (1) that used-car warranty under Illinois Consumer Fraud Act, which

applied to cars not more than four years old, was not plaintiff's exclusive remedy simply because such act was enacted after Illinois Uniform Commercial Code; (2) that both Illinois Consumer Fraud Act and Uniform Commercial Code applied to sale of used automobiles, and that used-car warranties under the former act supplemented remedies afforded to consumers under the Uniform Commercial Code; (3) that implied warranty of merchantability under Illinois UCC § 2-314(1) and (2)(c) applied to case; (4) that jury was entitled to believe plaintiff's testimony that defects in her car had substantially impaired its value; (5) that seller had not excluded or modified its implied warranty of merchantability in sales contract because seller had failed to include therein the word "merchantability," as required by Illinois UCC § 2-316(2); (6) that jury believed that plaintiff had properly revoked her acceptance of car; and (7) that trial court by adjusting plaintiff's damages to reflect difference, at time and place of her acceptance of car, between car's value as warranted and its actual worth had applied measure of damages prescribed by Illinois UCC § 2-714(2) for breach of warranty. *Jackson v. H. Frank Olds, Inc.*, 65 Ill. App. 3d 571, 382 N.E.2d 550 (1st Dist. 1978).

Proper measure of damages under UCC § 2-714(2) for breach of warranty is difference, at time and place of acceptance, between value of goods accepted and value such goods would have had if they had been as warranted. Such measure of damages depends on date of acceptance of the nonconforming goods and not on the date of the trial. *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 199 Neb. 489, 260 N.W.2d 193 (1977).

Before enactment of Uniform Commercial Code, breach of warranty and rescission were considered alternate remedies. The code, however, which is much more comprehensive and explicit than precode law, generally avoids use of ambiguous term "rescission" and provides in UCC § 2-608 specific remedy that permits buyer, under proper conditions, to force seller to retake nonconforming goods, even though buyer has already accepted them. Under the code, buyer's revocation

of acceptance is distinct course of action that is not to be confused with rescission by mutual consent. Nor is revocation of acceptance an alternative remedy for breach of warranty. Under UCC § 2-711(1), when buyer justifiably revokes acceptance, he may cancel and recover as much of purchase price as he has paid. On the other hand, under UCC § 2-714(2), basic measure of damages for breach of warranty is difference between value of goods accepted and value that they would have had if they had been as warranted. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

In action for breach of warranty, purchaser was entitled to recover purchase price of defective insecticide where insecticide would apparently have been worth purchase price if it had been as warranted, and where, in its defective condition, it cost purchaser a considerable sum in crop damage and must for practical purposes have been worth nothing. *Swenson v. Chevron Chem. Co.*, 89 S.D. 497, 234 N.W.2d 38 (1975).

In third-party action by lessees of printing equipment against manufacturer of equipment for breach of warranty, after lessee had refused to make further payments on lease and lessor repossessed equipment, sold it and brought action against lessees for balance due on lease under their separate guarantee of lease: (1) although privity of contract was requisite to action for breach of warranty, not involving personal injury, manufacturer was estopped from denying lessees benefits of express warranty in present case where equipment was delivered to lessees and was serviced by manufacturer, manufacturer's machine warranty was delivered to lessee, and numerous service calls were made without charge as result of manufacturer's having voluntarily extended 30-day guarantee period because machinery would not stay in adjustment; (2) measure of damages provided in UCC § 2-714(2) was not only recovery possible, lessees were entitled to keep goods and seek incidental and consequential damages as well, provided manufacturer was given, as it was, reasonable notice of defect as required by UCC § 2-607(3)(a), and, hence, lessees were entitled to re-

cover pursuant to UCC § 2-715, as consequential damage, amount they were forced to pay lessor under guaranty. *Addressograph-Multigraph Corp. v. Zink*, 273 Md. 277, 329 A.2d 28 (1974).

In action by purchasers of mobile home against manufacturer for breach of warranty, under UCC § 2-714(b), proper measure of damages was difference between actual cash market value of mobile home as it existed when purchased, \$2,000, and reasonable cash market value of same mobile home free from defects, \$6,000, and not difference between actual cash market value and contract price of \$5,300. *Melody Home Mfg. Co. v. Morrison*, 502 S.W.2d 196 (Tex. Civ. App. 1973), *ref. n.r.e.* (Mar. 20, 1974).

A complaint alleging that the value of wire as accepted was \$12.30, and that the value it would have had if it had been as warranted would have been \$103, was sufficient in its allegations of damages under subsection (2) of this section. *Solomon & Son v. Thomas*, 45 Luz. Legal Reg. Rep. 269 (Pa. 1955).

When there has been a breach of warranty the plaintiff has two available remedies: (1) he may rescind the contract and demand the return of the money paid on account of the purchase price, together with such incidental damages as come within the meaning of the Code, meanwhile asserting a security interest in the goods until paid; or (2) retain the goods and recover as damages the difference between the value of the goods accepted, at the time and place of acceptance, and the value they would have had if they had been as warranted. *Walters v. Garson*, 24 Fayette Legal J. 99 (Pa. 1942).

7.—Particular applications.

In buyer's action for breach of warranty attaching to a laser that did not operate at warranted power output, court held (1) that evidence supported district court's determination that seller had breached its express warranty and that buyer's remedy of repair or replacement of defective parts had failed in its essential purpose under UCC § 2-719(2); (2) that seller had been given adequate notice of its breach under UCC § 2-607(3)(a); and (3) that since laser was merely component of printer project that buyer was working on

and intent of parties, as evidenced by their contract and circumstances of case, was that buyer should bear risk of such project, buyer could recover only breach-of-warranty damages under UCC § 2-714(2) and incidental damages under UCC § 2-715(1), but not consequential damages under UCC § 2-715(2)(a) for salaries of buyer's employees who were working on the printer project, since such damages were not contemplated by parties. *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933 (7th Cir. Ill. 1978).

In buyer's action for damages for breach of warranty in sale of three-year-old used car, court held (1) that used-car warranty under Illinois Consumer Fraud Act, which applied to cars not more than four years old, was not plaintiff's exclusive remedy simply because such act was enacted after Illinois Uniform Commercial Code; (2) that both Illinois Consumer Fraud Act and Uniform Commercial Code applied to sale of used automobiles, and that used-car warranties under the former act supplemented remedies afforded to consumers under the Uniform Commercial Code; (3) that implied warranty of merchantability under Illinois UCC § 2-314(1) and (2)(c) applied to case; (4) that jury was entitled to believe plaintiff's testimony that defects in her car had substantially impaired its value; (5) that seller had not excluded or modified its implied warranty of merchantability in sales contract because seller had failed to include therein the word "merchantability," as required by Illinois UCC § 2-316(2); (6) that jury believed that plaintiff had properly revoked her acceptance of car; and (7) that trial court by adjusting plaintiff's damages to reflect difference, at time and place of her acceptance of car, between car's value as warranted and its actual worth had applied measure of damages prescribed by Illinois UCC § 2-714(2) for breach of warranty. *Jackson v. H. Frank Olds, Inc.*, 65 Ill. App. 3d 571, 382 N.E.2d 550 (1st Dist. 1978).

In action for seller's breach of warranty of good title to motor home purchased by plaintiff, where (1) original owner of home rented it for 13 days to thief who "drove off into the sunset" and was never again seen

by owner, (2) thief thereafter obtained Alabama registration for home, and also Nebraska and Indiana certificates of title therefor, before trading it in to defendant dealer in Indiana as part payment for truck and trailer, (3) plaintiff purchased home from defendants, who gave plaintiff certificate of title thereto, (4) Indiana state police seized home from plaintiff and surrendered it to original owner's insurer, (5) home's serial number proved to have been stolen, and (6) such false identification number appeared on all documents respecting home that thief had obtained in Alabama, Nebraska, and Indiana, court held (1) that rental transaction between original owner and thief constituted a "purchase" under UCC §§ 2-403(1) and § 1-201(32), since thief had acquired possessory interest in home by renting it, (2) thief did not transfer good title to defendant, as good-faith purchaser for value, since thief's title to home was void and not voidable under UCC § 2-403(1), (4) since defendant had no good title to convey to plaintiff, defendant breached its warranty of title under UCC § 2-312(1), and (5) evidence supported damages awarded plaintiff under UCC § 2-714(2) and (3). *McDonald's Chevrolet, Inc. v. Johnson*, 176 Ind. App. 399, 376 N.E.2d 106 (1978).

In action against manufacturer for breach of warranty in sale of modular home wherein buyer gave manufacturer more than adequate notice of home's defects, buyer's measure of damages under UCC § 2-714(2) was difference between value of defective home actually received and value of such home as warranted. In such case, however, cost of repairing home could not be used as proper yardstick for measuring difference between value of home actually received and value of home as warranted, since many of the home's defects could not be adequately repaired so as to place buyer in as good a position as if defendant had fully performed its contractual obligations. *Carlson v. Rysavy*, 262 N.W.2d 27 (S.D. 1978).

In suit arising out of sale and repossession of two coal trucks, where seller and manufacturer breached express warranty concerning such trucks, which were defective on delivery to buyer, but buyer did not reject trucks or revoke his acceptance

thereof, proper measure of damages under UCC § 2-714(2) was difference between reasonable market value of trucks at time of acceptance by buyer and their contract price. *Galigher Trucks, Inc. v. McKenzie*, 553 S.W.2d 294 (Ky. Ct. App. 1977).

Since measure of damages under UCC § 2-714(2) for breach of warranty of goods sold is difference at time and place of acceptance between value of goods accepted and value goods would have possessed if they had been as warranted, buyer's claim in action for damages for breach of warranties of fitness and merchantability of swim caps that damages should be ascertained from actual sales price of swim caps months after their delivery and acceptance was without legal basis. Such claim also did not come within scope of provision in UCC § 2-714(2) that rule of damages set forth in UCC § 2-714(2) applies unless special circumstances show proximate damages of different amount. *Noreli Indus., Inc. v. Kleinert's, Inc.*, 57 A.D.2d 792 (1st Dep't 1977).

In action by buyer of printing press against seller to recover damages for breach of warranty, evidence supported trial court's award of damages in sum of \$10,435 where under UCC § 2-714(2), evidence that cost of press to buyer, including finance charges, was \$7,006 and that actual value of defective press at time of acceptance 60 days later was one sixth of its purchase price or sum of \$1,167 was sufficient to establish the figure of \$5,833 as first element of damages to be awarded to buyer. *Burrus v. Itek Corp.*, 46 Ill. App. 3d 350, 360 N.E.2d 1168 (3d Dist. 1977).

Under UCC § 2-714(2), correct measure of damages for breach of warranty with respect to car with defective engine is difference between actual value of car and value it would have had if it had been as warranted (holding erroneous instruction that measure of damages in such case was amount of buyer's down payment and monthly installment payments). *Smart Chevrolet Co. v. Davis*, 262 Ark. 500, 558 S.W.2d 147 (1977).

Buyer's damages for seller's breach of express and implied warranties in sale of antifreeze to be used in internal-combustion engines of buyer's construction equip-

ment included (1) recovery under UCC § 2-714(2) of purchase price of such antifreeze, where antifreeze as delivered was worthless, and (2) consequential damages under UCC § 2-715(2)(a) for reasonable cost of labor and parts necessary to repair buyer's damaged equipment, and buyer's loss of income during period of repairs. *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977).

In in rem action in admiralty involving counterclaims by seller and buyer arising from breaches of contract to sell flour, (1) seller breached implied warranty of merchantability created by UCC § 2-314(1) and (2)(c), and also federal adulterated-food statute, as to one cargo of flour which was infested with insects when it arrived at warehouse prior to being loaded on ship, (2) buyer had right under UCC § 2-601(a) to reject all of such cargo and therefore was not liable for its purchase price or any consequential damages, (3) seller also breached implied warranty of merchantability with respect to two other cargoes of flour, and since buyer had paid for such flour and had ultimately accepted it, buyer was entitled to damages under UCC § 2-606(1)(a), (4) buyer was not barred from claiming damages for such nonconforming cargoes by failure to give notice of nonconformity by registered mail, since buyer's warning to seller of buyer's dissatisfaction with cargoes constituted adequate notice under UCC § 2-607(3)(a), and (5) under UCC § 2-714(2), although there was no evidence as to value of such cargoes at time and place of their acceptance (*Mobile, Alabama*), buyer was entitled to damages for difference between prices for good and infested flour in Bolivia, South America, plus damages for expenses incurred because of flour's infestation, since buyer had accepted such flour after it had been loaded on ships that transported it to Bolivia and had had no reasonable opportunity to inspect it before it was loaded. *T.J. Stevenson & Co. v. 81,193 Bags of Flour*, 449 F. Supp. 84 (S.D. Ala. 1976), rev'd on other grounds, 629 F.2d 338 (5th Cir. Ala. 1980), reh'g denied, 651 F.2d 779 (5th Cir. Ala. 1981).

In action for breach of automobile warranty, trial court erred in awarding damages based entirely on "special circum-

stances" and correct measure of damages was limited under UCC § 2-714 to difference, at time and place of acceptance, between value of automobile accepted and value it would have had if it had been as warranted, where, *inter alia*, automobile was solely used for pleasure, buyer lost no profits, buyer did not communicate to seller at time of sale sufficient facts to make it apparent that damages such as lost profits were within reasonable contemplation of parties, and direct expenses or monetary losses did not result from breach. *Eckstein v. Cummins*, 46 Ohio App. 2d 192, 347 N.E.2d 549 (1975).

Buyer of animal offal chilling equipment that did not operate as warranted was entitled to recover difference between value of equipment as warranted and as accepted; since chillers were of no use to buyer, except for scrap, entire value (i. e., purchase price), could be recovered from seller, although buyer should tender chillers to seller so that seller might reclaim any salvage value. Buyer was also entitled to consequential damages where, in effort to overcome chiller's deficiencies, buyer purchased stainless steel offal handling trucks and hooks. *Puritan Mfg., Inc. v. I. Klayman & Co.*, 379 F. Supp. 1306 (E.D. Pa. 1974).

In action by purchaser of new car against automobile dealer alleging that dealer's failure to disclose, prior to sale, that automobile had been damaged in transit and repaired constituted misrepresentation and breach of warranty, purchaser had choice of remedies: He could have disaffirmed contract and sought rescission; or he could have affirmed contract and claimed monetary damages based either on (1) difference in value between car he received and "new" car, or (2) cost of repairing alleged defects. However, purchaser was not entitled to recover damages for amounts expended in making repairs on car where purchaser failed to establish necessary causal connection between repairs and alleged fraud or breach of warranty. *Witters v. Daniels Motors, Inc.*, 524 P.2d 632 (Colo. Ct. App. 1974).

In action brought by buyer against seller of aircraft, if buyer's contention that 1968 aircraft was represented as 1969 aircraft were true, such would create ex-

press warranty under UCC § 2-313 and measure of damages would be calculated under UCC § 2-714(2), i.e., would be difference between value of new 1968 aircraft and value of new 1969 aircraft, less depreciation for use up to time of discovery of misrepresentation. *Crane v. Wood Motors, Inc.*, 53 Mich. App. 17, 218 N.W.2d 420 (1974).

Where evidence failed to disclose any difference in value between exercising device cot covers which had plastic binding and cot covers which had cloth binding, and rates of failure of 2 types of cot covers were equal, buyer of covers would not be entitled to any damages on its counterclaim for breach of warranty. *Foam-Tex Indus., Inc. v. Relaxaway Corp.*, 358 F. Supp. 8 (E.D. Mo. 1973).

Proper measure of damages for breach of warranty of title of automobile subsequently found to have been stolen was not purchase price of automobile, but value of vehicle at time buyer was required to turn it over to police. *Itoh v. Kimi Sales, Ltd.*, 74 Misc. 2d 402 (1973).

"Purchase price" of automobile included finance charge and was admissible as going to value of automobile at time and place of purchase, for purposes of determining damages arising out of breach of warranty. *Thompson Chrysler-Plymouth, Inc. v. Myers*, 48 Ala. App. 350, 264 So. 2d 893 (Civ. App. 1972).

Damages for breach of warranty could not include damages when buyer knew pipe to be defective and could not include "cover" purchase of other pipe nearly a year later, but could include value difference between pipe as warranted and as accepted as to that portion of pipe which buyer did not know was nonconforming, as well as incidental and consequential damages. *Fred J. Miller, Inc. v. Raymond Metal Prods. Co.*, 265 Md. 523, 290 A.2d 527 (1972).

Where buyer was sold an automobile represented to be a demonstrator almost as good as new, when as a matter of fact it had been wrecked and repaired, his measure of damages was the difference in the market value of the car as warranted, and its value as a wrecked car. *Union Motors, Inc. v. Phillips*, 241 Ark. 857, 410 S.W.2d 747 (1967).

8. Cost of repair as measure of damages.

If a heat pump could have been repaired so as to properly function, the heat pump manufacturer's liability for breach of implied warranty of merchantability would have been the cost of repairs. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

Where evidence in support of counterclaim for damages for breach of implied warranty of fitness of concrete-mixing trucks showed that although such trucks broke down often enough to belie their fitness for the particular purpose for which they were designed, buyer's "down-time" (time lost when trucks were not in use) was still less than ten hours per year per truck, which was equivalent to only normal wear-and-tear usage, (1) buyer's claim under UCC § 2-714(3) and § 2-715(2)(a) for lost profits during period trucks were not in use would not lie; (2) buyer's claim that \$15,000 per truck was required to keep trucks from falling into state of disrepair also failed because of trucks' surprisingly small "down-time"; (3) buyer's claims for impairment of reputation and punitive damages for willful breach were, under UCC § 2-714(1), outside loss resulting in ordinary course of events from seller's breach; and (4) value formula in UCC § 2-714(2) for breach of warranty was satisfied by award of \$7,000 damages for repairs to trucks. *Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp.*, 62 A.D.2d 982 (2d Dep't 1978).

In action for breach of warranty in sale of tractor, buyer was entitled to recover cost of repairing tractor, since cost of repairs is proper measure, under UCC § 2-714(2), of difference between value of goods as warranted by seller and value as accepted by buyer. *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

In action for damages for breach of warranty of merchantability of houseboat built for plaintiff buyer by defendant seller, where cost of repairing defects that existed in houseboat at time of its delivery to plaintiff was \$37,000, and where court concluded that there was no sufficient

basis for plaintiff's opinion that houseboat, as delivered, was worth \$80,000, but that it would have been worth \$160,000 if it had been delivered as warranted, proper measure of damages under UCC § 2-714(2) for defendant's breach of warranty, was cost of repairs (\$37,000). Moreover, under UCC § 2-715(1), plaintiff was also entitled to recover incidental damages for replacement of defective parts and materials, labor in inspecting and servicing defective mechanical components, and docking fees incurred while such services were being performed. *Tarter v. MonArk Boat Co.*, 430 F. Supp. 1290 (E.D. Mo. 1977), *aff'd*, 574 F.2d 984 (8th Cir. Mo. 1978).

Under UCC §§ 2-714(2), buyer seeking damages for breach of contract to manufacture, sell and deliver railroad hopper cars, based on serious structural defects in railcars, was not limited to repair costs where repair did not completely restore goods to value which they would have had if built in conformity with contract, and remaining diminution in value could also be recovered. *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. Minn. 1977).

In action for breach of warranty of used truck scale, awarding cost of new scale as damages for failure to repair old scale which was purchased resulted in greater recovery of damages than the purchase price of scale and was error. *Neuman v. Spector Wrecking & Salvage Co.*, 490 S.W.2d 875 (Tex. Civ. App. 1973).

Although damages in cases of breach of warranty are ordinarily measured by difference between actual value of article sold and its value if it were as warranted, Code § 2-714(2) is not exclusive of buyer's remedies where property is not totally destroyed; and if by reasonable expenditure goods may be made to conform to warranty, amount of such expenditure may be measure of such damages. *Downs v. Shouse*, 18 Ariz. App. 225, 501 P.2d 401 (1972).

Buyer is entitled to recover cost of making repairs to cure defects in nonconforming goods supplied by seller. *Southern Concrete Prods. Co. v. Martin*, 126 Ga. App. 534, 191 S.E.2d 314 (1972).

9. Special circumstances requiring different measure of damages.

In an action for the breach of an implied warranty, the buyer cannot recover consequential damages under UCC §§ 2-714(3) and 2-715(2)(b) to the extent that his own negligence was a concurring proximate cause of such damages. However, to the extent that the product was unsuitable and proximately caused the damages, the buyer can recover consequential damages for the breach of warranty. Where both the unsuitable product and the buyer's negligence are found to be proximate causes of the damages, the trier of facts must also determine the respective percentages (totaling 100 percent) by which the concurring causes contributed to the consequential damages. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (1978).

Under UCC § 2-714(2), the cash price paid for the goods is *prima facie* their value "as warranted," rather than the "credit price" of the goods. *Long v. Quality Mobile Home Brokers, Inc.*, 271 S.C. 482, 248 S.E.2d 311 (1978).

In seller's action for balance due on sale of concrete building blocks, buyer under counterclaim for damages resulting both directly and consequentially from seller's failure to supply blocks conforming to express and implied warranties could recover consequential damages under UCC § 2-715(2) without first establishing existence of "special circumstances" mentioned in UCC § 2-714(2), since UCC § 2-714(2) is concerned with value-of-goods damages and not with incidental damages under UCC § 2-715(1) or consequential damages under UCC § 2-715(2). *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 474 Pa. 199, 378 A.2d 288, 96 A.L.R.3d 290 (1977).

"Special-circumstances" requirement of UCC § 2-714(2) is unrelated to recovery of consequential damages under UCC § 2-715(2). *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 474 Pa. 199, 378 A.2d 288, 96 A.L.R.3d 290 (1977).

In action by buyer of tube mill against seller for breach of warranty, notwithstanding facts that when resale price of machine was coupled with award of damages, buyer would receive more than pur-

chase price of machine, damage award was not improper. *Bosway Tube & Steel Corp. v. McKay Mach. Co.*, 65 Mich. App. 426, 237 N.W.2d 488 (1975).

Party aggrieved by breach of contract is entitled to be put in as good position as if other party had fully performed, and this includes right to recover for loss of prospective profits resulting from breach, which profits may be determined on basis of combination of past earnings records and expert testimony of president of aggrieved party. *Matsushita Elec. Corp. of Am. v. Sonus Corp.*, 362 Mass. 246, 284 N.E.2d 880 (1972).

10. —Particular applications.

Measure of damages in case of sale of stolen car is equal to amount paid for vehicle. *Crook Motor Co. v. Goolsby*, 703 F. Supp. 511 (N.D. Miss. 1988).

If a heat pump could not be repaired and was worthless, the buyers would have been entitled to a refund of the purchase price from the heat pump manufacturer for breach of implied warranty of merchantability. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

The purchaser of defective farm equipment machinery was entitled to recover the down payment he had invested in a grain drill and combine where the seller and the financing corporation were deemed to be one and the same because of their interlocking directorates. The purchaser was also entitled to consequential damages to his soybean crop where the seller should reasonably have known that the delivery of the defective equipment and the unsuccessful repairs would cause such delay in the planting of the purchaser's crop. *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15 (Miss. 1981).

In an action for damages arising out of the breach of an express warranty to repair a used automobile purchased by the plaintiff, the defendant could not limit its liability to the costs of repairs and replacement of parts under the warranty as authorized by § 75-2-719 where it wrongfully failed to carry out its obligations under the warranty; the plaintiff had no incidental or consequential damages as contemplated by § 75-2-715 where he had purchased another second-hand car and had failed to take any reasonable action to

minimize the defendant's breach of the warranty but had simply abandoned the car at the dealer's. Where the car had been driven for over two years and 26,649 miles before the plaintiff had experienced any difficulty with it, the reasonable measure of damages under § 75-2-714 would be the fair market value the car would have had with that age and number of miles with no mechanical difficulty as experienced by the plaintiff, and the value it had had in its defective condition, and for which the defendant had refused to make repairs. *Ford Motor Co. v. Fairley*, 398 So. 2d 216 (Miss. 1981).

In action against manufacturer for breach of express and implied warranties in sale of heavy-duty farm equipment purchased to prepare land to grow crops, consequential damages for buyer's loss of crops were recoverable under "special-circumstances" provision of UCC § 2-714(2) and consequential-damages provisions of UCC § 2-714(3) and UCC § 2-715(2)(a), where buyer's act of planting crops was foreseeable by seller and buyer, although aware of defects in purchased equipment at time of planting crops, was put by equipment's defects into position of having to choose between using defective equipment and suffering damaged crops or else having no crops at all (holding that trial court did not err in refusing to limit buyer's damages to impaired value of equipment purchased). *Prutch v. Ford Motor Co.*, 40 Colo. App. 129, 574 P.2d 102 (1977), rev'd on other grounds, 618 P.2d 657 (Colo. 1980).

Under UCC § 2-714(2), measure of damages for breach of warranty arising from failure of television and radio broadcasting tower, which collapsed during a blizzard, to have been constructed in accordance with specifications contained in contract of sale was, under special circumstances of case, replacement cost of tower less reasonable depreciation for its use by plaintiff before its collapse (applying South Dakota law, and also holding that plaintiff could recover consequential damages under UCC § 2-715(2)). *Community Television Servs., Inc. v. Dresser Indus., Inc.*, 435 F. Supp. 214 (D.S.D. 1977), aff'd, 586 F.2d 637 (8th Cir. S.D. 1978), cert. denied, 441 U.S. 932, 99 S. Ct. 2052, 60 L. Ed. 2d 660 (1979).

In buyer's action for breach of warranty attaching to laser that did not operate at warranted power output, court held (1) that evidence supported district court's determination that seller had breached its express warranty and that buyer's remedy of repair or replacement of defective parts had failed in its essential purpose under UCC § 2-719(2); (2) that seller had been given adequate notice of its breach under UCC § 2-607(3)(a); and (3) that since laser was merely component of printer project that buyer was working on and intent of parties, as evidenced by their contract and circumstances of case, was that buyer should bear risk of such project, buyer could recover only breach-of-warranty damages under UCC § 2-714(2) and incidental damages under UCC § 2-715(1), but not consequential damages under UCC § 2-715(2)(a) for salaries of buyer's employees who were working on the printer project, since such damages were not contemplated by parties. *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933 (7th Cir. Ill. 1978).

Where asphalt supplier knew exact needs of paving contractor at time of supplying asphalt and, thus, supplier could have reasonably foreseen that if asphalt proved defective and failed, entire paving job would have to be taken up and completely redone, and where asphalt was in fact defective, ordinary measure of damages for breach of warranty stated in UCC § 2-714(2) was not applicable, due to special circumstances showing proximate damages of different amounts, consisting of incidental and consequential damages as provided by UCC § 2-715. *Lanphier Constr. Co. v. Fowco Constr. Co.*, 523 S.W.2d 29 (Tex. Civ. App. 1975), ref. n.r.e. (July 23, 1975).

In action for damages for breach of warranty of title, brought by buyer of stolen automobile against seller wherein buyer had undisturbed possession of automobile for period of approximately nine months, value of automobile at time buyer's possession was disturbed so that he lost use of automobile was proper measure of damages. *Ricklefs v. Clemens*, 216 Kan. 128, 531 P.2d 94, 94 A.L.R.3d 572 (1975).

In action by purchaser of bookkeeping machine against seller for breach of war-

ranty where buyer financed purchase of machine through lease agreement with leasing corporation, but because of difficulties with machine, buyer terminated payments to leasing corporation, leasing corporation repossessed machine, sold it and recovered balance due on lease from purchaser, purchaser was entitled to recover as damages for breach of warranty amount of deficiency judgment obtained by leasing corporation against purchaser. *Acme Pump Co. v. National Cash Register Co.*, 32 Conn. Supp. 69, 337 A.2d 672 (1974).

In action for breach of warranty relating to greenhouse roofing materials, ordinary measure of damages for breach of warranty was not applicable because of special circumstances showing proximate damages consisting of diminution in market value of greenhouse and loss of profits from sales of flowers. *General Supply & Equip. Co. v. Phillips*, 490 S.W.2d 913 (Tex. Civ. App. 1972), writ ref'd n.r.e., (June 13, 1973).

Where seller represented to buyer that he (seller) was owner of auto in question, where buyer had purchased auto from seller for \$1,650, and where auto was ultimately impounded as stolen vehicle, substantial evidence established, as a matter of law, a right on the part of the buyer to rescind his auto purchase transaction and to recover the purchase price which he had paid to the seller. *Sarad v. Tatum*, 492 P.2d 882 (Colo. Ct. App. 1971).

Buyer of cattle food can recover for diminution in value of cattle if he can establish that diminution proximately resulted from breach of implied warranty of food manufacturer; irrelevant whether cattle actually lost value or whether sale value was impaired. *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

11. Incidental and consequential damages.

The Uniform Commercial Code makes no provision for exemplary or punitive damages for breaches of warranty. Instead, the code provides, in UCC § 2-714(3) and UCC § 2-715(1) and (2)(b), only for recovery of incidental and consequential damages. *Sims v. Ryland Group, Inc.*, 37 Md. App. 470, 378 A.2d 1 (1977).

Consequential damages are recoverable for breach of contract if they are direct, immediate and probable result of breach, and issues of foreseeability and proximate-ness of consequential damages sustained as result of breach of implied warranty are for determination by jury. *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972).

12. —Particular applications.

Buyer was entitled to damages under UCC § 2-714(2), and to incidental damages under UCC § 2-714(3) and § 2-715(1), for seller's breach of express and implied warranties of fitness for particular purpose, and also express warranty by sample attaching to wrap coats purchased by buyer, where (1) samples of such coats were made part of basis of bargain and created express warranty under UCC § 2-313(1)(c) that all goods would conform to such samples, (2) seller knew that buyer was relying on seller to furnish goods that would be fit for buyer's particular purpose within meaning of UCC § 2-315, and (3) seller delivered over 3,700 nonconforming coats that were not fit for buyer's resale purposes. *Alafoss v. Premium Corp. of Am., Inc.*, 448 F. Supp. 95 (D. Minn. 1978), aff'd in part, rev'd on other grounds, 599 F.2d 232 (8th Cir. Minn. 1979).

Buyer who was entitled to rescission of contract for purchase of vinyl-laminating machine, and to return of all money paid under such contract, was not entitled to damages under UCC § 2-714(1) for interest charges on money that buyer had borrowed from bank to purchase machine where seller was unaware that buyer had had to borrow money to make purchase. *Distco Laminating, Inc. v. Union Tool Corp.*, 81 Mich. App. 612, 265 N.W.2d 768 (1978), appeal denied, 403 Mich. 848 (1978).

In buyer's action for breach of implied warranty of fitness of machine for boring tunnel in coal mine, where (1) seller warranted that machine would be free from defects in materials and workmanship, (2) such warranty was accompanied by disclaimer of all other warranties, express or implied, not set forth in writing signed by authorized representative of seller, (3) seller limited its liability for breach of warranty to repair or replacement of de-

fective parts and also excluded all liability for consequential damages, (4) seller agreed to furnish a specialist to supervise installation and initial operation of machine, and (5) seller's offer to sell machine was accompanied by letter signed by seller's employee, who had no authority to make binding representations about machine, which stated that machine would bore at approximate rate of 2.5 feet per hour through hardest materials that buyer might expect to encounter in its mine, court held (1) that buyer accepted seller's offer by mailing purchase order to seller, (2) that by accepting such offer, buyer agreed to seller's terms on liability for breach of warranty, (3) that district court properly found that representation about machine's boring rate, which was contained in letter signed by employee of seller who was not authorized to make such representation, was not part of parties' agreement, since it was not set forth in document that parties intended to be final expression of their agreement within meaning of UCC § 2-202, (4) that as a result, there was no undertaking by seller that machine would bore at rate of 2.5 feet per hour, (5) that seller also had made no express undertaking to assemble machine properly on buyer's premises, since provision in contract which stated that seller would furnish specialist to supervise machine's initial assembly and operation was only intended to prevent wrongful assembly or operation by buyer's employees when not under control of seller's specialist, (6) that such undertaking also did not exist as an independent and separate obligation of seller because assembly of machine, whether at seller's plant or on buyer's premises, came under seller's workmanship warranty, (7) that seller's inability to repair defects in machine caused buyer's limited repair remedy to fail in its essential purpose within meaning of UCC § 2-719(2), (8) that although failure of its limited remedy to achieve its essential purpose made available to buyer all remedies provided by Uniform Commercial Code, this did not mean that consequential damages, which buyer stipulated were its only damages, could be recovered by buyer under UCC §§ 2-714(3) and 2-715(2)(a), and (9) that since

contract had been made by parties of relatively equal bargaining power and liability for consequential damages had been assumed by buyer, mere fact that seller's efforts to repair machine had failed was not enough to require that seller absorb consequential-damage losses that buyer had plainly agreed to bear. *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. Cal. 1978).

In buyer's action for breach of warranty attaching to laser that did not operate at warranted power output, court held (1) that evidence supported district court's determination that seller had breached its express warranty and that buyer's remedy of repair or replacement of defective parts had failed in its essential purpose under UCC § 2-719(2); (2) that seller had been given adequate notice of its breach under UCC § 2-607(3)(a); and (3) that since laser was merely component of printer project that buyer was working on and intent of parties, as evidenced by their contract and circumstances of case, was that buyer should bear risk of such project, buyer could recover only breach-of-warranty damages under UCC § 2-714(2) and incidental damages under UCC § 2-715(1), but not consequential damages under UCC § 2-715(2)(a) for salaries of buyer's employees who were working on the printer project, since such damages were not contemplated by parties. *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933 (7th Cir. Ill. 1978).

In an action for the breach of an implied warranty, the buyer cannot recover consequential damages under UCC §§ 2-714(3) and 2-715(2)(b) to the extent that his own negligence was a concurring proximate cause of such damages. However, to the extent that the product was unsuitable and proximately caused the damages, the buyer can recover consequential damages for the breach of warranty. Where both the unsuitable product and the buyer's negligence are found to be proximate causes of the damages, the trier of facts on and intent of parties, as evidenced by their contract and circumstances of case, was that buyer should bear risk of such project, buyer could recover only breach-of-warranty damages under UCC § 2-

714(2) and incidental damages under UCC § 2-715(1), but not consequential damages under UCC § 2-715(2)(a) for salaries of buyer's employees who were working on the printer project, since such damages were not contemplated by parties. *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933 (7th Cir. Ill. 1978).

Under UCC § 2-714(3) and UCC § 2-715(2)(b), consequential damages are properly awarded for manufacturer's breach of express warranty in sale of casket, which on disinterment of decedent three months after his burial was found to contain water as against manufacturer's express warranty that casket would not leak, since no violence is done in such case to word "person" in UCC § 2-715(2)(b) to hold that that which brings on grief does damage to the person. Furthermore, under UCC § 2-318, consequential damages are properly awarded for such breach of warranty to members of decedent's family other than member who purchased casket from defendant. *Hirst v. Elgin Metal Casket Co.*, 438 F. Supp. 906 (D. Mont. 1977).

Under UCC § 2-714(3) and § 2-715(2), measure of damages in buyer's action for breach of warranty in sale of defective airplane, where plane was accepted by buyer, included expense of transporting plane for repairs, expense of overhauling plane, and damages for loss of plane's use while repairs were being made, since such expenses were proximately caused by seller's breach. *Miles v. Kavanaugh*, 350 So. 2d 1090 (Fla. App. 1977).

In action by buyer of four oil tankers against shipbuilder-seller for consequential damages under UCC § 2-714(3) and § 2-715(2) for losses incurred when tankers were inoperative because of cargo-pump and expansion-joint failures, in which shipbuilder filed third-party complaint against manufacturer of defective cargo pumps and manufacturer of pumps filed fourth-party complaint against manufacturer of defective expansion joints, (1) shipbuilder-seller breached express warranty to buyer under UCC § 2-313(1) that tankers would be built to operate efficiently and also implied warranties under UCC § 2-314(1) and § 2-315 of merchantability and fitness of

tankers for particular purpose (transportation of aviation fuels); (2) buyer of tankers was entitled only to consequential damages caused by defects in design and was not entitled to damages caused by defects in materials or workmanship; (3) shipbuilder-seller's foreseeable liability to buyer was \$500,000, which was amount of adjusted revenues lost by buyer when two of its tankers were inoperative because of cargo-pump and expansion-joint failures due to defective design; (4) manufacturer of defective cargo pumps breached its express and implied warranties to shipbuilder and was liable, in amount of \$2,000,000, for losses sustained by shipbuilder as result of cargo-pump and expansion-joint failures in tankers sold to buyer (including shipbuilder's liability to buyer for lost revenues during period tankers were inoperative), but was not liable to shipbuilder for cost of installing separate stripping on each tanker; and (5) manufacturer of defective expansion joints, which were used in connection with cargo pumps, breached its express and implied warranties concerning such joints and was liable to manufacturer of pumps for costs of replacing all defective joints. *Falcon Tankers, Inc. v. Litton Sys.*, 380 A.2d 569 (Del. Super. 1977).

Buyer of air conditioning equipment was not entitled to recover consequential damages under UCC § 2-714 or UCC § 2-715, even though buyer lost subsequent job opportunities upon seller's breach of contract, where relationship of buyer and seller was on ad hoc basis and where seller had no reason to know of any subsequent job opportunities of buyer. *Chrysler Corp. v. E. Shavitz & Sons*, 536 F.2d 743 (7th Cir. Ill. 1976).

Where buyer contracted to purchase 90,000 bushels of corn but seller delivered less than 2,000 bushels, where buyer proved that seller had reason to know at time of contracting that buyer expected to resell corn in area where market existed, and where buyer made attempt to cover, but was unsuccessful, buyer was entitled to recover lost profits as consequential damages under UCC § 2-714. *National Farmers Org., Inc. v. McCook Feed & Supply Co.*, 196 Neb. 424, 243 N.W.2d 335 (1976).

Purchaser of concrete blocks which were assembled to form planks and then fitted together to form floor and ceiling systems in various kinds of structures was entitled under UCC §§ 2-714(2) and (3) and 2-715(2)(a) to recover consequential damages for (1) blocks rejected after production, i.e., finished floor systems that could not be delivered to purchaser's customers, (2) cost of disposing of defective blocks and floor systems, (3) cost of hiring additional personnel to inspect and handle broken and rejected blocks, (4) costs incurred because purchaser's customers rejected floor systems, not including delivery costs or lost profits, where seller knew exactly what end use would be made of blocks it manufactured and where, furthermore, damages claimed by purchaser at trial were virtually identical to those claimed in earlier letter to seller. However, purchaser was not entitled to recover (5) costs incurred to place special covers on defective ceilings and (6) costs incurred to point and caulk defective ceilings, since these expenses could have been totally avoided had purchaser rejected planks at some point prior to their installation and, thus, they were losses which could have been prevented within meaning of UCC § 2-715(2)(a). *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 232 Pa. Super. 242, 336 A.2d 397 (1975), *aff'd*, 474 Pa. 199, 378 A.2d 288, 96 A.L.R.3d 290 (1977).

In action by hog producer against feed manufacturer for breach of warranty in connection with defective feed supplied by manufacturer, hog producer's losses on account of lost profits and diminished value as producing business were recoverable under UCC §§ 2-714 and 2-715 where feed manufacturer had close working relationship with hog producer during time when defective feed was being fed and where there was ample evidence showing loss of goodwill and business reputation. *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749 (10th Cir. Wyo. 1975).

In action by dairy farmer to recover damages from feed manufacturer for loss of milk production and injury to dairy cows allegedly caused by use of feed supplement, evidence was sufficient to establish breach of both express warranty

under UCC § 2-313 and implied warranty of fitness under UCC § 2-315 where there was express representation that use of feed supplement would increase milk production and where there was decrease in milk production resulting from wrong instructions about proper way to use feed supplement. However, farmer was not entitled to recover consequential damages under UCC §§ 2-714(3) and 2-715(2): (1) considering that there were many factors which could affect production of milk, to permit use of difference between total milk production figures for whole of year during which feed supplement was used for approximately 2 months, and total production figures for whole of preceding year, as measure of damages, would constitute rankest form of speculation and conjecture; (2) with respect to damages for decrease in market value of cows affected by feed, it could not reasonably be determined how much of decline in valuation of cattle between date of injury and day on which they were sold was attributable to injury and how much to changes, if any, in market value between those dates. *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

Seller of fabric was liable to buyer for breach of express warranties of merchantability and fitness for particular purpose, where buyer's purchase order stated that fabric was to be used for swimwear and that all "colors, prints and bonding processes must meet swimwear specifications," and where fabric supplied and subsequently manufactured into swimsuits was defective and failed to meet minimum performance standards for colorfastness; buyer, having given reasonable notice to seller under UCC § 2-607, was entitled to damages for credits issued to customers (including profits lost and costs of production for returns and allowances) plus cost of productions of unsaleable swimsuits under UCC §§ 2-714 and 2-715, and to deduct such damages from purchase price under UCC § 2-717. *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973).

Special items, such as cost of feeding livestock that die or are diseased, and therefore are marketed late, are recoverable on claim for breach of implied war-

ranty of fitness in pig sale. *W & W Live-stock Enters., Inc. v. Dennler*, 179 N.W.2d 484 (Iowa 1970) but see *William C. Mitchell, Ltd. v. Brown*, 576 N.W.2d 342 (Iowa 1998).

13. Pleading.

In action by buyer to recover damages allegedly resulting from operational failure of ice maker purchased from defendant, buyer was not entitled to recover purchase price but was limited to damages in amount of difference at time of place of acceptance between value of ice maker if it had been as warranted and its actual value where complaint alleged notice to seller of breach of warranty as required by UCC § 2-607 but failed to allege notice to seller of rejection of goods as required by UCC § 2-602 or notice of revocation of acceptance as required by UCC § 2-608 and where no special circumstances were alleged as would allow incidental or consequential damages under UCC § 2-715. *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555 (1974).

Consideration of large claim for consequential damages should be supported by appropriate pleadings setting out basis of claim; and award of consequential damages, apparently based in part on delay in furnishing television equipment in time to permit television station to open prior to 1968 election and thus obtain political advertising, was not supported by evidence, in absence of finding that lessor of equipment warranted or guaranteed that it would be in operating order prior to election. *KLPR TV, Inc. v. Visual Elecs. Corp.*, 465 F.2d 1382 (8th Cir. Ark. 1972).

In absence of allegation of facts that would put the dealer on guard to the fact that the contract carrier would hold the dealer responsible for any loss of profits arising from the inability to use engine in question, a dealer who sold to a contract carrier a diesel engine which was subsequently installed in a tractor was not liable for the loss of profits which the carrier claimed to sustain because of breach of implied warranty of merchantability in that the carrier was unable to use the tractor for stated periods due to breakdowns of the engine furnished by the dealer. *Keystone Diesel Engine Co. v.*

Irwin, 411 Pa. 222, 191 A.2d 376 (1963), but see, *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 474 Pa. 199, 378 A.2d 288 (1977).

The institution of proceedings before an alderman for breach of warranty did not constitute sufficient notice to the seller of the breach, since by beginning the action the buyers were exercising a remedy rather than giving notice, and hence a complaint not alleging notice of the breach and the time of such notice was demurrable. *Solomon & Son v. Thomas*, 45 Luz. Legal Reg. Rep. 269 (Pa. 1955).

14. Evidence of value or damage.

The evidence was insufficient to support an award of damages under § 75-2-714 in an action brought by purchasers of a used vehicle, where the purchasers offered no evidence to show either the amount received from sale of the vehicle or the value of the vehicle at the time of its sale; the burden of proving damages sustained from a breach of warranty by a seller cannot be met by mere conjecture or inferences unsupported by adequate evidence. *Gast v. Rogers-Dingus Chevrolet*, 585 So. 2d 725 (Miss. 1991).

In action for breach of warranty in sale of used dry-cleaning equipment, where (1) no evidence was introduced to show market value of equipment, or its market value if it had been conforming, or cost of any repairs made to equipment, but (2) evidence was introduced to show consequential damages arising from alleged breach, such consequential damages were recoverable under UCC § 2-714(3) and § 2-715(2). *D & H Co. v. Shultz*, 579 P.2d 821 (Okla. 1978).

In action for seller's breach of warranty of good title to motor home purchased by plaintiff, where (1) original owner of home rented it for 13 days to thief who "drove off into the sunset" and was never again seen by owner, (2) thief thereafter obtained Alabama registration for home, and also Nebraska and Indiana certificates of title therefor, before trading it in to defendant dealer in Indiana as part payment for truck and trailer, (3) plaintiff purchased home from defendants, who gave plaintiff certificate of title thereto, (4) Indiana state police seized home from plaintiff and surrendered it to original owner's insurer,

(5) home's serial number proved to have been stolen, and (6) such false identification number appeared on all documents respecting home that thief had obtained in Alabama, Nebraska, and Indiana, court held (1) that rental transaction between original owner and thief constituted a "purchase" under UCC §§ 2-403(1) and § 1-201(32), since thief had acquired possessory interest in home by renting it, (2) thief did not transfer good title to defendant, as good-faith purchaser for value, since thief's title to home was void and not voidable under UCC § 2-403(1), (4) since defendant had no good title to convey to plaintiff, defendant breached its warranty of title under UCC § 2-312(1), and (5) evidence supported damages awarded plaintiff under UCC § 2-714(2) and (3). *McDonald's Chevrolet, Inc. v. Johnson*, 176 Ind. App. 399, 376 N.E.2d 106 (1978).

In action for damages for breach of warranty in sale of swimming pool, where buyer informed seller of defects in pool after its installation, seller sent workmen to make repairs, buyer sent workmen away because of disagreement over manner of making repairs while pool was still partly disassembled, and windstorm subsequently destroyed pool, formula under UCC § 2-714(2) that measure of damages for breach of warranty is difference between actual value of goods and value that they would have had if they had been as warranted could not be applied where there was no evidence as to value of pool (1) at time defects in pool were noticed by buyer, (2) at time buyer ordered workmen to go away, and (3) before windstorm destroyed pool-in short, where there was no evidence whatever of pool's actual value or anything that could be used to estimate cost of repairing it. *Griese v. Cory Pools, Ltd.*, 58 Ill. App. 3d 256, 373 N.E.2d 1383 (2d Dist. 1978).

In breach of warranty action for defects in well-drilling machine, trial court did not err in directing verdict against plaintiff, even though plaintiff introduced evidence indicating that machine had defects and that such defects constituted a breach of warranty, since plaintiff failed to produce evidence of damages in accordance with UCC § 2-714. *Shuniak v. AAA Well Drilling & Boring Co.*, 146 Ga. App. 785, 247 S.E.2d 601 (1978).

In action for breach of warranty arising out of purchase of new automobile, award of damages in amount of \$7,314.60, exact purchase price of automobile, was proper under UCC § 2-714(2)(3), notwithstanding there was no express evidence as to value of automobile at time and place of acceptance if it had been as warranted, where there was evidence, *inter alia*, that automobile had been continually returned for repairs over two-year period; buyer was not required to minutely detail each element of damage and trier of fact could assess damages for inconvenience, aggravation and loss of use, notwithstanding want of mathematical specifics, so long as such assessment was reasonable and not punitive; award based on bona fide effort to compensate for consequences of defects that establish breach of warranty was remedy that UCC seeks to afford. *McGrady v. Chrysler Motors Corp.*, 46 Ill. App. 3d 136, 360 N.E.2d 818 (4th Dist. 1977).

In action for damages for breach of implied warranty of merchantability of mobile home, fair-market value of home within meaning of UCC § 2-714(2), which value was standard for measuring buyer's damages, was not established by testimony of plaintiff's witnesses on value where one witness testified that he did not know home's fair-market value and other witness's testimony was only to effect that home had wholesale value of \$6,000.00. *Fredrick v. Dreyer*, 257 N.W.2d 835 (S.D. 1977).

Where seller of truck misrepresented age of vehicle to buyer, evidence submitted by buyer that truck drew a bid of \$5,600 at forced sale did not preclude inference that amount received approximated fair value in suit to recover damages for breach of express warranty under UCC § 2-714; buyer should have been allowed to offer proof of consequential damages pursuant to UCC § 2-715(2). *Bergenstock v. Lemay's G.M.C., Inc.*, 118 R.I. 75, 372 A.2d 69 (1977).

In action by dairy farmer to recover damages from feed manufacturer for loss of milk production and injury to dairy cows allegedly caused by use of feed supplement, evidence was sufficient to establish breach of both express warranty

under UCC § 2-313 and implied warranty of fitness under UCC § 2-315 where there was express representation that use of feed supplement would increase milk production and where there was decrease in milk production resulting from wrong instructions about proper way to use feed supplement. However, farmer was not entitled to recover consequential damages under UCC §§ 2-714(3) and 2-715(2): (1) Considering that there were many factors which could affect production of milk, to permit use of difference between total milk production figures for whole of year during which feed supplement was used for approximately 2 months, and total production figures for whole of preceding year, as measure of damages, would constitute rankest form of speculation and conjecture; (2) with respect to damages for decrease in market value of cows affected by feed, it could not reasonably be determined how much of decline in valuation of cattle between date of injury and day on which they were sold was attributable to injury and how much to changes, if any, in market value between those dates. *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

In action by hog producer against feed manufacturer for breach of warranty in connection with defective feed supplied by manufacturer, hog producer's losses on account of lost profits and diminished value as producing business were recoverable under UCC §§ 2-714 and 2-715 where feed manufacturer had close working relationship with hog producer during time when defective feed was being fed and where there was ample evidence showing loss of goodwill and business reputation. *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749 (10th Cir. Wyo. 1975).

In action to recover damages for breach of warranty in connection with defective record albums manufactured by defendant, plaintiff corporation having entered into contract with defendant for production of records, under UCC §§ 2-714 and 2-715 plaintiff was not entitled to recover damages for loss of underwriting of its corporate stock where there was insufficient proof that defect was cause of loss of underwriting, nor for loss of costs in laying groundwork for production, including

advertising and promotion and cost of keeping corporation going during period of delay caused by defect, where no appreciable market existed for record at time of breach; however, plaintiff was entitled to recover expenses reasonably incurred in its efforts to rehabilitate record following breach. *Great Am. Music Mach., Inc. v. Mid-South Record Pressing Co.*, 393 F. Supp. 877 (M.D. Tenn. 1975).

In action by heating contractor against furnace manufacturer to recover damages for breach of warranty and consequential damages arising out of contractor's purchase of burners from manufacturer, jury and trial court could properly find that burners had no value for purposes intended at time of delivery notwithstanding they were still in use at time of trial; although continued use of burners was some evidence they had value, it was not conclusive on fact finders where there was both expert testimony and testimony by contractor's employees, as well as by those familiar with problem, that equipment was of no value, where manufacturer refused to accept back defective burners, and where, more importantly, manufacturer offered no evidence whatever of value of equipment at time of its delivery to rebut testimony of contractor's witnesses. *Louis DeGidio Oil & Gas Burner Sales & Serv., Inc. v. Ace Eng'g Co.*, 302 Minn. 19, 225 N.W.2d 217 (1974).

In action by buyer of truck trailers for breach of warranty, measure of damages was difference at time and place of acceptance between value of goods accepted and value they would have had if they had been as warranted, proper time for determination of value was period of time during which delivery and acceptance occurred, and, thus, evidence of trade-in value of trailers some six years after delivery and acceptance was too remote in time to be competent and was properly excluded; on other hand, evidence of hardness test made on top rails of trailers some six years after their manufacture was improperly excluded, notwithstanding lapse of time, since hardness of metal was such constant, immutable characteristic that lapse of time was greatly diminished in significance. *Tennessee-Carolina Transp., Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E.2d 181 (1974).

In breach of warranty action for damage to truck trailers, proper time for determination of value of trailers under Code provision relating to measure of damages when buyer retains goods and sues for loss of bargain occasioned by breach of warranty was time during which delivery and acceptance of trailers occurred; and admission of opinion evidence of value of trailers some years after time of acceptance was error. *Tennessee Carolina Transp., Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E.2d 711, 83 A.L.R.3d 636 (1973).

As to claim that failure to tractor retailer to deliver three-point hitch which was to be used on tractor in planting soybean crop resulting in decrease and loss in soybean production, proof was insufficient to take question of anticipated profits or consequential damages out of realm of speculation and conjecture and would present to jury incomplete set of figures as to anticipated profits; and recovery of such damages was properly denied. *Traylor v. Huntsman*, 253 Ark. 704, 488 S.W.2d 30 (1972).

Where the buyer rescinds the contract of sale and returns the goods promptly upon discovery of the defect there is no need for the buyer to prove the value of the goods at the time of the purchase. *Leveridge v. Notaras*, 433 P.2d 935 (Okla. 1967).

Where the egg production of an experimental flock of chickens was warranted to average "as good or better" than the control flock, evidence as to the loss in production and market value of the difference is the correct measure of damages, and where evidence was introduced to the effect that it was necessary for the poultry farmer to purchase eggs in order to supply his larger customers and thereby retain their patronage he, in effect, showed the amount of his loss, the value thereof and that he could have sold the eggs if the experimental chickens had produced as warranted. *Babcock Poultry Farm, Inc. v. Shook*, 204 Pa. Super. 141, 203 A.2d 399 (1964).

15. Burden of proof.

In action arising out of repossession of allegedly defective truck purchased by plaintiff, plaintiff was not entitled to damages for breach of warranty under UCC

§ 2-714(2) where plaintiff presented no proof as to difference in value of truck at time and place of acceptance and value it would have had if it had been as warranted. Plaintiff also was not entitled to consequential damages under UCC § 2-715(2)(b) because of repossession of truck where evidence did not establish that repossession had proximately resulted from defendant's alleged breach of warranty (observing that repossession of truck had resulted from plaintiff's failure to make payments). *Chaney v. GMAC*, 349 So. 2d 519 (Miss. 1977).

Damages for breach of warranty were proven in "reasonable" manner under UCC § 2-714 without necessity of proving reasonableness of each of hundreds of items listed in exhibit. *Aluminum Co. of Am. v. Electro Flo Corp.*, 451 F.2d 1115 (10th Cir. Utah 1971).

Correct measure of damages under Code § 2-714 is difference in value between goods accepted and value goods would have had if they had been as warranted; jury could not award such damages where neither pleadings nor evidence revealed any difference in value between substituted and ordered goods, burden being on buyer to prove amount of alleged damage with respect to accepted goods under Code § 2-607(4). *State ex rel. Hawkins-Hawkins Co. v. Travelers Indem. Co.*, 250 Or. 356, 442 P.2d 612 (1968).

16. Instructions to jury.

In a breach of warranty action arising from the purchase of a tree harvester, the trial court erred by instructing the jury on "difference in value" damages where the buyer never made a payment on the equipment and was credited for his down payment. *Puckett Mach. Co. v. Edwards*, 641 So. 2d 29 (Miss. 1994).

In a breach of warranty action arising from the purchase of a tree harvester, the trial court erred by instructing the jury on "difference in value" damages, since the buyer did not provide an adequate measure of damages where the value assigned to the equipment at trial was the value ascertained at the time of trial by the buyer's expert witness, not at the time of acceptance 4 years earlier. *Puckett Mach. Co. v. Edwards*, 641 So. 2d 29 (Miss. 1994).

In action by purchaser of new automobile against manufacturer for breach of express warranty, under which manufacturer was obligated to repair or replace defective parts, measure of damages applicable to manufacturer's breach was that set out in UCC § 2-714(2) and, therefore, trial court properly charged jury to effect that if they found that manufacturer breached its warranty, then purchaser would be entitled to recover difference, at time and place of acceptance, between value of automobile accepted and value it would have had if it had been as warranted. *Courtesy Ford Sales, Inc. v. Farrior*, 53 Ala. App. 94, 298 So. 2d 26 (Civ. App. 1974), cert. denied, 292 Ala. 718, 298 So. 2d 34 (1974).

In action for damages for breach of warranties contained in contract to manufacture, sell, and deliver machine for manufacturing hayrake teeth, seller's motion for new trial was properly granted where, although buyer had accepted machine despite its nonconformity, jury was not instructed (1) to determine any date or fact as to acceptance of nonconforming

goods, (2) on proper measure of damages under UCC § 2-714(2) for breach of warranty, or (3) on proper measure of damages for rental value of building space set aside for installation and operation of machine. *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 199 Neb. 489, 260 N.W.2d 193 (1977).

Trial court's instructions as to measure of damages was not substantially different from the statutory language contained in subsection (2) where it charged jury that the damages recoverable by the buyer were those which were a natural and proximate result of the claimed breach of warranty, and that the particular damages which might have resulted need not to have been contemplated or foreseeable by the seller, and further that the rule as to measure of damages followed is sometimes referred to as "out-of-pocket" rule of damages, which was the difference in value of what the buyer was induced to part with and the value of what the buyer got in the transaction. *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. Minn. 1964).

RESEARCH REFERENCES

ALR. Measure of damages in action for breach of warranty of title to personal property as the value of the property or the price plus interest. 13 A.L.R.2d 1372.

Necessity that buyer, relying on market price as measure of damages for seller's breach of sale contract, show that goods in question were available for market at price shown. 20 A.L.R.2d 819.

Purchaser's use or attempted use of articles known to be defective as affecting damages recoverable for breach of warranty. 33 A.L.R.2d 511.

Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty. 35 A.L.R.2d 1273.

Who may enforce guarantee. 41 A.L.R.2d 1213.

Extent of liability of seller of livestock infected with communicable disease. 87 A.L.R.2d 1317.

Seller's promises or attempts to repair article sold as affecting buyer's duty to

minimize damages for breach of sale contract or of warranty. 66 A.L.R.3d 1162.

Elements and measure of damages for breach of warranty in sale of horse. 91 A.L.R.3d 419.

Measure of damages in action for breach of warranty of title to personal property under UCC § 2-714. 94 A.L.R.3d 583.

Extent of liability of seller of livestock infected with communicable disease. 14 A.L.R.4th 1096.

Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract. 41 A.L.R.4th 131.

Third-party beneficiaries of warranties under UCC § 2-318. 50 A.L.R.5th 327.

Am Jur. 67A Am. Jur. 2d, Sales §§ 1238 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1111 et seq (remedies of buyer; damages).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1691 et seq (damages of buyer for breach regarding accepted goods).

16 Am. Jur. Proof of Facts, Automobile Design Hazards, §§ 91, 92, 93 (proofs in cases involving negligently designed motor vehicle components).

16 Am. Jur. Proof of Facts, Seat Belt Accidents, § 56 (proof that injuries resulted from improper installation of seat belt); § 57 (proof of defective seat belt).

17 Am. Jur. Proof of Facts, Ladder Accidents, §§ 67, 68 (proofs of injuries caused by improper construction of step ladders).

18 Am. Jur. Proof of Facts, Farm Machinery Accidents, § 76 (proof of overturning of row-crop tractor because of operator's negligence); § 77 (proof of injuries from ungarded tractor power take-off shaft); § 78 (proof of hay baler injuries caused by improper operating instructions); § 79 (proof of improper removal of operator's safety bar from hay bale

stacker); § 80 (proof of corn picker injuries caused by failure to provide proper operating instructions and to install necessary safety devices); § 81 (proof of explosion of cast-iron flywheel on ensilage cutter).

6 Am. Jur. Proof of Facts 2d, Buyer's Timely Notice of Breach in Regard to Accepted Goods, §§ 5 et seq. (proof that buyer gave seller notice of defects within a reasonable time).

37 Am. Jur. Proof of Facts 2d 681, Buyer's Dissatisfaction with Goods.

43 Am. Jur. Proof of Facts 2d 577, Wrongful Termination of Dealership.

Law Reviews. Williams, The Statute of Limitations, Prospective Warranties, and Problems of Interpretation in Article Two of the UCC. 52 Geo. Wash. L. Rev. 67, November, 1983.

1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss. L. J. 141, March 1983.

§ 75-2-715. Buyer's incidental and consequential damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Except as otherwise provided in House Bill No. 1270 [Laws, 1993, ch. 302], consequential damages resulting from the seller's breach include:

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

SOURCES: Codes, 1942, § 41A:2-715; Laws, 1966, ch. 316, § 2-715; Laws, 1993, ch. 302, § 3, eff from and after July 1, 1993.

Editor's Note — The code sections affected by Laws, 1993, ch. 302, referenced in this section, are §§ 11-1-63, 11-1-65, 75-2-715, and 11-7-13.

Laws, 1993, ch. 302, § 5, effective July 1, 1993, provides as follows:

"SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994."

Cross References — Liberal administration of code remedies, see § 75-1-106.

Obligation of good faith in performance or enforcement of contract or duty, see § 75-1-203.

Revocation of acceptance, see §§ 75-2-608, 75-2-703.

Merchant's excuse by failure of presupposed conditions, see § 75-2-615.

Contractual limitation of remedy, see § 75-2-719.

JUDICIAL DECISIONS

1. In general.
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7. —Indemnity and indemnification.
8. —Joint and several liability.
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20. —Maintenance and storage costs.
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24. —Repair costs.
25. —Replacement costs.
26. Evidence and burden of proof.
27. Jury instructions.

1. In general.

Plaintiff who successfully proves fraud is entitled to traditional remedies under tort law, to rescind contract and be put in status quo by recovery of purchase price, and may also invoke provisions of UCC. *Beck Enters., Inc. v. Hester*, 512 So. 2d 672 (Miss. 1987).

In buyer's action for breach of implied warranty of fitness of machine for boring tunnel in coal mine, where (1) seller warranted that machine would be free from defects in materials and workmanship, (2) such warranty was accompanied by disclaimer of all other warranties, express or implied, not set forth in writing signed by authorized representative of seller, (3) seller limited its liability for breach of warranty to repair or replacement of de-

fective parts and also excluded all liability for consequential damages, (4) seller agreed to furnish to specialist to supervise installation and initial operation of machine, and (5) seller's offer to sell machine was accompanied by letter signed by seller's employee, who had no authority to make binding representations about machine, which stated that machine would bore at approximate rate of 2.5 feet per hour through hardest materials that buyer might expect to encounter in its mine, court held (1) that buyer accepted seller's offer by mailing purchase order to seller, (2) that by accepting such offer, buyer agreed to seller's terms on liability for breach of warranty, (3) that district court properly found that representation about machine's boring rate, which was contained in letter signed by employee of seller who was not authorized to make such representation, was not part of parties' agreement, since it was not set forth in document that parties intended to be final expression of their agreement within meaning of UCC § 2-202, (4) that as a result, there was no undertaking by seller that machine would bore at rate of 2.5 feet per hour, (5) that seller also had made no express undertaking to assemble machine properly on buyer's premises, since provision in contract which stated that seller would furnish specialist to supervise machine's initial assembly and operation was only intended to prevent wrongful assembly or operation by buyer's employees when not under control of seller's specialist, (6) that such undertaking also did not exist as an independent and separate obligation of seller because assembly of machine, whether at seller's plant or on buyer's premises, came under seller's workmanship warranty, (7) that seller's inability to repair defects in machine caused buyer's limited repair remedy to fail in its essential purpose within meaning of UCC § 2-719(2), (8) that although failure of its limited remedy to achieve its essential purpose made available to buyer

all remedies provided by Uniform Commercial Code, this did not mean that consequential damages, which buyer stipulated were its only damages, could be recovered by buyer under UCC §§ 2-714(3) and 2-715(2)(a), and (9) that since contract had been made by parties of relatively equal bargaining power and liability for consequential damages had been assumed by buyer, mere fact that seller's efforts to repair machine had failed was not enough to require that seller absorb consequential-damage losses that buyer had plainly agreed to bear. *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. Cal. 1978).

Consequential damages under UCC § 2-715(2)(a) include any loss resulting from the general or particular requirements of the buyer as to which the seller had reason to know at the time of contracting and which could not reasonably be prevented by cover or otherwise. Consequential damages can be determined in any reasonable manner, and mathematical proof is not required. However, such damages must not be speculative. *English Whipple Sailyard, Ltd. v. The Yawl Ardent*, 459 F. Supp. 866 (W.D. Pa. 1978).

In general, UCC § 2-715 continues the prior law as to what consequential damages are recoverable for breach of warranty. *A. Ertag, Inc. v. Lehigh Valley Mills, Inc.*, 29 Lehigh L.J. 487 (Pa. 1962).

2. Construction with other law.

The provisions of the Uniform Commercial Code, with respect to the buyer's remedies when he accepts goods and does not revoke his acceptance but sues for damages because the goods are not as warranted, are codified in UCC § 2-714(1) and (2), and also, under appropriate circumstances, in UCC § 2-714(3) and UCC § 2-715(1) and (2). The statutory scheme, as apparent from all of these provisions which should be read as a whole, is as follows: (1) where the buyer has accepted the goods and given notification, he may recover damages which can be determined in any way that is reasonable; (2) the measure of damages is the difference, at the time and place of acceptance, between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circum-

stances show proximate damages in a different amount; and (3) in a proper case, incidental and consequential damages also may be recovered. *Carlson v. Rysavy*, 262 N.W.2d 27 (S.D. 1978).

The Uniform Commercial Code is ambiguous with respect to the effect that the failure of a limited remedy under UCC § 2-719(2) has on other contractual provisions. UCC § 2-719(2) provides that if a remedy fails of its essential purpose, "remedy may be had as provided in this act." The Official Comment to this section states that if a remedy fails of its purpose, "it must give way to the general remedy provisions" of Article 2. The general remedy provisions of Article 2 provide not only for the recovery of consequential damages (see UCC § 2-714(3) and § 2-715(2)), but also for their exclusion where this is not unconscionable (see UCC § 2-719(3)). In cases involving the failure of an exclusive remedy in a warranty provision that also excludes liability for consequential damages, the provisions that limit liability also fail, and the plaintiff is entitled to the full array of remedies provided by the Uniform Commercial Code, including the recovery of consequential and incidental damages (see UCC § 2-715(1) and (2)) (where seller's "New Equipment Warranty," given on sale of tractor to buyer, stated that warranty was in lieu of all warranties, including liability for incidental and consequential damages, and court stated that if buyer was able to prove existence of defect in tractor and also that limited remedy contained in seller's new equipment warranty had failed in its essential purpose, buyer would be entitled to full array of remedies provided by Uniform Commercial Code, including recovery of consequential and incidental damages under UCC § 2-714(3) and § 2-715(1) and (2)). *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

3. —Special circumstances.

In seller's action for balance due on sale of concrete building blocks, buyer under counterclaim for damages resulting both directly and consequentially from seller's failure to supply blocks conforming to express and implied warranties could recover consequential damages under UCC

§ 2-715(2) without first establishing existence of “special circumstances” mentioned in UCC § 2-714(2), since UCC § 2-714(2) is concerned with value-of-goods damages and not with incidental damages under UCC § 2-715(1) or consequential damages under UCC § 2-715(2). *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 474 Pa. 199, 378 A.2d 288, 96 A.L.R.3d 290 (1977).

“Special-circumstances” requirement of UCC § 2-714(2) is unrelated to recovery of consequential damages under UCC § 2-715(2). *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 474 Pa. 199, 378 A.2d 288, 96 A.L.R.3d 290 (1977).

4. —Tort action compared.

Damages for economic losses can be recovered in an action for breach of warranty, but not in an action based on strict liability in tort (stating that Uniform Commercial Code contains comprehensive mechanism for dealing with right of parties to sales transaction to recover damages for economic losses). *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

In action against manufacturer of poultry meal for damages resulting from injury to poultry producer’s chickens in that chickens fed with feed that included meal manufactured by defendant failed to achieve normal growth, gravamen of cause of action was breach of warranty of sale under UCC §§ 2-313 and 2-314 and damages sought were permissible under and governed by UCC §§ 2-714 and 2-715, even though tortious breach on part of defendants was alleged. *Mid-South Milling Co. v. Loret Farms, Inc.*, 521 S.W.2d 586 (Tenn. 1975).

Where buyer of used automobile sued seller for fraud, loss of use of personal vehicle was compensable; although UCC § 2-715(2) describes consequential damages in contract terminology (“reason to know”) rather than in tort terminology (“natural and ordinary result”), Code does not require that “reason to know” formulation be applied in fraud suits to exclusion of other remedies, and right to consequential damages was presumably “remedy” within meaning of UCC § 2-721. *Wagner v. Dan Unfug Motors, Inc.*, 35 Colo. App. 102, 529 P.2d 656 (1974).

Buyer’s failure to effect cover under UCC § 2-712 does not bar buyer’s recovery for incidental and consequential damages under UCC § 2-715. *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972).

5. Buyer’s obligation to cover or mitigate damages.

In an action for damages arising out of the breach of an express warranty to repair a used automobile purchased by the plaintiff, the defendant could not limit its liability to the costs of repairs and replacement of parts under the warranty as authorized by § 75-2-719 where it wrongfully failed to carry out its obligations under the warranty; the plaintiff had no incidental or consequential damages as contemplated by § 75-2-715 where he had purchased another second-hand car and had failed to take any reasonable action to minimize the defendant’s breach of the warranty but had simply abandoned the car at the dealer’s. Where the car had been driven for over two years and 26,649 miles before the plaintiff had experienced any difficulty with it, the reasonable measure of damages under § 75-2-714 would be the fair market value the car would have had with that age and number of miles with no mechanical difficulty as experienced by the plaintiff, and the value it had had in its defective condition, and for which the defendant had refused to make repairs. *Ford Motor Co. v. Fairley*, 398 So. 2d 216 (Miss. 1981).

The requirement of “cover” (see UCC §§ 2-712(1) and 2-715(2)(a)), or mitigation of damages, is not absolute and unyielding, but is subject to the circumstances of the case. The test of proper cover is whether, at the time and place, the buyer acted in good faith and in a reasonable manner, and it is immaterial that hindsight may later prove that the method of cover used was not the cheapest or the most effective. *S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524 (3d Cir. Pa. 1978).

Generally, when a seller refuses to deliver goods, the buyer, under UCC §§ 2-712(1) and 2-715(2)(a), must attempt to secure similar goods elsewhere as a prerequisite to the recovery of consequential damages. *S.J. Groves & Sons Co. v.*

Warner Co., 576 F.2d 524 (3d Cir. Pa. 1978).

In action by buyer of defective log-loading machine, as to which buyer has revoked acceptance, for damages under UCC § 2-715(2)(a) for lost profits caused by seller's breach, buyer's evidence provided sufficient basis for estimating amount of claimed profits with reasonable certainty, and conflict in evidence as to whether buyer had failed to mitigate his damages, as required by UCC § 2-715(2)(a), by not obtaining cover was properly submitted to jury for determination. However, buyer could not recover attorney fees as part of his consequential damages under UCC § 2-715(2)(a). *Hardwick v. Dravo Equip. Co.*, 279 Or. 619, 569 P.2d 588 (1977).

Purchaser of nonconforming mobile home under installment sales contract rightfully rejected unit and notified seller of rejection within reasonable time under UCC §§ 2-601 and 2-602, but purchaser's security interest in goods under UCC § 2-711 did not give him right to continued use of goods until security interest was satisfied; and where purchaser, instead of storing, reshipping, or reselling goods as provided by UCC § 2-604, moved into unit and corrected deficiencies, he accepted goods under UCC § 2-606 and became obligated to pay contract price under UCC § 2-607, retaining only his rights for damages under UCC §§ 2-714 and 2-715; although exclusion of expressed and implied warranties in dark print which was underlined complied with UCC § 2-316, purchaser could nevertheless recover for breach of express warranty under UCC § 2-313 should trier of fact conclude that dealer made express warranties that mobile home would conform to sample or model shown purchaser on dealer's lot. *Bowen v. Young*, 507 S.W.2d 600, 67 A.L.R.3d 354 (Tex. Civ. App. 1974).

Damages for breach of warranty could not include damages when buyer knew pipe to be defective and could not include "cover" purchase of other pipe nearly a year later, but could include value difference between pipe as warranted and as accepted as to that portion of pipe which buyer did not know was nonconforming, as well as incidental and consequential

damages. *Fred J. Miller, Inc. v. Raymond Metal Prods. Co.*, 265 Md. 523, 290 A.2d 527 (1972).

6. Extent of liability; foreseeability.

Seller of truck which turned out to be stolen knew he was selling to dealer in used trucks, and so is liable for buyer's reasonable repairs and other expenses of putting truck into condition for resale, and buyer's lost profits on resale of vehicle. *Crook Motor Co. v. Goolsby*, 703 F. Supp. 511 (N.D. Miss. 1988).

In buyer's action for breach of implied warranty of fitness of machine for boring tunnel in coal mine, where (1) seller warranted that machine would be free from defects in materials and workmanship, (2) such warranty was accompanied by disclaimer of all other warranties, express or implied, not set forth in writing signed by authorized representative of seller, (3) seller limited its liability for breach of warranty to repair or replacement of defective parts and also excluded all liability for consequential damages, (4) seller agreed to furnish to specialist to supervise installation and initial operation of machine, and (5) seller's offer to sell machine was accompanied by letter signed by seller's employee, who had no authority to make binding representations about machine, which stated that machine would bore at approximate rate of 2.5 feet per hour through hardest materials that buyer might expect to encounter in its mine, court held (1) that buyer accepted seller's offer by mailing purchase order to seller, (2) that by accepting such offer, buyer agreed to seller's terms on liability for breach of warranty, (3) that district court properly found that representation about machine's boring rate, which was contained in letter signed by employee of seller who was not authorized to make such representation, was not part of parties' agreement, since it was not set forth in document that parties intended to be final expression of their agreement within meaning of UCC § 2-202, (4) that as a result, there was no undertaking by seller that machine would bore at rate of 2.5 feet per hour, (5) that seller also had made no express undertaking to assemble machine properly on buyer's premises, since provision in contract which stated that seller

would furnish specialist to supervise machine's initial assembly and operation was only intended to prevent wrongful assembly or operation by buyer's employees when not under control of seller's specialist, (6) that such undertaking also did not exist as an independent and separate obligation of seller because assembly of machine, whether at seller's plant or on buyer's premises, came under seller's workmanship warranty, (7) that seller's inability to repair defects in machine caused buyer's limited repair remedy to fail in its essential purpose within meaning of UCC § 2-719(2), (8) that although failure of its limited remedy to achieve its essential purpose made available to buyer all remedies provided by Uniform Commercial Code, this did not mean that consequential damages, which buyer stipulated were its only damages, could be recovered by buyer under UCC §§ 2-714(3) and 2-715(2)(a), and (9) that since contract had been made by parties of relatively equal bargaining power and liability for consequential damages had been assumed by buyer, mere fact that seller's efforts to repair machine had failed was not enough to require that seller absorb consequential-damage losses that buyer had plainly agreed to bear. *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. Cal. 1978).

In buyer's action for breach of warranty attaching to a laser that did not operate at warranted power output, court held (1) that evidence supported district court's determination that seller had breached its express warranty and that buyer's remedy of repair or replacement of defective parts had failed in its essential purpose under UCC § 2-719(2); (2) that seller had been given adequate notice of its breach under UCC § 2-607(3)(a); and (3) that since laser was merely component of printer project that buyer was working on and intent of parties, as evidenced by their contract and circumstances of case, was that buyer should bear risk of such project, buyer could recover only breach-of-warranty damages under UCC § 2-714(2) and incidental damages under UCC § 2-715(1), but not consequential damages under UCC § 2-715(2)(a) for salaries of buyer's employees who were

working on the printer project, since such damages were not contemplated by parties. *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933 (7th Cir. Ill. 1978).

Buyer of boat, under counterclaim in admiralty action for damages for breach of contract and repairs caused by sinking of boat while work on it was in progress, was entitled to consequential damages under UCC § 2-715(2)(a) for (1) cost of repairs, including repairs made by buyer himself, (2) diminished value of boat after its sinking, (3) docking expenses, and (4) other sums spent by buyer in anticipation of sailing boat during following season. However, buyer was not entitled to consequential damages for loss of income from chartering boat, since such loss was not reasonably foreseeable by seller at time of entering into contract. *English Whipple Sailyard, Ltd. v. The Yawl Ardent*, 459 F. Supp. 866 (W.D. Pa. 1978).

Where (1) buyer offered to pay \$4,225 for used car, instead of car's list price of \$4,995, (2) salesman, on filling out purchase proposal, listed car's price as \$4,225, buyer signed such proposal, and sales manager initialed it, (3) salesman then informed buyer that purchase order for car had to be filled out, and buyer signed purchase order and gave salesman check for \$100 as down payment, (4) sales manager thereafter informed buyer that car could not be sold for \$4,225, and (5) buyer, in action for damages for breach of contract, sought writ of possession for car and consequential and punitive damages for fraud, court held (1) that action was breach of contract case that did not involve fraud, thus precluding award of punitive damages, (2) that although salesman had made mistake to buyer's injury, in that buyer was unable to purchase car with list price of \$4,995 for \$4,225, trial court had properly allowed buyer damages for breach of contract, and (3) that although UCC § 2-715(2)(a) provides that consequential damages include any loss that results from a buyer's general or particular requirements which seller, at time of contracting, had reason to know and which could not reasonably have been prevented by cover or otherwise, the items of consequential damages sought by buyer

in present case were not reasonably known to seller at time contract was entered into. *Wahba v. Don Corlett Motors, Inc.*, 573 S.W.2d 357 (Ky. Ct. App. 1978).

In an action for the breach of an implied warranty, the buyer cannot recover consequential damages under UCC §§ 2-714(3) and 2-715(2)(b) to the extent that his own negligence was a concurring proximate cause of such damages. However, to the extent that the product was unsuitable and proximately caused the damages, the buyer can recover consequential damages for the breach of warranty. Where both the unsuitable product and the buyer's negligence are found to be proximate causes of the damages, the trier of facts must also determine the respective percentages (totaling 100 percent) by which the concurring causes contributed to the consequential damages (action for breach of implied warranty of fitness of isomax reactor charge heater). *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (1978).

In action for breach of implied warranty of merchantability attaching to sale of mobile home, buyer's items of consequential damage under UCC § 2-715(2)(a) properly included (1) fact that seller could have foreseen that if it delivered home one week late, buyer might have to spend \$280 to rent other accommodations, and (2) fact that seller could also have foreseen that home's defects might involve a \$45 repair bill (also holding that finance charges involved in home's sale were not recoverable as consequential damages). *Long v. Quality Mobile Home Brokers, Inc.*, 271 S.C. 482, 248 S.E.2d 311 (1978).

Under UCC § 2-715(2)(a), consequential damages may be recovered by buyer whenever they were reasonably foreseeable by seller when he entered into the contract. *Prutch v. Ford Motor Co.*, 40 Colo. App. 129, 574 P.2d 102 (1977), *rev'd* on other grounds, 618 P.2d 657 (Colo. 1980).

Under UCC § 2-715(2), buyer of concrete building blocks was entitled to any consequential damages resulting from its general or particular requirements which seller had reason to know about and which could not reasonably have been prevented by cover or otherwise. The

"had-reason-to-know" test does not require buyer to show that seller had contemplated or tacitly agreed to certain consequential damages. If seller knew of buyer's general or particular requirements, seller is liable for resulting consequential damages, regardless of whether seller contemplated or agreed to such damages. *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 474 Pa. 199, 378 A.2d 288, 96 A.L.R.3d 290 (1977).

Consequential damages under UCC § 2-715(2) are only granted where breach was proximate cause of loss and damages were reasonably foreseeable at time of contracting; therefore, where it was clearly foreseeable that buyer would need to replace defective parts, but was not foreseeable that replacement parts would themselves be defective, buyer was not entitled to recover consequential damages for losses resulting from failure of such replacement parts. *Falcon Tankers, Inc. v. Litton Sys.*, 355 A.2d 898 (Del. Super. 1976).

Reasonably foreseeable operating losses caused by defective machinery were recoverable as element of damages. *Gurney Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 467 F.2d 588 (4th Cir. N.C. 1972).

7. —Indemnity and indemnification.

In buyer's suit for seller's breach of warranties respecting new mobile home sold to buyer, trial court in rendering judgment for buyer was authorized by UCC § 2-715(2)(a) to order seller to execute indemnity agreement holding buyer harmless and indemnifying buyer in event finance company, which was holder in due course of commercial paper involved in sale, or Federal Housing Administration should sue buyer for balance due on purchase price, since buyer's default in payment was direct result of seller's breach. *Lycos v. Gray Mobile Home Sales, Inc.*, 76 Mich. App. 165, 256 N.W.2d 63 (1977).

UCC § 2-715(2)(a)(b), does not displace principles of law and equity concerning contribution and indemnity; therefore, under UCC § 1-103, general law on contribution and indemnity continues to supplement provisions of UCC and were applicable in truck owner's action for breach of warranty against dealer and manufacturer of truck to recover amount

paid out in settlement of lawsuits arising out of collision between automobile and truck. *Dodge Trucks, Inc. v. Wilson*, 140 Ga. App. 743, 231 S.E.2d 818 (1976), *aff'd*, 238 Ga. 636, 235 S.E.2d 142 (1977).

In action by purchaser of bookkeeping machine against seller for breach of warranty where buyer financed purchase of machine through lease agreement with leasing corporation, but because of difficulties with machine, buyer terminated payments to leasing corporation, leasing corporation repossessed machine, sold it and recovered balance due on lease from purchaser, purchaser was entitled to recover as damages for breach of warranty amount of deficiency judgment obtained by leasing corporation against purchaser. *Acme Pump Co. v. National Cash Register Co.*, 32 Conn. Supp. 69, 337 A.2d 672 (1974).

Where retailer and wholesaler of child's toy each paid \$10,000 to consumer in settlement of products liability action, and where retailer made out *prima facie* case for breach of warranty of merchantability by wholesaler, retailer was entitled to recover from wholesaler as consequential damages amount it was required to pay in settlement. *Kelly v. Hanscom Bros.*, 231 Pa. Super. 357, 331 A.2d 737 (1974).

In third-party action by lessees of printing equipment against manufacturer of equipment for breach of warranty, after lessee had refused to make further payments on lease and lessor repossessed equipment, sold it and brought action against lessees for balance due on lease under their separate guarantee of lease: (1) although privity of contract was requisite to action for breach of warranty, not involving personal injury, manufacturer was estopped from denying lessees benefits of express warranty in present case where equipment was delivered to lessees and was serviced by manufacturer, manufacturer's machine warranty was delivered to lessee, and numerous service calls were made without charge as result of manufacturer's having voluntarily extended 30-day guarantee period because machinery would not stay in adjustment; (2) measure of damages provided in UCC § 2-714(2) was not only recovery possible, lessees were entitled to keep goods and

seek incidental and consequential damages as well, provided manufacturer was given, as it was, reasonable notice of defect as required by UCC § 2-607(3)(a), and, hence, lessees were entitled to recover pursuant to UCC § 2-715, as consequential damage, amount they were forced to pay lessor under guaranty. *Addressograph-Multigraph Corp. v. Zink*, 273 Md. 277, 329 A.2d 28 (1974).

8. —Joint and several liability.

Comparative negligence rule applied, in action under UCC § 2-314, to bar buyer's recovery of so much of consequential property damages as were proximately caused by buyer's failure to heed seller's warnings concerning continued unsafe operation of defectively-installed oil refinery equipment. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (1978).

The agent of a seller who is a party to the misrepresentation of a race horse is not jointly and severally liable with his principal in an action for a rescission of the contract and a recovery of the purchase money paid for the horse; however, a different result would have been reached had the purchasers sued to recover damages consequent upon the misrepresentation. *Grandi v. LeSage*, 74 N.M. 799, 399 P.2d 285 (1965).

9. —Punitive damages.

Nowhere in UCC §§ 2-714 and 2-715 is there indication that punitive damages are element of recovery in breach of warranty cases. *Novosel v. Northway Motor Car Corp.*, 460 F. Supp. 541 (N.D.N.Y. 1978).

The Uniform Commercial Code makes no provision for exemplary or punitive damages for breaches of warranty. Instead, the code provides, in UCC § 2-714(3) and UCC § 2-715(1) and (2)(b), only for recovery of incidental and consequential damages. *Sims v. Ryland Group, Inc.*, 37 Md. App. 470, 378 A.2d 1 (1977).

10. Particular items and elements.

In breach-of-warranty action by buyer against manufacturer of defective heat pump that was installed by defendant's dealer in plaintiff's new house, court held (1) that case involved breach of binding compromise settlement between plaintiff

and defendant; (2) that defendant's attempt in its limited express warranty to limit its liability respecting any implied warranties was invalid under both Mississippi statute abolishing privity requirement between buyer and manufacturer and also Mississippi UCC § 2-719(4); (3) that defendant was "seller" within meaning of Mississippi privity statute; (4) that because of defendant's breach of implied warranty of merchantability that attached to heat pump under Mississippi UCC § 2-314(1) and (2)(c), plaintiff was entitled to recover (a) damages under Mississippi UCC § 2-714(2) for difference between actual value of heat pump at time plaintiff accepted it and its value in absence of defendant's breach of warranty, and (b) consequential damages under Mississippi UCC § 2-715(2)(a) for additional expenses incurred in purchasing one wood heater and two kerosene heaters; and (5) that case did not justify award of punitive damages for defendant's breach. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

In buyer's action for breach of warranty attaching to a laser that did not operate at warranted power output, court held (1) that evidence supported district court's determination that seller had breached its express warranty and that buyer's remedy of repair or replacement of defective parts had failed in its essential purpose under UCC § 2-719(2); (2) that seller had been given adequate notice of its breach under UCC § 2-607(3)(a); and (3) that since laser was merely component of printer project that buyer was working on and intent of parties, as evidenced by their contract and circumstances of case, was that buyer should bear risk of such project, buyer could recover only breach-of-warranty damages under UCC § 2-714(2) and incidental damages under UCC § 2-715(1), but not consequential damages under UCC § 2-715(2)(a) for salaries of buyer's employees who were working on the printer project, since such damages were not contemplated by parties. *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933 (7th Cir. Ill. 1978).

In action by contractor against supplier of concrete based on supplier's furnishing

of substandard strength concrete, contractor was entitled to recover, inter alia, cost of tests performed to determine if slab containing substandard concrete could still be used as floor of building, even though buyer accepted concrete within meaning of UCC § 2-607, where, after performing customary cylinder tests to determine general quality, buyer had no reasonable way to discover insufficiency of compression strengths and cost of tests to determine whether concrete could still be used was reasonable incidental expense within meaning of UCC § 2-715. *S.M. Wilson & Co. v. Reeves Red-E-Mix Concrete, Inc.*, 39 Ill. App. 3d 353, 350 N.E.2d 321 (5th Dist. 1976).

In action for breach of express warranty by purchaser of drive-in business for damage caused by collapse of canopy, method of computing damages which granted plaintiff value of used canopy was reasonable under circumstances. *Rose v. Helm*, 501 P.2d 753 (Colo. Ct. App. 1972).

Loss due to insolvency of buyer's customer was too remote and speculative to be considered consequential damages recoverable by buyer after seller's alleged breach of contract by reason of late delivery of goods. *Buffalo Tank Div., Bethlehem Steel Corp. v. Acme Process Equip. Co.*, 54 Pa. D. & C.2d 328 (1972), *aff'd*, 222 Pa. Super. 712, 294 A.2d 773 (1972).

Items of damages not expressly recognized as consequential may not be recovered. *A. & H. Paint Co. v. Michaels*, 21 Lawr. L.J. 153 (Pa. 1962).

11. —Attorneys' fees.

Attorney's fees, in the absence of express statutory or contractual provision therefor, are not recoverable by buyer under UCC § 2-715(2) as consequential damages for seller's breach. *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

Rule that buyer may collect as consequential damages his expenses including attorney's fees in defending title after having given notice to his seller that third party is claiming adversely was especially compelling where auction company should have known that potential loss to automobile dealer bidding at auction included costs which might be incurred in defending suits by subvendees, as well as lost

profit of resale and incidental expense, if title received by dealer turned out to be bad. *Universal C.I.T. Credit Corp. v. State Farm Mut. Auto. Ins. Co.*, 493 S.W.2d 385 (Mo. Ct. 1973).

Attorney's fees, in the absence of statute, are not recoverable as consequential damages. Therefore a buyer who sues his seller because of the buyer's liability to his purchasers cannot recover from the original seller the buyer's attorney's fees in defending the suits brought by his purchasers or for representing the buyer in the suit with the seller. *A. Ertag, Inc. v. Lehigh Valley Mills, Inc.*, 29 Lehigh L.J. 487 (Pa. 1962).

12. —Loss of crops or livestock in production.

The purchaser of defective farm equipment machinery was entitled to recover the down payment he had invested in a grain drill and combine where the seller and the financing corporation were deemed to be one and the same because of their interlocking directorates. The purchaser was also entitled to consequential damages to his soybean crop where the seller should reasonably have known that the delivery of the defective equipment and the unsuccessful repairs would cause such delay in the planting of the purchaser's crop. *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15 (Miss. 1981).

In action against manufacturer for breach of express and implied warranties in sale of heavy-duty farm equipment purchased to prepare land to grow crops, consequential damages for buyer's loss of crops were recoverable under "special-circumstances" provision of UCC § 2-714(2) and consequential-damages provisions of UCC § 2-714(3) and UCC § 2-715(2)(a), where buyer's act of planting crops was foreseeable by seller and buyer, although aware of defects in purchased equipment at time of planting crops, was put by equipment's defects into position of having to choose between using defective equipment and suffering damaged crops or else having no crops at all (holding that trial court did not err in refusing to limit buyer's damages to impaired value of equipment purchased). *Prutch v. Ford Motor Co.*, 40 Colo. App. 129, 574 P.2d 102

(1977), rev'd on other grounds, 618 P.2d 657 (Colo. 1980).

In action by dairy farmer to recover damages from feed manufacturer for loss of milk production and injury to dairy cows allegedly caused by use of feed supplement, evidence was sufficient to establish breach of both express warranty under UCC § 2-313 and implied warranty of fitness under UCC § 2-315 where there was express representation that use of feed supplement would increase milk production and where there was decrease in milk production resulting from wrong instructions about proper way to use feed supplement. However, farmer was not entitled to recover consequential damages under UCC §§ 2-714(3) and 2-715(2): (1) considering that there were many factors which could affect production of milk, to permit use of difference between total milk production figures for whole of year during which feed supplement was used for approximately 2 months, and total production figures for whole of preceding year, as measure of damages, would constitute rankest form of speculation and conjecture; (2) with respect to damages for decrease in market value of cows affected by feed, it could not reasonably be determined how much of decline in valuation of cattle between date of injury and day on which they were sold was attributable to injury and how much to changes, if any, in market value between those dates. *Shotkoski v. Standard Chem. Mfg. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

Under UCC § 2-715 damages for breach of implied warranty in sale of bull semen were limited to calf crop that might have been expected from 1971 breeding but did not extend to loss of second calf crop. *Baden v. Curtiss Breeding Serv.*, 380 F. Supp. 243 (D. Mont. 1974).

Where equipment seller was aware of buyer's silage crops and the need for their expeditious harvesting, that the equipment was specially adapted to that purpose, that there was no other such equipment available in the area for lease or purchase in time to complete the harvest, where the fair net value of the crop was \$10 per ton and 1,425 tons were ready for harvest, and where the jury found that the seller had repudiated the sales con-

tract, buyer's consequential damages under UCC § 2-715 would crop loss. *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

Consequential damages could be recovered from seller who failed to deliver harvesting equipment where crop was virtually ready for harvest at time of purchase, and a lack of sufficient funds would excuse failure to make redelivery bond. *Lake Village Implement Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

13. —Loss of good will.

In action by hog producer against feed manufacturer for breach of warranty in connection with defective feed supplied by manufacturer, hog producer's losses on account of lost profits and diminished value as producing business were recoverable under UCC §§ 2-714 and 2-715 where feed manufacturer had close working relationship with hog producer time when defective feed was being fed and where there was ample evidence showing loss of goodwill and business reputation. *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749 (10th Cir. Wyo. 1975).

In action for breach of contract to deliver "top quality" Christmas trees, damages for loss of future profits resulting from loss of goodwill occasioned by buyer's inability to perform his contracts with florists whom he was to have supplied during Christmas season were entirely too speculative for reasonable calculation and could not be recovered under Pennsylvania law. *Traynor v. Walters*, 342 F. Supp. 455 (M.D. Pa. 1972).

Loss of customers represents too speculative an item to permit recovery therefore on breach of warranty. *A. & H. Paint Co. v. Michaels*, 21 Lawr. L.J. 153 (Pa. 1962).

In excluding recovery for loss of good will for breach of warranty the code continues the prior law. *A. & H. Paint Co. v. Michaels*, 21 Lawr. L.J. 153 (Pa. 1962).

The Uniform Commercial Code did not enlarge the scope of a buyer's damages to include a loss of good will. *Harry Rubin & Sons v. Consolidated Pipe Co. of Am.*, 396 Pa. 506, 153 A.2d 472 (1959).

14. —Loss of resale value.

Buyer was entitled to damages under UCC § 2-714(2), and to incidental dam-

ages under UCC § 2-714(3) and § 2-715(1), for seller's breach of express and implied warranties of fitness for particular purpose, and also express warranty by sample attaching to wrap coats purchased by buyer, where (1) samples of such coats were made part of basis of bargain and created express warranty under UCC § 2-313(1)(c) that all goods would conform to such samples, (2) seller knew that buyer was relying on seller to furnish goods that would be fit for buyer's particular purpose within meaning of UCC § 2-315, and (3) seller delivered over 3,700 nonconforming coats that were not fit for buyer's resale purposes. *Alafoss v. Premium Corp. of Am., Inc.*, 448 F. Supp. 95 (D. Minn. 1978), *aff'd in part, rev'd on other grounds*, 599 F.2d 232 (8th Cir. Minn. 1979).

Purchaser of conveyor-stacker, on justifiably revoking acceptance of equipment after giving defendant manufacturer-seller ample time to correct problems causing equipment not to function properly, was entitled under UCC § 2-711(1) to recover, as damages for defendant's breach of both express warranty and implied warranties of merchantability and fitness for particular purpose, price paid for equipment and also, under UCC § 2-715(1) and (2), incidental and consequential damages resulting from seller's breach, including purchaser's loss of profit in resale of equipment. *Barney Mach. Co. v. Continental M.D.M., Inc.*, 434 F. Supp. 596 (W.D. Pa. 1977).

15. —Lost profits; measure and evidence.

Loss may be determined in any manner which is reasonable under the circumstances, and does not require mathematical precision, therefore a plaintiff who has produced the best evidence available to him should not be denied recovery because the amount cannot be ascertained with the same precision as an ordinary claim for damages. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

In action by buyer of pizza oven against manufacture-seller for consequential damages for lost profits under UCC § 2-715(2)(a) arising from breach of implied warranties of merchantability and fitness of oven for particular purpose, (1) evi-

dence was sufficient to allow jury to conclude with reasonable certainty that buyer had suffered lost profits, at least to extent of \$8,000, because of increased labor costs that were attributable to defective oven, but (2) evidence was not sufficient to establish with reasonable certainty amount claimed by buyer as lost profits caused by alleged decrease in sales during period oven was used in buyer's business, since oven was not sole cause of such decrease in sales. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

In action by buyer of four oil tankers against shipbuilder-seller for consequential damages under UCC § 2-714(3) and § 2-715(2) for losses incurred when tankers were inoperative because of cargo-pump and expansion-joint failures, in which shipbuilder filed third-party complaint against manufacturer of defective cargo pumps and manufacturer of pumps filed fourth-party complaint against manufacturer of defective expansion joints, (1) shipbuilder-seller breached express warranty to buyer under UCC § 2-313(1) that tankers would be built to operate efficiently and also implied warranties under UCC § 2-314(1) and § 2-315 of merchantability and fitness of tankers for particular purpose (transportation of aviation fuels); (2) buyer of tankers was entitled only to consequential damages caused by defects in design and was not entitled to damages caused by defects in materials or workmanship; (3) shipbuilder-seller's foreseeable liability to buyer was \$500,000, which was amount of adjusted revenues lost by buyer when two of its tankers were inoperative because of cargo-pump and expansion-joint failures due to defective design; (4) manufacturer of defective cargo pumps breached its express and implied warranties to shipbuilder and was liable, in amount of \$2,000,000, for losses sustained by shipbuilder as result of cargo-pump and expansion-joint failures in tankers sold to buyer (including shipbuilder's liability to buyer for lost revenues during period tankers were inoperative), but was not liable to shipbuilder for cost of installing separate stripping on each tanker; and (5) manufacturer of defective expansion

joints, which were used in connection with cargo pumps, breached its express and implied warranties concerning such joints and was liable to manufacturer of pumps for costs of replacing all defective joints. *Falcon Tankers, Inc. v. Litton Sys.*, 380 A.2d 569 (Del. Super. 1977).

Seller of fabric was liable to buyer for breach of express warranties of merchantability and fitness for particular purpose, where buyer's purchase order stated that fabric was to be used for swimwear and that all "colors, prints and bonding processes must meet swimwear specifications," and where fabric supplied and subsequently manufactured into swimsuits was defective and failed to meet minimum performance standards for colorfastness; buyer, having given reasonable notice to seller under UCC § 2-607, was entitled to damages for credits issued to customers (including profits lost and costs of production for returns and allowances) plus cost of production of unsaleable swimsuits under UCC §§ 2-714 and 2-715, and to deduct such damages from purchase price under UCC § 2-717. *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973).

In action for breach of warranty related to greenhouse roofing panels, proper measure of damages for lost profits would be difference between reasonable value of each crop of chrysanthemums as actually raised and sold and reasonable market value of crop which would have been produced and sold had paneling been as warranted. *General Supply & Equip. Co. v. Phillips*, 490 S.W.2d 913 (Tex. Civ. App. 1972), writ ref'd n.r.e., (June 13, 1973).

In action against seller and manufacturer of truck for breach of warranty, buyer should have been permitted on issue of consequential damages in nature of loss of commercial profits to testify that he purchased truck for particular purpose and attempted to minimize damages by asking seller for substitute truck; that he always had commercial loads available and had lease contract during time truck was "down" or disabled due to alleged malfunctioning or non-conformity; and that his business records might serve as guide to establish lost profits. *Gramling v. Baltz*, 253 Ark. 352, 485 S.W.2d 183 (1972).

16. —Lost profits; allowed.

The loss by plaintiff, Mississippi corporation operating jewelry counters in department stores throughout southeast, of corollary sales as result of a breach of contract by defendant seller of wrist-watches, was a foreseeable consequence of the breach, inasmuch as very purpose of a "loss leader" promotion, in which plaintiff intended to engage by selling watches provided by the defendant at a sale price, was to increase the amount of corollary sales in plaintiff's establishment on the basis of increased patronage attracted by the sale, and plaintiff showed that defendant knew the watches would be used for this purpose. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

In buyer's action for damages for seller's breach of contract to sell unique porcelain animal figures and also specific performance of such contract under UCC § 2-716(1), district court ruled, on denying buyer's motion for preliminary injunction to restrain seller from disposing of figures remaining in its possession, (1) that since seller had distributed all but 50 figures to other buyers, plaintiff had already sustained major part of its business injury, (2) that plaintiff was not entitled to specific performance, since it had not demonstrated existence of any special circumstances that would justify penalizing other good-faith purchasers of such figures in order to grant specific performance to plaintiff, (3) that plaintiff's lost profits from seller's breach were susceptible of ascertainment for purpose of computing damages for nondelivery under UCC § 2-713(1) and incidental and consequential damages under UCC § 2-715(1) and (2), and (4) that plaintiff's total damage claim of nearly nine million dollars was an adequate remedy at law. *Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197 (S.D.N.Y. 1978).

In action by buyer of printing press against seller to recover damages for breach of warranty, evidence supported trial court's award of damages in sum of \$10,435 as buyer was entitled to consequential damages under UCC § 2-715(2)(a), even though buyer continued to use press in spite of many problems in effort to maintain his business, and

evidence that buyer spent 1000 hours trying to get machine to work properly, that press "jam ups" caused great loss of paper, and that buyer suffered loss of profits was sufficient to establish award of consequential damages. *Burrus v. Itek Corp.*, 46 Ill. App. 3d 350, 360 N.E.2d 1168 (3d Dist. 1977).

In proceeding based on seller's alleged breach of contract to sell buyer 4,150 tons of Class I steel, which matter was submitted to arbitration governed by Uniform Commercial Code, where court order submitting matter to arbitration stated that buyer would have right to sell and make deliveries of nonconforming steel rejected by buyer; where buyer, prior to such order, had informed seller that it would sell nonconforming steel for seller's account if seller did not give buyer other instructions within reasonable time; and where seller did not give any other instructions to buyer and buyer resold such steel, (1) seller had sufficient notice under UCC § 2-706 of buyer's intent to resell; (2) such resale under UCC § 2-604 did not constitute acceptance of goods; and (3) arbitrators under UCC § 2-715(1) properly allowed buyer sales commission on such resale as damages resulting from seller's breach. *North Am. Steel Corp. v. Siderius, Inc.*, 75 Mich. App. 391, 254 N.W.2d 899 (1977).

In action by hog producer against feed manufacturer for breach of warranty in connection with defective feed supplied by manufacturer, hog producer's losses on account of lost profits and diminished value as producing business were recoverable under UCC §§ 2-714 and 2-715 where feed manufacturer had close working relationship with hog producer during time when defective feed was being fed and where there was ample evidence showing loss of goodwill and business reputation. *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749 (10th Cir. Wyo. 1975).

If seller of cupric oxide had reason to know that buyer would resell material contracted for and if buyer did, in fact, enter resale contract, buyer would be entitled to any consequential damages, including loss of profits, which it could prove were result of seller's non-delivery. *Gulf Chem. & Metallurgical Corp. v. Sylvan*

Chem. Corp., 122 N.J. Super. 499, 300 A.2d 878 (1973), *aff'd*, 126 N.J. Super. 261, 314 A.2d 73 (1973), certification denied, 64 N.J. 507, 317 A.2d 720 (1974).

17. —Lost profits; denied.

In an action for negligence and breach of warranty arising from the defendant's sale of a combine to the plaintiff, evidence of lost profits was speculative and insufficient where (1) the plaintiff testified that his losses for 1994, 1995, and 1996 were the result of the defective combine, but he did not produce any other evidence — contracts, witness testimony, financial records — to establish his claims of lost acreage, and (2) he listed five farmers for whom he could have engaged in custom cutting, yet not one of these farmers was called to verify that they had the acreage available to cut and that they made other arrangements only because the plaintiff was not able to cut their crops. *Parker Tractor & Implement Co. v. Johnson*, — So. 2d —, 1999 Miss. LEXIS 346 (Miss. Nov. 4, 1999).

Buyer of boat, under counterclaim in admiralty action for damages for breach of contract and repairs caused by sinking of boat while work on it was in progress, was entitled to consequential damages under UCC § 2-715(2)(a) for (1) cost of repairs, including repairs made by buyer himself, (2) diminished value of boat after its sinking, (3) docking expenses, and (4) other sums spent by buyer in anticipation of sailing boat during following season. However, buyer was not entitled to consequential damages for loss of income from chartering boat, since such loss was not reasonably foreseeable by seller at time of entering into contract. *English Whipple Sailyard, Ltd. v. The Yawl Ardent*, 459 F. Supp. 866 (W.D. Pa. 1978).

Where evidence in support of counterclaim for damages for breach of implied warranty of fitness of concrete-mixing trucks showed that although such trucks broke down often enough to belie their fitness for the particular purpose for which they were designed, buyer's "down-time" (time lost when trucks were not in use) was still less than ten hours per year per truck, which was equivalent to only normal wear-and-tear usage, (1) buyer's claim under UCC § 2-714(3) and § 2-

715(2)(a) for lost profits during period trucks were not in use would not lie; (2) buyer's claim that \$15,000 per truck was required to keep trucks from falling into state of disrepair also failed because of trucks' surprisingly small "down-time"; (3) buyer's claims for impairment of reputation and punitive damages for willful breach were, under UCC § 2-714(1), outside loss resulting in ordinary course of events from seller's breach; and (4) value formula in UCC § 2-714(2) for breach of warranty was satisfied by award of \$7,000 damages for repairs to trucks. *Nassau Suffolk White Trucks, Inc. v. Twin County Transit Mix Corp.*, 62 A.D.2d 982 (2d Dep't 1978).

Buyer of air conditioning equipment was not entitled to recover consequential damages under UCC § 2-714 or UCC § 2-715, even though buyer lost subsequent job opportunities upon seller's breach of contract, where relationship of buyer and seller was on ad hoc basis and where seller had no reason to know of any subsequent job opportunities of buyer. *Chrysler Corp. v. E. Shavitz & Sons*, 536 F.2d 743 (7th Cir. Ill. 1976).

Although buyer knew there was some "pan scale" in some of the 732 bags of sugar retained by buyer out of 800 bags delivered in two shipments, fact that seller accepted return of 68 bags of defective sugar was insufficient evidence that buyer had not accepted sugar prior to inspection and, thus, was insufficient to support exclusion of implied warranty of merchantability under UCC § 2-316. However, buyer's knowledge of defect (pan scale) gained through inspection of sugar that was used to process frozen food prevented buyer from recovering lost profits as consequential damage under UCC § 2-715. Furthermore, although buyer notified seller in November, 1969, of 68 defective bags, notice in May, 1971, that other sugar was defective was not made within commercially reasonable time under UCC § 2-607 where buyer used sugar promptly after delivery in November of 1969. *Michigan Sugar Co. v. Jebavy Sorenson Orchard Co.*, 66 Mich. App. 642, 239 N.W.2d 693, 93 A.L.R.3d 357 (1976).

In action on account for lease-purchase of front-end loader, lessee-buyer was not

entitled to recover damages for loss of anticipated profits on grading contract, as alleged in counterclaim based on failure of consideration, fraud and breach of warranty, where contract, if it existed, was merely to furnish equipment and labor at hourly rate for unspecified sum and amount of time, making such damages too remote and speculative to be recoverable, and where lessee-buyer had covered his loss by obtaining suitable substitute tractor from another company. *Trawick v. Trax, Inc.*, 136 Ga. App. 62, 220 S.E.2d 70 (1975).

In action for rescission of contract for sale of cordwood business, record was insufficient to support award for loss of anticipated profits, in view of plaintiffs' inexperience in type of business involved and lack of detailed evidence on cost and profit factors. *Melms v. Mitchell*, 266 Or. 208, 512 P.2d 1336, 65 A.L.R.3d 376 (1973).

As to claim that failure of tractor retailer to deliver three-point hitch which was to be used on tractor in planting soybean crop resulted in decrease and loss in soybean production, proof was insufficient to take question of anticipated profits or consequential damages out of realm of speculation and conjecture and would present to jury incomplete set of figures as to anticipated profits; and recovery of such damages was properly denied. *Traylor v. Huntsman*, 253 Ark. 704, 488 S.W.2d 30 (1972).

Loss of profit is too speculative an item to permit recovery under breach of warranty. *A. & H. Paint Co. v. Michaels*, 21 Lawr. L.J. 153 (Pa. 1962).

18. —Lost profits; disclaimer.

In action by soybean processor against installer of processing equipment for damages resulting from explosion at processor's plant: (1) lost profits sought by processor clearly fell within purview of contract provision purporting to bar recovery of consequential damages; (2) contractual exclusion of consequential damages would not be stricken as unconscionable where contract was entered into in commercial setting by parties of equal bargaining power, there was total lack of type of oppression or unfair surprise which typified findings of unconscionability in

consumer sphere, where parties had been engaged in business endeavors for over 20 years, and where exclusion of liability often had been part of prior agreements; (3) and thus, provision was enforceable limitation on remedies available to processor under its contract theories. *Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co.*, 383 F. Supp. 606 (N.D. Iowa 1974).

In seller's third-party action against manufacturer of allegedly defective boiler for indemnification of any sum which might be assessed against it in action by buyer, seller's lost profits were element of consequential damages which were excluded by manufacturer's written warranty. *Council Bros. v. Ray Burner Co.*, 473 F.2d 400 (5th Cir. Fla. 1973).

19. —Loss of use.

In action for breach of implied warranty of merchantability attaching to sale of mobile home, buyer's items of consequential damage under UCC § 2-715(2)(a) properly included (1) fact that seller could have foreseen that if it delivered home one week late, buyer might have to spend \$280 to rent other accommodations, and (2) fact that seller could also have foreseen that home's defects might involve a \$45 repair bill (also holding that finance charges involved in home's sale were not recoverable as consequential damages). *Long v. Quality Mobile Home Brokers, Inc.*, 271 S.C. 482, 248 S.E.2d 311 (1978).

In buyers' action to revoke acceptance of motor home, (1) buyers' signing of document entitled "Pre-Delivery Inspection and Acceptance Declaration" by means of which seller had attempted both to disclaim all express and implied warranties and to limit remedies available to buyers, in event of a breach, to repair and replacement of defective parts—did not deprive buyers of right to seek revocation of acceptance under UCC § 2-608, since seller's failure after reasonable time to repair numerous defects in home resulted in failure of buyer's limited repair-and-replacement-of-parts remedy in its essential purpose within meaning of UCC § 2-719(2), thus enabling buyers to invoke any remedies available under Uniform Commercial Code; (2) buyers were entitled to revoke acceptance of home under UCC § 2-

608(1) and (2), since jury found on sufficient evidence that its defects had substantially impaired its value and that buyers' formal revocation of acceptance had immediately followed several months of nearly continuous efforts to have home repaired; and (3) buyers were entitled to only \$500 as consequential damages allowable under UCC § 2-715(2)(b) for loss of home's use, since there was no evidence of extent to which home would have been used by buyers if it had not been defective. *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

In action for damages for breach of warranty of title, brought by buyer of stolen automobile against seller wherein buyer had undisturbed possession of automobile for period of approximately nine months, value of automobile at time buyer's possession was disturbed so that he lost use of automobile was proper measure of damages. *Ricklefs v. Clemens*, 216 Kan. 128, 531 P.2d 94, 94 A.L.R.3d 572 (1975).

20. —Maintenance and storage costs.

Buyer of boat, under counterclaim in admiralty action for damages for breach of contract and repairs caused by sinking of boat while work on it was in progress, was entitled to consequential damages under UCC § 2-715(2)(a) for (1) cost of repairs, including repairs made by buyer himself, (2) diminished value of boat after its sinking, (3) docking expenses, and (4) other sums spent by buyer in anticipation of sailing boat during following season. However, buyer was not entitled to consequential damages for loss of income from chartering boat, since such loss was not reasonably foreseeable by seller at time of entering into contract. *English Whipple Sailyard, Ltd. v. The Yawl Ardent*, 459 F. Supp. 866 (W.D. Pa. 1978).

Although furniture was returned and accepted by seller upon seller's breach of sales contract and although no payment was made by buyer, under UCC § 2-715(1) buyer suffered incidental damages of \$150 for care and custody of goods and for handling and securing return subsequent to seller's breach. *Rodrigues v. R.H. Macy & Co.*, 88 Misc. 2d 985 (1977).

Where new car after its purchase exhibited numerous minor defects and one major defect (frequent stalling of engine), and

where seller, despite frequent attempts, failed seasonably to repair such defects, (1) buyer was entitled under UCC § 2-608(1)(a) to revoke acceptance of car, since its defects collectively constituted substantial impairment of its value to buyer; (2) seller did not have unlimited time to repair car's defects; (3) provision in owner's manual limiting buyer's remedies to repair or replacement of defective parts failed as exclusive remedy under UCC § 2-719(2), thus justifying buyer's cancellation of contract and recovery of purchase price; (4) buyer, although failing to prove consequential damages, was entitled to recover incidental damages under UCC § 2-715(1) for repair and maintenance costs incurred in caring for car; and (5) lack of privity between buyer and United States distributor of type of car in suit did not relieve distributor of liability to buyer, since distributor was unable to assure court of continued existence of corporate dealer from which buyer had purchased car. *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 98 A.L.R.3d 1170 (Minn. 1977).

In action by buyer who successfully revoked sale of mare which was erroneously described in sales catalog, buyer was entitled to recover under UCC § 2-715 expenses of insuring, care, custody, and preservation of the mare, but was not entitled to damages for fraud under UCC § 2-721, since fraud was not proved by clear and convincing evidence. *Keck v. Wacker*, 413 F. Supp. 1377 (E.D. Ky. 1976).

In action against seller of carpet for rescission of contract and damages, buyer was properly awarded damages for freight, handling and storage charges following discovery of nonconformity, pre-judgment interest on purchase price, and loss of profits under UCC §§ 2-711 to 2-715. *La Villa Fair v. Lewis Carpet Mills, Inc.*, 219 Kan. 395, 548 P.2d 825 (1976).

Purchaser of concrete blocks which were assembled to form planks and then fitted together to form floor and ceiling systems in various kinds of structures was entitled under UCC §§ 2-714(2) and (3) and 2-715(2)(a) to recover consequential damages for (1) blocks rejected after production, i.e., finished floor systems that could not be delivered to purchaser's cus-

tomers, (2) cost of disposing of defective blocks and floor systems, (3) cost of hiring additional personnel to inspect and handle broken and rejected blocks, (4) costs incurred because purchaser's customers rejected floor systems, not including delivery costs or lost profits, where seller knew exactly what end use would be made of blocks it manufactured and where, furthermore, damages claimed by purchaser at trial were virtually identical to those claimed in earlier letter to seller. However, purchaser was not entitled to recover (5) costs incurred to place special covers on defective ceilings and (6) costs incurred to point and caulk defective ceilings since these expenses could have been totally avoided had purchaser rejected planks at some point prior to their installation and, thus, they were losses which could have been prevented within meaning of UCC § 2-715(2)(a). *R.I. Lampus Co. v. Neville Cement Prods. Corp.*, 232 Pa. Super. 242, 336 A.2d 397 (1975), *aff'd*, 474 Pa. 199, 378 A.2d 288, 96 A.L.R.3d 290 (1977).

Upon cancellation of a contract for the purchase of a used airplane the buyer is entitled to recover so much of the purchase price as has been paid, incidental damages for expenses such as the cost of repairs reasonably incurred as a result of the seller's breach, and the cost of the care and custody of the plane. *Lanners v. Whitney*, 247 Or. 223, 428 P.2d 398 (1967).

21. —Personal injury.

Action for breach of contract of sale, to which four-year period of limitations prescribed by New York UCC § 2-725(1) applies, includes action for personal injuries arising from breach of warranty in view of provisions of (1) New York UCC § 2-318, which explicitly states that seller's warranty, whether express or implied, extends to any natural person who is injured in person by breach of the warranty, (2) New York UCC § 2-715(2)(b), which states that consequential damages resulting from seller's breach include injury to person or property proximately resulting from any breach of warranty, and (3) New York UCC § 2-719(3), which makes a limitation of consequential damages for injury to the person caused by consumer goods *prima facie* unconscionable. *McCarthy v.*

Bristol Labs., 61 A.D.2d 196 (2d Dep't 1978).

Airplane passenger could maintain action for personal injuries against airplane manufacturer, based on breach of implied warranty under UCC § 2-715, notwithstanding passenger was not in privity with manufacturer, and thus plaintiff could avail herself of 4-year statute of limitations provided in UCC § 2-725 which commenced to run from date of injury. *Roberts v. General Dynamics, Convair Corp.*, 425 F. Supp. 688 (S.D. Tex. 1977).

In action by buyers of mobile home against seller for breach of warranty, buyers were entitled to recover consequential damages under UCC § 2-715 for "injury to persons" where buyers testified concerning physical discomforts and illnesses suffered as result of lack of air-conditioning, heating and other defective conditions which existed in mobile home. *Mobile Home Sales Mgt. Inc. v. Brown*, 115 Ariz. 11, 562 P.2d 1378 (Ct. App. 1977).

A buyer's personal injuries resulting from a seller's breach of warranty clearly give rise to a cause of action for damages under this section. *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964).

While consequential damages might be recovered for breach of implied warranty of fitness for consumption in an action by the purchaser of a chicken pie against the manufacturer to recover for injuries resulting from a chicken bone lodging in the purchaser's throat as he was eating the pie, such damages would include only such personal injuries as "proximately" resulted from the breach. *DeGraff v. Myers Foods, Inc.*, 19 Pa. D. & C.2d 19 (1958).

22. —Personal injury; mental distress.

Under UCC § 2-714(3) and UCC § 2-715(2)(b), consequential damages are properly awarded for manufacturer's breach of express warranty in sale of casket, which on disinterment of decedent three months after his burial was found to contain water as against manufacturer's express warranty that casket would not leak, since no violence is done in such case to word "person" in UCC § 2-715(2)(b) to

hold that that which brings on grief does damage to the person. Furthermore, under UCC § 2-318, consequential damages are properly awarded for such breach of warranty to members of decedent's family other than member who purchased casket from defendant. *Hirst v. Elgin Metal Casket Co.*, 438 F. Supp. 906 (D. Mont. 1977).

Where parents purchased vault for casket of son, relying on funeral home's judgment to furnish suitable goods, and where vault was too small and parents had to return next day for another service and burial, parents were not barred from bringing action for breach of contract; implied warranty of fitness of UCC § 2-315 was neither excluded nor modified in any way by funeral home and parents would be entitled to incidental and consequential damages resulting from breach pursuant to UCC § 2-715. *Caldwell v. Brown Serv. Funeral Home*, 345 So. 2d 1341 (Ala. 1977).

Alleged lost sentimental value of wedding pictures is so highly speculative that it is not a proper element of damages recoverable under UCC § 2-715 for consideration by a jury. *Carpel v. Saget Studios, Inc.*, 326 F. Supp. 1331 (E.D. Pa. 1971).

23. —Property damage.

Buyer's damages for seller's breach of express and implied warranties in sale of antifreeze to be used in internal-combustion engines of buyer's construction equipment included (1) recovery under UCC § 2-714(2) of purchase price of such antifreeze, where antifreeze as delivered was worthless, and (2) consequential damages under UCC § 2-715(2)(a) for reasonable cost of labor and parts necessary to repair buyer's damaged equipment, and buyer's loss of income during period of repairs. *R. Clinton Constr. Co. v. Bryant & Reaves, Inc.*, 442 F. Supp. 838 (N.D. Miss. 1977).

In action by homeowner against seller of bricks to recover damages for breach of warranty, (1) implied warranty of fitness for particular purpose attached to sale of bricks under UCC § 2-315, where intended purpose for which they were to be utilized was expressly made known to defendant's salesmen, where plaintiff and his brick layer agent relied on judgment of defendant's salesmen in selecting suitable

brick for stated purposes, and where salesman had reason to know that there was such reliance, (2) warranty was not excluded by usage of trade under UCC § 2-316(3)(c), and (3) since bricks clearly were not fit for use to which they were put and since plaintiff's loss was proximate result thereof, he was clearly entitled to consequential damages under UCC § 2-715(2)(b). *Cohen v. Bratt & Doxey Supply Co.*, 51 A.D.2d 719 (2d Dep't 1976), appeal denied, 39 N.Y.2d 706 (1976).

Manufacturer or rear-axle assemblies used in trucks was liable to purchaser of trucks for damage to purchaser's property, notwithstanding lack of privity, where rear-axle assemblies were defective and caused serious physical harm not only to themselves but also to other drive train components; i.e., vibrations along drive train caused by defective rear-axle assemblies and truck manufacturers deficient design caused cracking of transmission casings, loosening of drive train components and serious premature wear to whole assembly, which damage, proximately resulting from nonmerchantability of rear-axle assemblies, was recoverable under UCC § 2-715(2)(b). *Walker Truck Contractors v. Crane Carrier Co.*, 405 F. Supp. 911 (E.D. Tenn. 1975).

24. —Repair costs.

Buyer of boat, under counterclaim in admiralty action for damages for breach of contract and repairs caused by sinking of boat while work on it was in progress, was entitled to consequential damages under UCC § 2-715(2)(a) for (1) cost of repairs, including repairs made by buyer himself, (2) diminished value of boat after its sinking, (3) docking expenses, and (4) other sums spent by buyer in anticipation of sailing boat during following season. However, buyer was not entitled to consequential damages for loss of income from chartering boat, since such loss was not reasonably foreseeable by seller at time of entering into contract. *English Whipple Sailyard, Ltd. v. The Yawl Ardent*, 459 F. Supp. 866 (W.D. Pa. 1978).

In action for damages for breach of warranty of merchantability of houseboat built for plaintiff buyer by defendant seller, where cost of repairing defects that

existed in houseboat at time of its delivery to plaintiff was \$37,000, and where court concluded that there was no sufficient basis for plaintiff's opinion that houseboat, as delivered, was worth \$80,000, but that it would have been worth \$160,000 if it had been delivered as warranted, proper measure of damages under UCC § 2-714(2) for defendant's breach of warranty was cost of repairs (\$37,000). Moreover, under UCC § 2-715(1), plaintiff was also entitled to recover incidental damages for replacement of defective parts and materials, labor in inspecting and servicing defective mechanical components, and docking fees incurred while such services were being performed. *Tarter v. MonArk Boat Co.*, 430 F. Supp. 1290 (E.D. Mo. 1977), *aff'd*, 574 F.2d 984 (8th Cir. Mo. 1978).

Under UCC § 2-714(3) and § 2-715(2), measure of damages in buyer's action for breach of warranty in sale of defective airplane, where plane was accepted by buyer, included expense of transporting plane for repairs, expense of overhauling plane, and damages for loss of plane's use while repairs were being made, since such expenses were proximately caused by seller's breach. *Miles v. Kavanaugh*, 350 So. 2d 1090 (Fla. App. 1977).

In action to recover damages for breach of warranty in connection with defective record albums manufactured by defendant, plaintiff corporation having entered into contract with defendant for production of records, under UCC §§ 2-714 and 2-715 plaintiff was not entitled to recover damages for loss of underwriting of its corporate stock where there was insufficient proof that defect was cause of loss of underwriting, nor for loss of costs in laying groundwork for production, including advertising and promotion and cost of keeping corporation going during period of delay caused by defect, where no appreciable market existed for record at time of breach; however, plaintiff was entitled to recover expenses reasonably incurred in its efforts to rehabilitate record following breach. *Great Am. Music Mach., Inc. v. Mid-South Record Pressing Co.*, 393 F. Supp. 877 (M.D. Tenn. 1975).

In action against seller of house for damages arising out of defective construc-

tion: (1) by analogy to UCC § 2-314(1), seller of house, who was in business of selling houses and who caused house to be built expressly for resale, made implied warranty against structural defects; and (2) by analogy to UCC § 2-715(1), measure of damages for breach of implied warranty of structural defects was reasonable cost of repairs. *Bolkum v. Staab*, 133 Vt. 467, 346 A.2d 210 (1975).

In seller's third-party action against manufacturer of allegedly defective boiler for indemnification of any sum which might be assessed against it in favor of buyer, incidental damages included, first, whatever amount might reasonably compensate seller for sums expended in adding to, shipping, and start-up services in boiler, diminished by salvage value of aperturances which seller had installed on bare pressure vessel; second, payments by buyer for repairs on boiler; and third, expenditures for labor incurred in attempt to make boiler functional. *Council Bros. v. Ray Burner Co.*, 473 F.2d 400 (5th Cir. Fla. 1973).

25. —Replacement costs.

In buyer's breach of contract action for seller's failure to deliver truck to be used in buyer's construction business, (1) since possibility that seller would not be able to obtain truck from manufacturer was clearly foreseeable contingency at time seller entered into contract (which contained no escape clause making obligation to deliver truck contingent on seller's obtaining it), manufacturer's cancellation of seller's order for truck was not "a contingency the nonoccurrence of which was a basic assumption on which the contract [between buyer and seller] was made" within meaning of UCC § 2-615(a), governing excuse of nonperformance; (2) buyer was entitled to "cover" damages under UCC § 2-712(1) and (2) for increase in net purchase price incurred in purchasing replacement truck; (3) buyer did not waive right to incidental and consequential damages by failure to cancel order for truck when seller first notified buyer that delivery would not be made on date buyer needed truck; and (4) buyer's loss of use of truck in buyer's business while buyer's old truck was being repaired, and also buyer's depreciation or trade-in value loss on old

truck, were properly recoverable items of incidental and consequential damages under UCC § 2-715(1) and (2), since such damages resulted from seller's breach. *Barbarossa & Sons v. Iten Chevrolet, Inc.*, 265 N.W.2d 655 (Minn. 1978).

Under UCC § 2-714(2), measure of damages for breach of warranty arising from failure of television and radio broadcasting tower, which collapsed during a blizzard, to have been constructed in accordance with specifications contained in contract of sale was, under special circumstances of case, replacement cost of tower less reasonable depreciation for its use by plaintiff before its collapse (applying South Dakota law, and also holding that plaintiff could recover consequential damages under UCC § 2-715(2)). *Community Television Servs., Inc. v. Dresser Indus., Inc.*, 435 F. Supp. 214 (D.S.D. 1977), *aff'd*, 586 F.2d 637 (8th Cir. S.D. 1978), *cert. denied*, 441 U.S. 932, 99 S. Ct. 2052, 60 L. Ed. 2d 660 (1979).

In action by buyer, a manufacturer of cup boosters, against seller of aluminum blanks used in manufacture of cup boosters for breach of option authorizing buyer to increase original order by 100 per cent, buyer was entitled to consequential damages pursuant to UCC § 2-715 for costs attributable to extra freight for blanks obtained from substitute supplier, and loss of profits in connection with contract for sale of finished cup boosters to United States which resulted from change in delivery schedule caused by seller's breach, however, buyer could not recover under UCC § 2-715 for transportation of its agent in seeking substitute blanks, and for down time of machinery due to seller's breach, where those damages were not satisfactorily proved. *R.L. Pohlman Co. v. Keystone Consol. Indus., Inc.*, 399 F. Supp. 330 (E.D. Mo. 1975).

Where asphalt supplier knew exact needs of paving contractor at time of supplying asphalt and, thus, supplier could have reasonably foreseen that if asphalt proved defective and failed, entire paving job would have to be taken up and completely redone, and where asphalt was in fact defective, ordinary measure of damages for breach of warranty stated in UCC § 2-714(2) was not applicable, due to spe-

cial circumstances showing proximate damages of different amounts, consisting of incidental and consequential damages as provided by UCC § 2-715. *Lanphier Constr. Co. v. Fowco Constr. Co.*, 523 S.W.2d 29 (Tex. Civ. App. 1975), *ref. n.r.e.* (July 23, 1975).

Supplier of roofing materials was liable to roofing contractor under UCC § 2-715 for amount of interest contractor was required to pay when he borrowed money to replace defective roof, as result of defective roofing materials supplied by supplier, where necessity of borrowing money to correct error was foreseeable incident of supplier's breach of warranty. *Certain-Teed Prods. Corp. v. Goslee Roofing & Sheet Metal, Inc.*, 26 Md. App. 452, 339 A.2d 302 (1975).

Buyer of animal offal chilling equipment that did not operate as warranted was entitled to recover difference between value of equipment as warranted and as accepted; since chillers were of no use to buyer, except for scrap, entire value (i. e., purchase price), could be recovered from seller, although buyer should tender chillers to seller so that seller might reclaim any salvage value. Buyer was also entitled to consequential damages where, in effort to overcome chiller's deficiencies, buyer purchased stainless steel offal handling trucks and hooks. *Puritan Mfg., Inc. v. I. Klayman & Co.*, 379 F. Supp. 1306 (E.D. Pa. 1974).

Where defendant seller contracted with plaintiff buyer to supply sleeve bearings impregnated with specified oil in accord with government specifications for use in manufacture of bomb fuses, but instead supplied bearings coated with non-conforming oil, and where, although bearings coated with non-conforming oil were visibly different from conforming bearings, buyer used non-conforming bearings to manufacture two lots of bomb fuses which were discovered to be defective as result of use of such bearings, buyer was not entitled to recover cost of remanufacturing defective lots of fuses as consequential damages under UCC § 2-715 since such damages were not proximately caused by seller's breach of warranty but by buyer's unreasonable failure to discover patent defect in bearings. *General Instrument*

Corp., F.W. Sickles Div. v. Pennsylvania Pressed Metals, Inc., 366 F. Supp. 139 (M.D. Pa. 1973), *aff'd*, 506 F.2d 1051 (3d Cir. Pa. 1974), *aff'd*, 506 F.2d 1052 (3d Cir. Pa. 1974).

26. Evidence and burden of proof.

Loss may be determined in any manner which is reasonable under the circumstances, and does not require mathematical precision, therefore a plaintiff who has produced the best evidence available to him should not be denied recovery because the amount cannot be ascertained with the same precision as an ordinary claim for damages. *Migerobe, Inc. v. Certina USA, Inc.*, 924 F.2d 1330 (5th Cir. 1991).

In action for breach of warranty in sale of used dry-cleaning equipment, where (1) no evidence was introduced to show market value of equipment, or its market value if it had been conforming, or cost of any repairs made to equipment, but (2) evidence was introduced to show consequential damages arising from alleged breach, such consequential damages were recoverable under UCC § 2-714(3) and § 2-715(2). *D & H Co. v. Shultz*, 579 P.2d 821 (Okla. 1978).

Where manufacturer breached express warranty attaching to sale of truck by failing to repair within reasonable time recurring problems in truck's steering, transmission, and air-conditioning systems, and also did not remedy truck's overheating problem and loss of engine power, express limitation of manufacturer's warranty remedy to repair and replacement of defective parts failed in its essential purpose, and under UCC § 2-719(2), all other contractual remedies were available to buyer (holding, however, that difference-in-value rule of damages in UCC § 2-714(2) was inappropriate to case, since buyer no longer had truck (which had been sold) and all claims for deficiency judgment on balance due had been forgiven; that buyer had not presented evidence of consequential damages recoverable under UCC § 2-715(2)(a); and that buyer had only proved \$200 in incidental damages recoverable under UCC § 2-715(1)). *Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 2 A.L.R.4th 567 (Mo. Ct. App. 1978).

Consequential damages recoverable under UCC § 2-715(2) for seller's breach of implied warranty need not be proved with mathematical certainty, but evidence must be sufficient to enable trier of fact to estimate actual damages with reasonable degree of certainty. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

In action arising out of repossession of allegedly defective truck purchased by plaintiff, plaintiff was not entitled to damages for breach of warranty under UCC § 2-714(2) where plaintiff presented no proof as to difference in value of truck at time and place of acceptance and value it would have had it if had been as warranted. Plaintiff also was not entitled to consequential damages under UCC § 2-715(2)(b) because of repossession of truck where evidence did not establish that repossession had proximately resulted from defendant's alleged breach of warranty (observing that repossession of truck had resulted from plaintiff's failure to make payments). *Chaney v. GMAC*, 349 So. 2d 519 (Miss. 1977).

Although seller was liable under UCC § 2-313 for breach of express warranty that cows had been vaccinated for shipping fever when in fact cattle had not been vaccinated within time period needed to develop adequate immunity, and shipping fever epidemic spread throughout newly purchased herd and some of buyer's cows in old herd, buyer did not sustain burden of proving additional consequential damages as allowed under UCC § 2-715, for lost calf crop and cost of feeding and maintaining nonproductive heifers where (1) spread of shipping fever could have been significantly reduced by separating sick animals from healthy ones, (2) buyer, an experienced rancher, knew of this precautionary measure but only wooden fence separated two herds, and (3) there was conflicting expert testimony as to whether heifers could have been successfully bred at an earlier period. *State v. Weekes*, 312 Minn. 1, 250 N.W.2d 590 (1977).

In action against seller of rebuilt diesel engine for breach of implied warranty of fitness for particular purpose, buyer was not entitled to relief under UCC §§ 2-

711(1) and 2-715(1), (2)(a), where there was insufficient evidence as to what caused engine to "seize up," rendering it inoperable. *Industrial Contract Carriers, Inc. v. Pacific Diesel Power Co.*, 277 Or. 677, 562 P.2d 164 (1977).

Lost profits may be recovered under UCC § 2-715(2), which allows consequential damages arising from seller's breach. The burden of proof in establishing damages for lost profits is on the buyer, but mathematical certainty is not required. Loss of profits can be recovered if the evidence shows with reasonable certainty both their occurrence and their extent (allowing buyer damages for loss of profits resulting from purchase of defective printing press). *Drier v. Perfection, Inc.*, 259 N.W.2d 496 (S.D. 1977).

Where seller of truck misrepresented age of vehicle to buyer, evidence submitted by buyer that truck drew a bid of \$5,600 at forced sale did not preclude inference that amount received approximated fair value in suit to recover damages for breach of express warranty under UCC § 2-714; buyer should have been allowed to offer proof of consequential damages pursuant to UCC § 2-715(2). *Bergenstock v. Lemay's G.M.C., Inc.*, 118 R.I. 75, 372 A.2d 69 (1977).

In action by buyer of wheat storage building to recover for breach of warranty, resulting in damage to wheat stored in building, where buyer testified that, because of damaged condition of wheat due to moisture and buyer's inability to treat it successfully, he was forced to sell wheat during May at price of \$2.03 per bushel, but that he usually sold wheat in December or January at which time price of wheat was \$4.50 to \$5.00 per bushel, and where such testimony was not supported or corroborated by other evidence, buyer failed to establish such damage as consequential damages with reasonable certainty. *Karlen v. Butler Mfg. Co.*, 526 F.2d 1373 (8th Cir. S.D. 1975).

In action by buyer to recover damages allegedly resulting from operational failure of ice maker purchased from defendant, UCC § 2-715(2) did not impose on buyer burden of proving that consequential damages could not reasonably have been prevented by cover or otherwise.

Kohlenberger, Inc. v. Tyson's Foods, Inc., 256 Ark. 584, 510 S.W.2d 555 (1974).

Consideration of large claim for consequential damages should be supported by appropriate pleadings setting out basis of claim; and award of consequential damages, apparently based in part on delay in furnishing television equipment in time to permit television station to open prior to 1968 election and thus obtain political advertising, was not supported by evidence, in absence of finding that lessor of equipment warranted or guaranteed that it would be in operating order prior to election. *KLPR TV, Inc. v. Visual Elecs. Corp.*, 465 F.2d 1382 (8th Cir. Ark. 1972).

27. Jury instructions.

In action by buyer against paint manufacturer for damages for breach of warranty in sale of red barn paint, where evidence showed (1) that plaintiff was professional barn painter, (2) that he had not followed defendant's instructions when adding linseed oil to paint purchased, (3) that paint on customers' barns painted by plaintiff had faded within one to four months after its application, (4) that plaintiff had had many complaints, and (5) that defendant had admitted that a "fade problem" existed with respect to paint purchased by plaintiff, which was of "bottom-of-the-line" quality, court held, on affirming judgment for plaintiff, (1) that although plaintiff's proof of causation was not direct, jury could still infer from fact that fading of paint was quite uniform that presence or absence of linseed oil had had no effect on paint's fading; (2) that since defendant had admitted that paint had a "fade problem" which was to be expected with that brand of paint, jury could therefore infer that paint was not "good barn paint" and that it violated defendant's express warranty made under UCC § 2-313(1)(a); (3) that jury could also infer that paint was not of merchantable quality in violation of implied warranty of merchantability created by UCC § 2-314(1) and (2)(c); (4) that, moreover, it was not fit for plaintiff's particular purpose in violation of implied warranty of fitness contained in UCC § 2-315; and (5) that trial court correctly instructed jury that it could consider whether plaintiff had complied with defendant's directions in deter-

mining whether plaintiff had been negligent, and whether such negligence had been a cause of his consequential damages (declining, since issue was first presented on appeal, to consider whether plaintiff's consequential damages should have reduced by 15 per cent to reflect proportion of fault that jury attributed to plaintiff's negligence, and stating that Minnesota courts had not determined whether comparative-fault principle should be applied in breach-of-warranty actions, although

its application seemed equitable and appropriate under UCC § 2-715(2)(b)). *Chatfield v. Sherwin-Williams Co.*, 266 N.W.2d 171 (Minn. 1978).

In action by cattle buyer against seller for breach of express and implied warranties as to age and pregnancy condition of cattle, trial court's failure to instruct jury on incidental damages under UCC § 2-715 was not prejudicial to defendant seller. *Dold v. Sherow*, 220 Kan. 350, 552 P.2d 945 (1976).

RESEARCH REFERENCES

ALR. Measure of damages in action for breach of warranty of title to personal property as the value of the property or the price plus interest. 13 A.L.R.2d 1372.

Recovery for loss of goodwill occasioned by use of unfit materials. 28 A.L.R.2d 591.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury. 75 A.L.R.2d 39.

Extent of liability of seller of livestock infected with communicable disease. 87 A.L.R.2d 1317.

Elements and measures of damages for breach of warranty in sale of horse. 91 A.L.R.3d 419.

Buyer's incidental and consequential damages from seller's breach under UCC § 2-715. 96 A.L.R.3d 299.

Products liability: inconsistency of verdicts on separate theories of negligence, breach of warranty, or strict liability. 41 A.L.R.4th 9.

Auction sales under UCC § 2-328. 44 A.L.R.4th 110.

Recoverability of compensatory damages for mental anguish or emotional distress for breach of service contract. 54 A.L.R.4th 901.

Products liability: Manufacturer's postsale obligation to modify, repair, or recall product. 47 A.L.R.5th 395.

Third-party beneficiaries of warranties under UCC § 2-318. 50 A.L.R.5th 327.

Am Jur. 22 Am. Jur. 2d, Damages § 456-459.

67A Am. Jur. 2d, Sales §§ 1310, 1318, 1329, 1355, 1360 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1121 et seq (remedies of buyer; damages).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1701 et seq (incidental and consequential damages of buyer).

2 Am. Jur. Trials, Investigating Particular Civil Actions, §§ 31-37 (products liability claims).

10 Am. Jur. Trials, Exploding Bottle Litigation §§ 1 et seq.

12 Am. Jur. Trials, Products Liability Cases §§ 1 et seq.

13 Am. Jur. Trials, Boiler Explosion Cases §§ 1 et seq.

14 Am. Jur. Trials, Glass Door Accidents §§ 1 et seq.; Liquefied Petroleum (LP) Gas Fires and Explosions §§ 1 et seq.

17 Am. Jur. Trials, Power Press Accident Cases §§ 1 et seq.

17 Am. Jur. Proof of Facts, Automobile Tire Defects and Hazards, §§ 59 et seq. (proofs respecting blowout accidents and explosion of tire while being mounted).

18 Am. Jur. Proof of Facts, Farm Machinery Accidents, § 76 (proof of overturning of row-crop tractor because of operator's negligence); § 77 (proof of injuries from unguarded tractor power take-off shaft); § 78 (proof of hay baler injuries caused by improper operating instructions); § 79 (proof of improper removal of operator's safety bar from hay bale stacker); § 80 (proof of corn picker injuries caused by failure to provide proper operating instructions and to install necessary safety devices); § 81 (proof of explosion of cast-iron flywheel on ensilage cutter).

21 Am. Jur. Proof of Facts, Side Effects of Drugs, § 43 (proof of injury produced by drug side effects); § 44 (proof of teratological side effect caused by a drug).

43 Am. Jur. Proof of Facts 2d 577, Wrongful Termination of Dealership.

CJS. 77A C.J.S., Sales §§ 49, 66 et seq.

Law Reviews. McIntosh, Tort Reform in Mississippi: An Appraisal of the New

Law of Products Liability, Part I. 16 Miss. C. L. Rev. 393, Spring, 1996.

McIntosh, Tort Reform in Mississippi: An Appraisal of the New Law of Products Liability, Part II, 17 Miss. C. L. Rev. 277, Spring, 1997.

§ 75-2-716. Buyer's right to specific performance or replevin.

(1) Specific performance may be decreed where the goods are unique or in other proper circumstances.

(2) The decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just.

(3) The buyer has a right of replevin for goods identified to the contract if after reasonable effort he is unable to effect cover for such goods or the circumstances reasonably indicate that such effort will be unavailing or if the goods have been shipped under reservation and satisfaction of the security interest in them has been made or tendered. In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests upon acquisition of a special property, even if the seller had not then repudiated or failed to deliver.

SOURCES: Codes, 1942, § 41A:2-716; Laws, 1966, ch. 316, § 2-716, eff March 31, 1968; Laws, 2001, ch. 495, § 10, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, added the second sentence in (3).

Cross References — Action of replevin, generally, see §§ 11-37-101 et seq.

Rights of unsecured creditors as subject to buyer's rights to recover goods, see § 75-2-402(1).

Buyer's rights on seller's insolvency with respect to goods not shipped but paid for in whole or in part, see § 75-2-502.

Action by seller for price, as comparable to buyer's rights, see § 75-2-709.

Remedy of buyer where seller fails to deliver or repudiates, see § 75-2-711(2)(b).

Documents of title, see §§ 75-7-101 et seq.

Negotiable document of title outstanding, see § 75-7-602.

JUDICIAL DECISIONS

1. In general.

In determining whether specific performance is an appropriate remedy for breach of contract, one consideration is the adequacy of damages to protect the expectation interest of the injured party. The traditional legal remedy, a judgment for the purchase price less what the seller

with reasonable diligence could obtain from another buyer, is often attended by difficult measurement problems, the presence of which suggests an equitable remedy. Another important consideration is the level of transaction costs between the parties, and unless those costs are so high that no voluntary exchange can take

place, the court should order specific performance. *Osborne v. Bullins*, 549 So. 2d 1337 (Miss. 1989).

Since specific enforcement will not be decreed if performance sought is impossible or in violation of rights of third person superior to those of plaintiff, court would not grant specific performance of contract for sale of 600 limited edition porcelain figures, where defendant had in its possession only 50 such figures and could not obtain more without violating rights of good-faith purchasers. *Joneil Fifth Ave. Ltd. v. Ebeling & Reuss Co.*, 458 F. Supp. 1197 (S.D.N.Y. 1978).

Where uncontradicted testimony showed that some components of plaintiff's stereo system, allegedly worth \$10,000, were irreplaceable, that other components were replaceable with great difficulty, that system had been assembled over 15-year period, and that plaintiff had personally designed and built parts of it to match that type of system, system had unique value within meaning of UCC § 2-716(1) and fell into category of property that was not readily obtainable because of scarcity (action for specific performance of contract to repurchase stereo system in which court held that chancellor had erred in not finding that system was sufficiently unique to justify equitable jurisdiction of chancery court). *Cumbest v. Harris*, 363 So. 2d 294 (Miss. 1978).

In buyer's action for damages and specific performance of contract to sell two "Reddies" machines for processing butter and margarine into table-service pats, where court found that seller had breached contract, that machines were unique within meaning of UCC § 2-716(1), and that sale would not violate contract provision which provided that such sale could be made if it did not jeopardize seller's business, seller would be ordered to specifically perform contract. However, buyer's claim for damages, although not precluded by UCC § 2-716(2), would be denied because damages sought were speculative, even when measured by rule that loss of value of use of property, rather than loss of profits, is proper measure of damages for breach of contract to deliver property. *Dexter Bishop Co. v. B. Redmond & Son*, 58

A.D.2d 755 (1st Dep't 1977), appeal denied, 45 N.Y.2d 705 (1978).

In buyer's suit for specific performance, where seller, after agreeing to sell all cotton produced by him during 1973 crop year, cancelled contract two months later for buyer's failure to furnish required performance bond within two-week deadline set by seller and buyer thereafter furnished seller with letter of credit (which would expire before cotton was picked) in amount of such bond before buyer finally sent bond itself, (1) since written contract between parties did not specify time bond was to be furnished, UCC § 2-309(1) applied and required that bond be furnished within reasonable time; (2) in determining what was reasonable time, Comment 6 to UCC § 2-309(1) would be followed; (3) under Comment 6, effective communication of proposed time limit calls for response, and failure to reply constitutes acquiescence in such time limit; (4) although buyer did not acquiesce in seller's proposed time limit which was sufficient for answering, new trial would be necessary on issue as to whether buyer furnished bond within reasonable time because buyer's response communication did not answer such issue; and (5) if at new trial buyer should be found to have furnished bond within reasonable time, buyer's remedy would not be suit for specific performance under UCC § 2-716(1), but would be suit under UCC § 2-712(2) for damages for breach of contract, since buyer could have purchased other cotton on open market as cover for cotton not furnished by seller. *Weathersby v. Gore*, 556 F.2d 1247 (5th Cir. 1977).

In replevin action by buyer against seller to obtain possession of supposedly used Ferrari sports car of limited availability that seller ordered for buyer from another dealer, where car on seller's receipt thereof proved to be virtually new racing vehicle, not intended for highway use, that seller wished to retain for himself, and where parties were shown to have modified in writing prior oral agreement under which buyer was to be sold "used" car in suit, seller's conduct in claiming that since such car was "new" it was not what buyer had ordered did not meet standards of good faith imposed by UCC § 1-201(19) and UCC § 2-103(1)(b); and when car was identified to contract

buyer had right to replevin under UCC § 2-716(3), since he was unable to effect cover and there was no other way for him to protect himself against loss of such deposit on car. *Tatum v. Richter*, 280 Md. 332, 373 A.2d 923 (1977).

Under UCC § 2-716, remedy of specific performance may be applicable to contracts for sale of grain if there are proper circumstances; however, in absence of findings of uniqueness or other proper circumstances, remedy of specific performance was not available to enforce contract for sale of grain. *Tower City Grain Co. v. Richman*, 232 N.W.2d 61 (N.D. 1975).

In action by group of gasoline service station operators seeking mandatory injunction directing oil company to fill all orders for gasoline with reasonable promptness, court would make fair and reasonable allocation within meaning of federal regulations. *G.W.S. Serv. Stations,*

Inc. v. Amoco Oil Co., 75 Misc. 2d 40 (1973).

Acceptance of additional nonconforming hog fence panels did not in itself bar buyer's right to counterclaim, in action by seller for price of additional panels, for damages resulting from nonconformity either of panels initially received by him or of additional panels. *Jones v. Atkins*, 254 Ark. 472, 494 S.W.2d 448 (1973).

Certificates of public convenience issued to a trucker by the Interstate Commerce Commission and the Pennsylvania Public Utility Commission are unique, within the meaning of subsection (1) of this section, and therefore a contract for the sale of a trucking business, its good will, a piece of real estate, and the transfer of ICC and PUC certificates owned by the sellers was a proper subject for a decree of specific performance. *McCormick Dray Line, Inc. v. Lovell*, 13 Pa. D. & C.2d 464 (1958).

RESEARCH REFERENCES

ALR. Specific performance of contract which expressly leaves open for future agreement or negotiation the terms of payment for property. 68 A.L.R.2d 1221.

Specific performance of sale of goods under UCC § 2-716. 26 A.L.R.4th 294.

Auction sales under UCC § 2-328. 44 A.L.R.4th 110.

Am Jur. 67A Am. Jur. 2d, Sales §§ 1179, 1181, 1183, 1187.

71 Am. Jur. 2d, Specific Performance §§ 83 et seq., 187 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1151-2:1154 (remedies of buyer; specific performance or replevin).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1711 et seq (right of buyer to specific performance or replevin).

37 Am. Jur. Trials 597, Trial Report: Defending a Celebrity in a Breach of Employment Contract Case.

43 Am. Jur. Proof of Facts 2d 577, Wrongful Termination of Dealership.

CJS. 77A C.J.S., Sales § 389 et seq.

81 C.J.S., Specific Performance §§ 64 et seq.

§ 75-2-717. Deduction of damages from the price.

The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.

SOURCES: Codes, 1942, § 41A:2-717; Laws, 1966, ch. 316, § 2-717, eff March 31, 1968.

Cross References — Assurance of due performance, see § 75-2-609.

JUDICIAL DECISIONS

1. In general.

A television supplier's failure to properly install television equipment was a material breach of a lease/purchase agreement for television sets to be installed in a motel, which gave the motel owner the right to withhold payment pursuant to § 75-2-717. *Patel v. Telerent Leasing Corp.*, 574 So. 2d 3 (Miss. 1990).

Under UCC § 2-717, buyer may not withhold payment due seller under some contracts in order to cover losses under other contracts between parties. *National Farmers Org. v. Bartlett & Co., Grain*, 560 F.2d 1350 (8th Cir. Mo. 1977).

Evidence by buyer of natural gas under output contracts with producer-seller which showed that charts measuring seller's production had been altered to indicate that more gas had been produced and delivered to buyer than was actually the case, but which failed to show who had altered such charts, did not support finding that seller was guilty of breach of contract with regard to gas supplied to buyer and that buyer, as a result, had right under UCC § 2-717 to deduct damages for such breach from unpaid contract price (applying Ohio law; stating that UCC § 2-717 is not general set-off provision that permits buyer of goods to adjust its contract obligations according to equities perceived by buyer, and that buyer must first incur damages resulting from seller's breach before it can deduct anything from contract price under UCC § 2-717). *Columbia Gas Transmission Corp. v. Larry H. Wright, Inc.*, 12 Ohio Op. 3d 95, 443 F. Supp. 14 (S.D. Ohio 1977).

Where buyer of new pickup truck sued dealer, manufacturer, and credit company to which buyer's installment-purchase contract had been assigned for damages for breach of warranty and credit company counterclaimed for balance due on purchase price, rights of credit company were subject under UCC § 9-318 to all terms of contract between buyer and dealer, including any defenses arising from such contract, since buyer had not agreed pursuant to UCC § 9-206 not to assert any claims or defenses against credit company and language of contract did not prevent

buyer from asserting defense of breach of express warranty. However, although evidence sustained defense of breach of express warranty, such defense was not complete bar to credit company's counterclaim for balance due on purchase price but could only be used under UCC § 2-717 as setoff against balance due, since buyer at time of suit had driven vehicle approximately 49,000 miles and had not rejected acceptance of vehicle or properly revoked acceptance thereof under the Uniform Commercial Code. *Arnold v. Ford Motor Co.*, 90 N.M. 549, 566 P.2d 98 (1977).

Where plaintiff buyer acknowledged that it owed open-account claim set forth in defendant seller's counterclaim, defendant was entitled to prejudgment interest on amount of such claim, and plaintiff was not excused from liability for such interest by UCC § 2-717, since UCC § 2-717 relates to offsetting rights from same contract and defendant's counterclaim had no relation to contract or subject matter of plaintiff's complaint. *Frigiquip Corp. v. Parker-Hannifin Corp.*, 75 F.R.D. 605 (W.D. Okla. 1976).

Where buyer and seller allegedly entered into two oral contracts for sale of corn, although seller denied existence of second contract, and where, after seller had partially completed delivery under first contract, buyer refused to promise to pay seller for balance of corn that remained to be delivered under first contract and stated he would instead withhold payment as setoff against second contract: (1) buyer wrongfully asserted right of setoff under UCC § 2-717 since there were two separate contracts and (2) seller justifiably withheld delivery under UCC §§ 2-610 and 2-703, having interpreted seller's statement as wrongful refusal to pay on contract and as repudiation thereof. *Jurek v. Thompson*, 308 Minn. 191, 241 N.W.2d 788 (1976).

Seller of dictating machines was entitled to recover agreed price from buyer who accepted delivery under UCC § 2-607(1); seller's termination of buyer as its exclusive distributing agent could not be asserted as defense where, after buyer learned that it was no longer distributor,

it failed to take timely action to revoke acceptance under UCC § 2-608 or to give seller timely notice of election to offset damages under UCC § 2-717; nor could buyer rely on UCC § 2-609 right to demand adequate assurance of performance where buyer had already accepted goods in question. *Gutor Int'l AG v. Raymond Packer Co.*, 493 F.2d 938 (1st Cir. Mass. 1974).

Seller of fabric was liable to buyer for breach of express warranties of merchantability and fitness for particular purpose, where buyer's purchase order stated that fabric was to be used for swimwear and that all "colors, prints and bonding processes must meet swimwear specifications," and where fabric supplied and subsequently manufactured into swimsuits was defective and failed to meet minimum performance standards for colorfastness; buyer, having given reasonable notice to seller under UCC § 2-607, was entitled to damages for credits issued to customers (including profits lost and costs of production for returns and allowances) plus cost of production of unsaleable swimsuits un-

der UCC §§ 2-714 and 2-715, and to deduct such damages from purchase price under UCC § 2-717. *Rite Fabrics, Inc. v. Stafford-Higgins Co.*, 366 F. Supp. 1 (S.D.N.Y. 1973).

In a contract action for goods sold and delivered, the defendant's request for a ruling that the defendant was entitled to deduct its damages resulting from the plaintiff's breach of warranty by reason of late delivery from any balance of the price still due the plaintiff, was properly granted. *Butane Prods. Corp. v. Empire Adv. Serv., Inc.*, 39 Mass. App. Dec. 92 (1967).

This section does not apply to a contract for the sale of the capital stock of a corporation and its subsidiaries which provides as a condition precedent to acceptance of the contract that the financial condition of such corporations at the time of closing should not be less favorable than the statements as of a given prior date, so as to permit the buyer, after acceptance, to recover damages by reason of the diminution in net worth of the corporations. In re *Carter*, 390 Pa. 365, 134 A.2d 908 (1957).

RESEARCH REFERENCES

Am Jur. 67A Am. Jur. 2d, Sales §§ 1270 et seq.

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:1721 et seq (deduction of damages from the price).

CJS. 77A C.J.S., Sales §§ 326 et seq.

§ 75-2-718. Liquidation or limitation of damages; deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceed

(a) the amount to which the seller entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent (20%) of the value of the total performance for which the buyer is obligated under the contract or five hundred dollars (\$500.00), whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this chapter other than subsection (1), and

(b) the amount of value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this chapter on resale by an aggrieved seller (Section 2-706) [§ 75-2-706].

SOURCES: Codes, 1942, § 41A:2-718; Laws, 1966, ch. 316, § 2-718, eff March 31, 1968.

Cross References — Unconscionable contract or clause, see § 75-2-302.

Resale of goods by seller, see § 75-2-706.

Limitation of remedies for breach of warranty, see § 75-2-725(2).

JUDICIAL DECISIONS

1. In general.
2. Liquidated damages.
3. Recovery of payment by buyer.
4. Punitive damages.

1. In general.

Parties to a contract are given broad latitude within which to fashion their own remedies for breach of contract. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

Buyer of vegetable oils, bailed with an independent warehouse by seller in order to keep it out of the possession of the buyer until payment was made, had no right to assert a lien against it. *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

2. Liquidated damages.

Liquidated damages of \$75,000 paid as earnest money on a house and real property improperly operated as a forfeiture of the entire down payment upon breach of the contract, without regard to whether the vendor had actually suffered that amount of damage, since it would be inequitable to award the vendor any amount in excess of a sum reasonably necessary to cover actual damages; under this section, which is applicable to goods and not land sales contracts, but which was persuasive under these facts, a term fixing unreason-

ably large liquidated damages is void as a penalty. *Maxey v. Glindmeyer*, 379 So. 2d 297 (Miss. 1980).

Test for deciding whether commercial sales contract provision for attorney's fees liquidated at 30 per cent of recovered amount was proper under UCC § 2-718(1) was (1) whether stipulated fee reasonably related to normal fee attorney would charge for collection of contract claim or, alternatively, (2) whether stipulated fee was commensurate with fee actually agreed to by plaintiff and his attorney; however, even if stipulated fee corresponded to actual arrangement, but would nevertheless be unreasonably large, then it would be void as penalty. *Equitable Lumber Corp. v. IPA Land Dev. Corp.*, 38 N.Y.2d 516, 344 N.E.2d 391, 98 A.L.R.3d 577 (1976).

Where sellers entered into three grain contracts calling for delivery of wheat and durum to elevator company on or before April 30 and May 15, 1973, where each contract provided in part that in case of default in delivery of grain, sellers agreed to pay elevator company "as liquidated damages" difference between contract price and market price on specified date (i.e., April 30, May 15, and May 30, respectively), where, pursuant to contract, deliveries of part of grain called for were made and accepted periodically from January

through July 11, 1973, but where on July 12 sellers notified elevator company they would make no further deliveries pursuant to contracts, elevator company was bound by liquidated damages clause in contract: (1) liquidated damage clause, without evidence to contrary, was so inconsistent with any other damage remedy as to require conclusion that it contemplated exclusiveness within meaning of UCC § 2-719(1)(b); (2), furthermore, clause would not be held unconscionable particularly where contract was one of "adhesion" and challenger was drafter of contract. *Ray Farmers Union Elevator Co. v. Weyrauch*, 238 N.W.2d 47 (N.D. 1975).

So-called liquidated damages clause in health spa contract which provided for full payment whether or not purchaser used the spa's facilities was in the nature of a penalty under UCC § 2-718, subd 1, and thus unenforceable against purchaser who attempted to cancel said contract shortly after its execution without ever participating in any reducing sessions or otherwise using seller's facilities. *Nu Dimensions Figure Salons v. Becerra*, 73 Misc. 2d 140 (1973).

This section was referred to for comparison purposes in *Security Safety Corp. v. Kuznicki* (1966) 350 Mass 157, 213 NE2d 866, where it was determined that a provision for liquidated damages in a contract for the installation of a fire detection system constituted a penalty and, as such, was void. *Security Safety Corp. v. Kuznicki*, 350 Mass. 157, 213 N.E.2d 866 (1966).

The Uniform Commercial Code allows the seller actual damages where liquidated damages have not been stipulated. *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

In deciding a case to which earlier law was applicable, the court noted with approval language of this section favoring upholding and enforcing provisions for liquidated damages provided in the case of delays involving contract performance even in the absence of proof or actual damages resulting from the delay, where it was reasonable at the time of making the contract to so contract. *Bethlehem*

Steel Co. v. City of Chicago, 234 F. Supp. 726 (N.D. Ill. 1964), *aff'd*, 350 F.2d 649 (7th Cir. Ill. 1965).

A provision in a contract for sale of refrigerated cases and equipment for a food market, giving the seller authority to enter judgment for the full amount of the unpaid purchase price plus interest and costs, with 15 per cent added for attorney's fees, was unconscionable and void as providing for "unreasonably large liquidated damages," and where the seller entered judgment for the full amount of the purchase price without showing what goods had been identified in the contract, what goods were standard items and readily salable, what goods had actually been specially manufactured prior to cancellation of the contract by the buyers, and what goods had been or would be readily resold, the default judgment would be opened. *Denkin v. Sterner*, 10 Pa. D. & C.2d 203 (1956).

3. Recovery of payment by buyer.

Under New Jersey law, subd (2) ¶ (b) of this section destroys the old rule that the buyer forfeits his downpayment by breaching the contract of purchase, and provides that where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds reasonable liquidated damages specified in the agreement, or in the absence of such terms, 20 percent of the value of the total performance. *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 N.Y.2d 344, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

These sections destroy the old rule that the buyer forfeits his down payment by breaching the contract, by providing that where the seller justifiably withholds delivery of the goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payment exceeds reasonable liquidated damages specified in the agreement, or "in the absence of such terms, 20 percent of the value of the total performance for which the buyer is obligated under the contract or \$500, whichever is smaller." *Procter & Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*,

16 N.Y.2d 344, 213 N.E.2d 873, 21 A.L.R.3d 1320 (1965).

4. Punitive damages.

Where (1) contract for sale of specially constructed grain-storage tanks provided that minimum cancellation charge of 15 percent would be imposed if contract were cancelled, (2) contract was cancelled by buyer, and (3) seller showed actual damages substantially in excess of 15 percent of contract price, cancellation provision was not invalid under UCC § 2-718(1), dealing with liquidated damages, on alleged ground that it called for imposition of penalty instead of liquidated damages. *Coast Trading Co. v. Parmac, Inc.*, 21 Wash. App. 896, 587 P.2d 1071 (1978).

The manufacturer of a truck will not be held liable for punitive damages where its conduct was merely negligence or stubbornness in failing to issue proper warning and to withdraw the product sooner from the market, since punitive damages may only be awarded where there is an intention to cause harm or reckless indifference or wantonness short of criminality, and such conduct must be clearly shown, any doubts to be resolved against liability where many suits will or may be brought against the manufacturer and the total possible claims could aggregate millions of dollars. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. N.Y. 1967).

RESEARCH REFERENCES

ALR. Seller's right to retain down payment on buyer's unjustified refusal to accept goods. 11 A.L.R.2d 701.

Contractual liquidated damages provisions under UCC Article 2. 98 A.L.R.3d 586.

Am Jur. 67A Am. Jur. 2d, Sales §§ 894 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1161, 2:1163 (liquidation or limitation of damages; deposits).

6 Am. Jur. Pl & Pr Forms, Sales, Forms 2:1128, 2:1135 (remedies of buyer; damages).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1731 et seq (liquidation or limitation of damages; deposits).

2 Am Law Prod Liab 3d, Waiver, Exclusion, or Modification of Warranties § 22:37.

CJS. 78 C.J.S., Sales §§ 395, 406 et seq.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 32:17.

§ 75-2-719. Contractual modification or limitation of remedy.

(1) Subject to the provisions of subsections (2), (3), and (4) of this section and of Section 75-2-718 on liquidation and limitation of damages,

(a) The agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Code.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

(4) Any limitation of remedies which would deprive the buyer of a remedy to which he may be entitled for breach of an implied warranty of merchantability or fitness for a particular purpose shall be prohibited. The provisions of this subsection do not apply to computer hardware, computer software, and services performed on computer hardware and computer software, which are sold between merchants.

SOURCES: Codes, 1942, § 41A:2-719; Laws, 1966, ch. 316, § 2-719; Laws, 1976, ch. 385, § 4; Laws, 1998, ch. 513, § 4, eff from and after July 1, 1998.

Cross References — Statutory prohibition against limitation of remedies or disclaimer of liability as to implied warranty of merchantability or fitness for particular purpose, see § 11-7-18.

Unconscionable contract or clause, see § 75-2-302.

Contractual limitations as restricting buyer's rights on improper delivery, see § 75-2-601.

Modification of sales warranties where security agreement exists, see § 75-9-206(2).

JUDICIAL DECISIONS

1. In general.
2. Scope.
3. Exclusivity of remedy.
4. —Cumulative or optional remedy.
5. —Cumulative or optional remedy; election.
6. —Repair or replacement.
7. —Repair or replacement; motor vehicles.
8. —Return and repayment.
9. Failure of essential purpose.
10. —Failure to repair.
11. —Failure to repair; timeliness.
12. —Defect not amenable to repair.
13. —No failure of essential purpose.
14. Limitation or exclusion of consequential damages.
15. —Conscionability.
16. —Conscionability; bargaining position.
17. —Conscionability; form of disclaimer.
18. Conscionability; commercial loss.
19. —Conscionability; personal injury.
20. —Course of dealing or trade usage.
21. —Fraud.
22. —Latent defects.
23. —Negligence.
24. Pleading.
25. Evidence and burden of proof.

1. In general.

In breach-of-warranty action by buyer against manufacturer of defective heat pump that was installed by defendant's

dealer in plaintiff's new house, court held (1) that case involved breach of binding compromise settlement between plaintiff and defendant; (2) that defendant's attempt in its limited express warranty to limit its liability respecting any implied warranties was invalid under both Mississippi statute abolishing privity requirement between buyer and manufacturer and also Mississippi UCC § 75-2-719(4); (3) that defendant was "seller" within meaning of Mississippi privity statute; (4) that because of defendant's breach of implied warranty of merchantability that attached to heat pump under Mississippi UCC § 75-2-314(1) and (2)(c), plaintiff was entitled to recover (a) damages under Mississippi UCC § 75-2-714(2) for difference between actual value of heat pump at time plaintiff accepted it and its value in absence of defendant's breach of warranty, and (b) consequential damages under Mississippi UCC § 75-2-715(2)(a) for additional expenses incurred in purchasing one wood heater and two kerosene heaters; and (5) that case did not justify award of punitive damages for defendant's breach. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

Under UCC § 2-316, a seller may disclaim all warranties if certain specific requirements are met, and such a provision is called a "disclaimer." On the other hand, a guarantee that recognizes the

existence of warranties but limits the seller's liability to a particular remedy is a limitation of remedy, rather than a disclaimer, and is controlled by UCC § 2-719. *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

Although it may appear illogical that the Uniform Commercial Code permits a disclaimer of warranties altogether if the requirements of UCC § 2-316 are met but makes it very difficult to create a warranty and then limit the remedy (see UCC § 2-719(3)), this inconsistency can be clarified on the basis of public policy concerning consumer protection. In the case of consumer goods, to give what looks like relief in the form of an express warranty, but actually is not, is unconscionable as a surprise limitation and thus is against public policy. *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

Parties to a contract are given broad latitude within which to fashion their own remedies for breach of contract. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

UCC § 2-719 is an expansion of § 71 of the Uniform Sales Act. *Bafle v. Remchow & Ford Motor Co.*, 58 Schuyl. L. Rec. 108 (Pa. 1962).

The parties are left free to shape their remedies to their particular requirements, and reasonable agreements limiting or modifying remedies are to be given effect. *Bafle v. Remchow & Ford Motor Co.*, 58 Schuyl. L. Rec. 108 (Pa. 1962).

2. Scope.

Defendant auto dealer, which improperly applied a manufacturer's rustproofing material to plaintiff's automobile resulting in rust damage, is liable to the plaintiff for consequential damages, i.e., the cost of repairing his car, since the application of the rustproofing material was a contract between the plaintiff and defendant which the defendant breached by improper application and inadequate inspection and the defendant cannot claim as a defense the terms of section 2-719 of the Uniform Commercial Code that limits a buyer's remedies to the return of the goods and repayment of the price since the contract is for services and not a sales contract and for the same reason the four-year Statute of Limitations under section

2-725 of the Uniform Commercial Code is not applicable but rather the six-year Statute of Limitations under CPLR 213. *Perlmutter v. Don's Ford, Inc.*, 96 Misc. 2d 719 (1978).

Limitation-of-liability provision in contract to design and construct new recovery system in pulp mill relieved defendant engineering and construction company from liability for consequential damages, including loss of profits and products, arising from breach of contract or breach of warranty, even if defendant had breached its contractual obligation to repair or replace defective equipment, because (1) contract in suit, not being transaction in goods, was not governed by UCC Art 2, and (2) even if UCC Art 2 should be deemed to apply to such contract, defendant's obligation to repair or replace defective equipment was not exclusive or limited remedy under UCC § 2-719(2) that failed in its essential purpose, so as to cause limitation-of-liability provision in contract to be ineffective, since plaintiff had recourse to substantial damages under contract's terms and defendant's failure to repair or replace defective equipment would not leave plaintiff without minimum adequate remedies. *Lincoln Pulp & Paper Co. v. Dravo Corp.*, 436 F. Supp. 262 (D. Me. 1977).

3. Exclusivity of remedy.

In action by buyer for damages for breach of warranty attaching to television tower that collapsed during winter blizzard, where (1) seller expressly warranted in sale contract that tower would withstand uniform wind load of 60 pounds per square foot on flat surfaces of tower, (2) seller's advertising literature contained affirmation of fact that tower would safely withstand maximum wind velocities and ice loads to which it would normally be subjected, and (3) sale contract contained limitation-of-liability clause that limited buyer's remedies for breach of express warranty in sale contract to repair and replacement of defective parts and provided such limited warranty was in place of all other warranties, court held (1) that under UCC § 2-719(2), seller's limitation-of-liability clause applied only to limited and exclusive warranty set forth in sale contract, (2) that it did not apply to

broader warranty created by affirmation of fact in seller's advertising literature, (3) that such affirmation created express promise that tower's durability would be greater than that stated in technical specifications in sale contract concerning wind load, (4) that seller's general disclaimer of all warranties, other than limited one set forth in sale contract, did not restrict buyer's right to recovery for breach of warranty, since UCC § 2-316(1) provides that language which limits or negates an express warranty is inoperative if it cannot reasonably be construed consistently with language that creates such warranty, and (5) that sufficient evidence supported finding that seller had breached its express warranty in affirmation in its advertising literature that tower would withstand wind and ice loads to which it would normally be subjected. *Community Television Servs., Inc. v. Dresser Indus., Inc.*, 586 F.2d 637 (8th Cir. S.D. 1978), cert. denied, 441 U.S. 932, 99 S. Ct. 2052, 60 L. Ed. 2d 660 (1979).

In action for damages by buyer of meat containing excess fat content, settlement formula in purchase contract was exclusive remedy of buyer within meaning of UCC § 2-719(1), even though word "exclusive" was not used, where parties had numerous previous transaction and on one such occasion had utilized the settlement formula as the measure of damages and where the formula was not unconscionable within meaning of UCC § 2-302(1) in light of parties prior dealings and status as professional traders. *J.D. Pavlak, Ltd. v. William Davies Co.*, 40 Ill. App. 3d 1, 351 N.E.2d 243 (1st Dist. 1976).

Where sellers entered into three grain contracts calling for delivery of wheat and durum to elevator company on or before April 30 and May 15, 1973, where each contract provided in part that in case of default in delivery of grain, sellers agreed to pay elevator company "as liquidated damages" difference between contract price and market price on specified date (i.e., April 30, May 15, and May 30, respectively), where, pursuant to contract, deliveries of part of grain called for were made and accepted periodically from January through July 11, 1973, but where on July 12 sellers notified elevator company they

would make no further deliveries pursuant to contracts, elevator company was bound by liquidated damages clause in contract: (1) liquidated damage clause, without evidence to contrary, was so inconsistent with any other damage remedy as to require conclusion that it contemplated exclusiveness within meaning of UCC § 2-719(1)(b); (2), furthermore, clause would not be held unconscionable particularly where contract was one of "adhesion" and challenger was drafter of contract. *Ray Farmers Union Elevator Co. v. Weyrauch*, 238 N.W.2d 47 (N.D. 1975).

Clause in which airplane manufacturer stated that it "shall not be liable for failure or delay in making delivery for any cause whatsoever" and allowing buyer to cancel order with full deposit refunded, although speaking in terms of liability rather than remedies, was used to express intent that return of deposit was to be sole remedy. *Dow Corning Corp. v. Capitol Aviation, Inc.*, 411 F.2d 622 (7th Cir. Ill. 1969).

A warranty of a new motor truck and chassis to be free from defects in material and workmanship, and expressly made in lieu of all other warranties, express or implied, validly excluded all warranties other than the one stated. *Cox Motor Car Co. v. Castle*, 402 S.W.2d 429 (Ky. 1966).

4. —Cumulative or optional remedy.

UCC § 2-719(1)(b) creates a presumption that clauses prescribing remedies are cumulative, rather than exclusive, and intent to create a sole remedy must be clearly expressed in the contract. *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. Tex. 1978).

Under UCC § 2-719(1)(a), a seller and buyer may limit the buyer's remedies to the repair and replacement of nonconforming goods. However, UCC § 2-719(1)(b) creates a presumption that contractual clauses prescribing remedies are cumulative to other available remedies. Consequently, if the parties intend that the stated, or limited, remedy is to be the sole and exclusive remedy, that intent must be clearly expressed. *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

Where contract forms did not clearly express intent to limit buyer's remedy to

repair or replacement, contract clauses prescribed cumulative rather than exclusive remedies. *Nitrin, Inc. v. Bethlehem Steel Corp.*, 35 Ill. App. 3d 596, 342 N.E.2d 79 (1st Dist. 1976).

5. —Cumulative or optional remedy; election.

Where buyer refused to perform contract for sale of yacht, seller's resort to contractual remedy which allowed it to retain buyer's cash deposit as liquidated damages, precluded it from obtaining specific performance. *Miller Yacht Sales, Inc. v. Scott*, 311 So. 2d 762 (Fla. App. 1975), cert. denied, 328 So. 2d 843 (Fla. 1976).

In action arising out of breach of "forward contract" for sale of cotton, wherein contractual provision as to liquidated damages did not indicate that it was exclusive remedy in event of breach, under UCC § 2-719, resort to that remedy was optional and grower could not elect to breach contract and pay liquidated damages. *Carolinas Cotton Growers Ass'n v. Arnette*, 371 F. Supp. 65 (D.C.S.C. 1974).

Decision by buyer of color television broadcasting equipment to affirm sales contract and sue for its breach precluded subsequent claim by buyer that contractual limitation of seller's liability to repair or replacement of defective items could not apply because contract was induced by fraud. *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. Tex. 1973).

6. —Repair or replacement.

In action by general contractor, which had been employed by defendant utility to construct power plant, for retained funds that utility refused to disburse, which action was ultimately settled with regard to all parties except for utility's counterclaim against subcontractor that supplied turbine generator and turbines for project, district court held, with respect to utility's claims against subcontractor for (a) breach of implied warranties by furnishing defective equipment, (b) cost of replacement power, and (c) lost profits, (1) that general contractor had express and implied authority from utility to execute limitation-of-liability agreement as to subcontractor's warranties and general contractor's remedies thereon, (2) that

such limitation-of-liability agreement was valid and insulated subcontractor from utility's claims for cost of replacement power, lost profits, and breach of implied warranties, (3) that utility did not obtain contract rights under UCC § 2-207 by virtue of subcontractor's price quotation, utility's purchase order, and events subsequent to execution of such documents, (4) that under UCC § 2-719(1)(a), general contractor's standard contract terms, when construed in light of both its course of dealing with subcontractor and usage of the trade, also limited utility's recovery to cost of replacement and repair of defective parts, and did not permit recovery under any legal theory for cost of replacement power, and (5) that cost of replacement power was consequential damage for breach of warranty attaching to power-generating equipment involved in suit. *Ebasco Servs., Inc. v. Pennsylvania Power & Light Co.*, 460 F. Supp. 163 (E.D. Pa. 1978).

Liability of seller for damages arising from allegedly defective photographic paper would be limited under UCC § 2-719 to replacement of paper pursuant to seller's statement of limited liability, notwithstanding no evidence existed that limitation of liability was negotiated, where buyer ordered seller's paper knowing that seller had stated in its instructions for use of paper and on each package delivered to buyer that seller's liability would be limited to replacement of defective paper. *D.O.V. Graphics, Inc. v. Eastman Kodak Co.*, 46 Ohio Misc. 37, 347 N.E.2d 561 (1976).

Damages recoverable from supplier of valve for breach of implied warranties were validly limited under UCC § 2-719 by supplier's express warranty providing, *inter alia*, that supplier's obligation was limited to repairing or furnishing, without charge, replacement part, that supplier's liability, whether based on warranty, contract or negligence, would not in any case exceed cost of correcting defect in equipment, and that, in any event, supplier could not be held liable for any special, indirect or consequential damages. *Beaunit Corp. v. Volunteer Natural Gas Co.*, 402 F. Supp. 1222 (E.D. Tenn. 1975).

Warranty of boiler, which provided for repair or replacement of defective parts or

for refund of purchase price, did not clearly specify that remedy or remedies provided thereby were to be exclusive of any other remedy under various provisions of Florida UCC, so that these remedies provided for were cumulative rather than exclusive. (But further warranty providing that "No claim for cost of removing, returning, or replacing defective parts or for other consequential damages will be allowed" clearly expressed exclusive limitation on measure of damages. *Council Bros. v. Ray Burner Co.*, 473 F.2d 400 (5th Cir. Fla. 1973).

Warranty provided that repair and replacement of defective parts constituted fulfillment of all manufacturer's liabilities to turbine purchaser; held, this was adequate to limit liabilities under UCC § 2-719(1)(a). *Southwest Forest Indus., Inc. v. Westinghouse Elec. Corp.*, 422 F.2d 1013 (9th Cir. 1970), cert. denied, 400 U.S. 902, 91 S. Ct. 138, 27 L. Ed. 2d 138 (1970).

In construction contract wherein contractor guaranteed the materials to be free from defects and warranted that installation would be in good and workmanlike manner, limitation of contractor's liability to replacement or correction of defective materials and/or installation was valid and enforceable. *Magar v. Lifetime, Inc.*, 187 Pa. Super. 143, 144 A.2d 747 (1958).

7. —Repair or replacement; motor vehicles.

In action by buyer against seller and manufacturer for breach of express and implied warranties attaching to tire that blew out and injured plaintiff, where plaintiff, who lacked sufficient evidence of tire's defect, contended that manufacturer's attempt in its written guaranty to avoid liability for personal injuries was unconscionable under UCC 2-719(3), that such part of the guaranty should have been excised from the warranty agreement, and that the warranty agreement as thus excised should have been submitted to the jury, court, on agreeing with plaintiff's contention, held that nothing in record overcame clear unconscionability of limiting plaintiff's remedy, as defendant's warranty had attempted to do, to repair or replacement of tire in suit, and that on new trial of case, plaintiff should proceed

only on theory of breach of express warranty. *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

Where manufacturer breached express warranty attaching to sale of truck by failing to repair within reasonable time recurring problems in truck's steering, transmission, and air-conditioning systems, and also did not remedy truck's overheating problem and loss of engine power, express limitation of manufacturer's warranty remedy to repair and replacement of defective parts failed in its essential purpose, and under UCC § 2-719(2), all the contractual remedies were available to buyer (holding, however, that difference-in-value rule of damages in UCC § 2-714(2) was inappropriate to case, since buyer no longer had truck (which had been sold) and all claims for deficiency judgment on balance due had been forgiven; that buyer had not presented evidence of consequential damages recoverable under UCC § 2-715(2)(a); and that buyer had only proved \$200 in incidental damages recoverable under UCC § 2-715(1). *Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 2 A.L.R.4th 567 (Mo. Ct. App. 1978).

Where all defects complained of by buyer of new automobile were completely remedied within four months of purchase and where "as is" language of sales agreement effectively excluded implied warranties under UCC § 2-316, seller and manufacturer did not breach limited warranty that seller would repair or replace any part found to be defective in factory materials or workmanship within 12 months from date of original retail sale and delivery pursuant to UCC § 2-719. *Henderson v. Ford Motor Co.*, 547 S.W.2d 663 (Tex. Civ. App. 1977).

Provisions of written warranty, accompanying sale of new truck, by which manufacturer's and seller's liability was limited to repair and replacement of defective parts, and excluding any further liability, would be valid under UCC § 2-719. *K-Lines, Inc. v. Roberts Motor Co.*, 273 Or. 242, 541 P.2d 1378 (1975).

8. —Return and repayment.

In action for breach of express and implied warranties attaching to contract to trade horses at agreed values, (1) al-

though all elements of express warranty under UCC § 2-313(1) were established, plaintiff's sole remedy, under contract provision permitted by UCC § 2-719(1)(b), was to return his horse in exchange for specified monetary credit on another, and higher-priced, horse, and (2) under UCC § 2-316(3)(b), plaintiff's refusal to examine horse traded to him precluded any recovery for breach of implied warranty of merchantability. *Calloway v. Manion*, 572 F.2d 1033 (5th Cir. Tex. 1978).

9. Failure of essential purpose.

It is the essence of a sales contract that at least minimum adequate remedies be available. Therefore, under UCC § 2-719(2) and Official Comment 1, if an apparently fair and reasonable clause, because of circumstances, fails in its purpose or operates to deprive either party of the substantial value of his bargain, that party is entitled to utilize the general remedy provisions of the code. *Envirex, Inc. v. Ecological Recovery Assocs.*, 454 F. Supp. 1329 (M.D. Pa. 1978), *aff'd*, 601 F.2d 574 (3d Cir. Pa. 1979).

In buyer's action for breach of warranty attaching to laser that did not operate at warranted power output, court held (1) that evidence supported district court's determination that seller had breached its express warranty and that buyer's remedy of repair or replacement of defective parts had failed in its essential purpose under UCC § 2-719(2); (2) that seller had been given adequate notice of its breach under UCC § 2-607(3)(a); and (3) that since laser was merely component of printer project that buyer was working value of the bargain, it must give way to the general remedy provisions of Article 2. *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933 (7th Cir. Ill. 1978).

Where manufacturer breached express warranty attaching to sale of truck by failing to repair within reasonable time recurring problems in truck's steering, transmission, and air-conditioning systems, and also did not remedy truck's overheating problem and loss of engine power, express limitation of manufacturer's warranty remedy to repair and replacement of defective parts failed in its essential purpose, and under UCC § 2-

719(2), all the contractual remedies were available to buyer (holding, however, that difference-in-value rule of damages in UCC § 2-714(2) was inappropriate to case, since buyer no longer had truck (which had been sold) and all claims for deficiency judgment on balance due had been forgiven; that buyer had not presented evidence of consequential damages recoverable under UCC § 2-715(2)(a); and that buyer had only proved \$200 in incidental damages recoverable under UCC § 2-715(1). *Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 2 A.L.R.4th 567 (Mo. Ct. App. 1978).

If buyer's limited remedy fails in its essential purpose within meaning of UCC § 2-719(2), buyer is thereupon entitled to resort to any remedies that are available under the Uniform Commercial Code. *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

Uniform Commercial Code is ambiguous with respect to effect that failure of limited remedy under UCC § 2-719(2) has on other contractual provisions. UCC § 2-719(2) provides that if remedy fails of its essential purpose, "remedy may be had as provided in this act." The Official Comment to this section states that if a remedy fails of its purpose, "it must give way to the general remedy provisions" of Article 2. The general remedy provisions of Article 2 provide not only for the recovery of consequential damages (see UCC § 2-714(3) and § 2-715(2)), but also for their exclusion where this is not unconscionable (see UCC § 2-719(3)). In cases involving the failure of an exclusive remedy in a warranty provision that also excludes liability for consequential damages, the provisions that limit liability also fail, and the plaintiff is entitled to the full array of remedies provided by the Uniform Commercial Code, including the recovery of consequential and incidental damages (see UCC § 2-715(1) and (2)) (where seller's "New Equipment Warranty," given on sale of tractor to buyer, stated that warranty was in lieu of all warranties, including liability for incidental and consequential damages, and court stated that if buyer was able to prove existence of defect in tractor and also that limited remedy contained in seller's new equipment war-

ranty had failed in its essential purpose, buyer would be entitled to full array of remedies provided by Uniform Commercial Code, including recovery of consequential and incidental damages under UCC § 2-714(3) and § 2-715(1) and (2)). *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

Contracts are entered into based on premise that each party will in good faith make reasonable effort to meet its obligations under the contract; if liability limitation provision is relied upon to protect party from results of its violation of this premise, provision may not pass test of reasonableness and there may be failure of essential purpose under UCC § 2-719(2); in making this determination it may be appropriate that contract negotiations be considered to determine whether they placed contractual relationship of parties upon different basis. *J.A. Jones Constr. Co. v. City of Dover*, 372 A.2d 540 (Del. Super. 1977), appeal dismissed, 377 A.2d 1 (Del. Supr. 1977).

Where buyer of new car justifiably revoked acceptance of car, UCC § 2-719(2), dealing with effect of failure of exclusive or limited remedy, precluded invocation of clause in purchase contract which limited seller's liability for incidental damages resulting from car's defects. *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 98 A.L.R.3d 1170 (Minn. 1977).

In proceeding based on seller's alleged breach of contract to sell buyer 4,150 tons of Class I steel, which matter was ordered submitted to arbitration governed by Uniform Commercial Code, where arbitrators found that steel contracted for was nonconforming, that price adjustment for delivery of nonconforming steel was accepted trade usage, and that such remedy had failed because of seller's refusal to grant adjustment, declining price of Class II steel, and limited market for Class II steel, (1) trade usage of price adjustment was part of contract of sale and acted as limitation on buyer's rejection remedy under UCC § 2-601(a); but (2) since limited remedy of trade-usage price adjustment had failed in its essential purpose within meaning of UCC § 2-719(2), buyer was entitled under UCC § 2-601(a) to reject entire shipment of steel. *North Am. Steel*

Corp. v. Siderius, Inc., 75 Mich. App. 391, 254 N.W.2d 899 (1977).

In action on contract under which buyer agreed to purchase minimum amount of liquid chemicals per month and seller agreed to make available for purchase maximum amount of such chemicals per month, provision requiring either party to cancel agreement prior to seeking damages for breach was unenforceable under UCC § 2-719(2), on grounds that it failed to serve its essential purpose, and agreement was governed by general remedy provisions of UCC § 2-711(1) where seller breached contract by failing to meet its minimum monthly commitments, buyer in reliance on agreement had entered into continuing resale obligations with third parties, and operation of provision would have deprived buyer of substantial value of its bargain, i.e., guaranteed source of product availability. *Chemetron Corp. v. McLouth Steel Corp.*, 381 F. Supp. 245 (N.D. Ill. 1974), *aff'd*, 522 F.2d 469 (7th Cir. Ill. 1975).

Where truck warranty specifically excluded coverage for "Loss of time, inconvenience, loss of use of the vehicle or other consequential damages," buyer was not entitled to recover damages for loss of use of his truck as result of alleged breach of express warranty, since he had previously relied upon that warranty to have his truck repaired, and could not now repudiate it; but loss of use of vehicle might be subject of damage when it was alleged and proved that limited warranty had failed in its essential purpose. *Orr Chevrolet, Inc. v. Courtney*, 488 S.W.2d 883 (Tex. Civ. App. 1972).

10. —Failure to repair.

In an action for damages arising out of the breach of an express warranty to repair a used automobile purchased by the plaintiff, the defendant could not limit its liability to the costs of repairs and replacement of parts under the warranty as authorized by § 75-2-719 where it wrongfully failed to carry out its obligations under the warranty; the plaintiff had no incidental or consequential damages as contemplated by § 75-2-715 where he had purchased another second-hand car and had failed to take any reasonable action to minimize the defendant's breach of the

warranty but had simply abandoned the car at the dealer's. Where the car had been driven for over two years and 26,649 miles before the plaintiff had experienced any difficulty with it, the reasonable measure of damages under § 75-2-714 would be the fair market value the car would have had with that age and number of miles with no mechanical difficulty as experienced by the plaintiff, and the value it had had in its defective condition, and for which the defendant had refused to make repairs. *Ford Motor Co. v. Fairley*, 398 So. 2d 216 (Miss. 1981).

When a manufacturer limits its obligation to repair and replacement of defective parts and repeatedly fails to correct a defect within a reasonable time, it is liable for the breach of that promise as a breach of warranty. The fact that the manufacturer in good faith attempts to repair the defect whenever requested to do so is not a fulfillment of the warranty; he must demonstrate that the defect is permanently remedied, as promised in the express warranty. He can be held liable for failure to fulfill the warranty obligation even though his failure to repair is neither wilful nor negligent. Furthermore, the buyer is not bound to permit the warrantor to tinker with the article indefinitely in the hope that it ultimately may be made to comply with the warranty. The limited exclusive remedy fails in its purpose, and thus is avoided under UCC § 2-719(2), whenever the warrantor fails to correct the defect within a reasonable period. When this occurs, all contractual remedies are available to the buyer. *Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 2 A.L.R.4th 567 (Mo. Ct. App. 1978).

Where a party under UCC § 2-719(1)(a) limits its warranty obligation to the repair and replacement of defective parts, failure to fulfill that obligation, if it operates to deprive the other party of the substantial value of the bargain, causes the limited remedy "to fail of its essential purpose" within the meaning of UCC § 2-719(2) and entitles the injured party to pursue the remedies that are otherwise available under the Uniform Commercial Code. *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

In buyer's action for breach of warranty attaching to laser that did not operate at

warranted power output, court held (1) that evidence supported district court's determination that seller had breached its express warranty and that buyer's remedy of repair or replacement of defective parts had failed in its essential purpose under UCC § 2-719(2); (2) that seller had been given adequate notice of its breach under UCC § 2-607(3)(a); and (3) that since laser was merely component of printer project that buyer was working value of the bargain, it must give way to the general remedy provisions of Article 2. *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933 (7th Cir. Ill. 1978).

If after repeated efforts by a seller to place a product into warranted condition, the seller cannot or will not do so, the remedy of repair or replacement may be deemed to have failed in its essential purpose under UCC § 2-719(2), and other remedies under the Uniform Commercial Code may be resorted to. *AES Technology Sys., Inc. v. Coherent Radiation*, 583 F.2d 933 (7th Cir. Ill. 1978).

In action by buyer of used car to recover purchase price from seller for seller's breach of express and implied warranties, where engine in vehicle at time of sale and also replacement engine subsequently installed were both defective, so as to cause breach of seller's express engine warranty and also breach of vehicle's implied warranty of merchantability under UCC § 2-314(1) and (2)(c), remedy of recovery of purchase price was available to buyer because (1) language in seller's express warranty did not expressly limit buyer's remedy to repair and replacement of defective parts; (2) even if seller's express warranty could be construed as limiting buyer's remedy to repair and replacement of defective parts, such exclusive remedy failed in its essential purpose within meaning of UCC § 2-719(2); and (3) buyer's remedies were not limited by any exclusion or modification by seller, under UCC § 2-316(2), of vehicle's implied warranty of merchantability. Furthermore, since buyer under UCC § 2-608(2) had sufficiently revoked her acceptance of vehicle she was entitled to recover its purchase price. *Stream v. Sportscar Salon, Ltd.*, 91 Misc. 2d 99 (1977).

Where new car after its purchase exhibited numerous minor defects and one major defect (frequent stalling of engine), and where seller, despite frequent attempts, failed seasonably to repair such defects, (1) buyer was entitled under UCC § 2-608(1)(a) to revoke acceptance of car, since its defects collectively constituted substantial impairment of its value to buyer; (2) seller did not have unlimited time to repair car's defects; (3) provision in owner's manual limiting buyer's remedies to repair or replacement of defective parts failed as exclusive remedy under UCC § 2-719(2), thus justifying buyer's cancellation of contract and recovery of purchase price; (4) buyer, although failing to prove consequential damages, was entitled to recover incidental damages under UCC § 2-715(1) for repair and maintenance costs incurred in caring for car; and (5) lack of privity between buyer and United States distributor of type of car in suit did not relieve distributor of liability to buyer, since distributor was unable to assure court of continued existence of corporate dealer from which buyer had purchased car (citing annotation as to time for revocation of acceptance under UCC § 2-608). *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349, 98 A.L.R.3d 1170 (Minn. 1977).

Where jury could reasonably have concluded that buyer's revocation of acceptance of new 1970 Lincoln Continental automobile was timely and justifiable, buyer under UCC § 2-711(1) was entitled to recover amount of purchase price that he had already paid. Moreover, such recovery was not limited by warranty provision, incorporated in sales contract, that buyer was entitled only to repair and replacement of defective parts. The Uniform Commercial Code expressly declares in UCC § 1-102(1) that it is to be liberally construed, and it also recognizes in Official Comment 1 to UCC § 2-719 that the very essence of a sales contract is that minimum adequate remedies at least be available. In present case, however, limited remedy of warranty in sales contract failed to achieve its essential purpose, since even after numerous attempts at repairs, vehicle purchased by buyer did not operate as new automobile should

operate. *Conte v. Dwan Lincoln-Mercury, Inc.*, 172 Conn. 112, 374 A.2d 144 (1976).

In action by seller of sectional steel plate against buyer for balance due under contract of sale, in which contract contained provision limiting seller's warranty liability for defective material to replacement or refund of purchase price at seller's option, factual issue was presented on question of whether limitation of liability provision failed of its essential purpose within meaning of UCC § 2-719(2), where buyer alleged that plates delivered by seller did not conform to contractual respecifications in major respects, that defects could not be detected until construction had actually commenced, that seller failed to render adequate assistance when requested in that defective plates sent back to seller for corrective repairs were returned to buyer uncorrected, and that under these and totality of circumstances, refund of purchase price would have been totally inadequate remedy. *Earl M. Jorgensen Co. v. Mark Constr., Inc.*, 56 Haw. 466, 540 P.2d 978 (1975).

Where strict language of express warranty and disclaimer placed purchaser of automobile in position such that his defective vehicle was incapable of repair pursuant to such express warranty and disclaimer because he could not identify any part, replacement of which would remedy defect, such result made disclaimer unconscionable and void within meaning of UCC § 2-302. Furthermore, where seller was unable to cure defect in purchaser's automobile, express warranty and its disclaimer which provided for contractual modification and limitation of rights and remedies of purchaser, failed of its essential purpose and, thus, "circumstances caused an exclusive or limited remedy to fail of its essential purpose" within meaning of UCC § 2-719(2), and could not be deemed exclusive remedy. *Eckstein v. Cummins*, 41 Ohio App. 2d 1, 321 N.E.2d 897 (1974).

Even though seller effectively disclaimed implied warranties under UCC § 2-316 and warranted only that products were in accordance with published specifications and that obligation under such warranties was limited to repairing or replacing nonconforming products, buyer

was not precluded from consequential damages under UCC §§ 2-719 where seller allegedly failed to repair or replace as provided in contract; but conduct of seller was not such as would render disclaimer of warranties unconscionable under UCC § 2-302. *Koehring Co. v. A.P.I., Inc.*, 369 F. Supp. 882 (E.D. Mich. 1974).

11. —Failure to repair; timeliness.

In action for buyer's allegedly wrongful cancellation of contracts to purchase corn of specified grade, trial court erred in granting summary final judgment for seller where record revealed that issue of material fact existed as to whether seller's failure to furnish grade of corn agreed on had caused exclusive remedy adopted by parties for breach of contract to fail in its essential purpose within meaning of UCC § 2-719(2). *Tampa Farm Serv., Inc. v. Cargill, Inc.*, 356 So. 2d 347 (Fla. App. 1978).

When a manufacturer limits its obligation to repair and replacement of defective parts and repeatedly fails to correct a defect within a reasonable time, it is liable for the breach of that promise as a breach of warranty. The fact that the manufacturer in good faith attempts to repair the defect whenever requested to do so is not a fulfillment of the warranty; he must demonstrate that the defect is permanently remedied, as promised in the express warranty. He can be held liable for failure to fulfill the warranty obligation even though his failure to repair is neither willful nor negligent. Furthermore, the buyer is not bound to permit the warrantor to tinker with the article indefinitely in the hope that it ultimately may be made to comply with the warranty. The limited exclusive remedy fails in its purpose, and thus is avoided under UCC § 2-719(2), whenever the warrantor fails to correct the defect within a reasonable period. When this occurs, all contractual remedies are available to the buyer. *Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 2 A.L.R.4th 567 (Mo. Ct. App. 1978).

In buyers' action to revoke acceptance of motor home, (1) buyers' signing of document entitled "Pre-Delivery Inspection and Acceptance Declaration"-by means of which seller had attempted both to disclaim all express and implied warranties

and to limit remedies available to buyers, in event of a breach, to repair and replacement of defective parts-did not deprive buyers of right to seek revocation of acceptance under UCC § 2-608, since seller's failure after reasonable time to repair numerous defects in home resulted in failure of buyer's limited repair-and-replacement-of-parts remedy in its essential purpose within meaning of UCC § 2-719(2), thus enabling buyers to invoke any remedies available under Uniform Commercial Code; (2) buyers were entitled to revoke acceptance of home under UCC § 2-608(1) and (2), since jury found on sufficient evidence that its defects had substantially impaired its value and that buyers' formal revocation of acceptance had immediately followed several months of nearly continuous efforts to have home repaired; and (3) buyers were entitled to only \$500 as consequential damages allowable under UCC § 2-715(2)(b) for loss of home's use, since there was no evidence of extent to which home would have been used by buyers if it had not been defective. *Murray v. Holiday Rambler, Inc.*, 83 Wis. 2d 406, 265 N.W.2d 513 (1978).

A limited remedy fails in its essential purpose, within the meaning of UCC § 2-719(2), whenever the seller fails to repair the goods within a reasonable time. Good faith attempts to repair may be relevant to the issue of what constitutes a reasonable time. However, since UCC § 2-719(2) operates whenever a party is deprived of his contractual remedy, there is no need for the plaintiff to prove that the failure to repair was willful or negligent. *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

Where (1) seller and manufacturer, in their "New Equipment Warranty," expressly warranted that buyer of tractor would receive machine "free from defects in material and workmanship under normal use and service," but limited their liability, under UCC § 2-719(1)(a), for breach of such warranty to repair or replacement of parts shown to be defective within specified period, and (2) where defendants' warranty did not state time for performance of their repair-or-replacement obligation, court held that defendants, under UCC § 2-309(1), were obli-

gated to repair or replace defective parts within reasonable time in order to prevent limited remedy from failing in its essential purpose within meaning of UCC § 2-719(2). *Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978).

Where disclaimer contained in new car's warranty limited manufacturer's obligation to repair and replacement, but where, by delaying for unreasonable length of time repair of purchaser's vehicle, manufacturer deprived purchaser of "substantial value of the bargain," manufacturer's warranty was breached causing available remedy "to fail of its essential purpose" and, thus, purchaser was entitled to recover incidental and consequential damages from manufacturer's breach. *Ehlers v. Chrysler Motor Corp.*, 88 S.D. 612, 226 N.W.2d 157 (1975).

Limited, exclusive remedy of replacement or repair of defective parts fails of its purpose and is thus avoided under Code § 2-719(2), whenever warrantor fails to correct defeat within reasonable period; and upon such failure recourse may be had to all remedial provisions of Code. *Beal v. GMC*, 354 F. Supp. 423 (D. Del. 1973).

12. —Defect not amenable to repair.

In buyer's action for breach of implied warranty of fitness of machine for boring tunnel in coal mine, where (1) seller warranted that machine would be free from defects in materials and workmanship, (2) such warranty was accompanied by disclaimer of all other warranties, express or implied, not set forth in writing signed by authorized representative of seller, (3) seller limited its liability for breach of warranty to repair or replacement of defective parts and also excluded all liability for consequential damages, (4) seller agreed to furnish a specialist to supervise installation and initial operation of machine, and (5) seller's offer to sell machine was accompanied by letter signed by seller's employee, who had no authority to make binding representations about machine, which stated that machine would bore at approximate rate of 2.5 feet per hour through hardest materials that buyer might expect to encounter in its mine, court held (1) that buyer accepted seller's offer by mailing purchase order to

seller, (2) that by accepting such offer, buyer agreed to seller's terms on liability for breach of warranty, (3) that district court properly found that representation about machine's boring rate, which was contained in letter signed by employee of seller who was not authorized to make such representation, was not part of parties' agreement, since it was not set forth in document that parties intended to be final expression of their agreement within meaning of UCC § 2-202, (4) that as a result, there was no undertaking by seller that machine would bore at rate of 2.5 feet per hour, (5) that seller also had made no express undertaking to assemble machine properly on buyer's premises, since provision in contract which stated that seller would furnish specialist to supervise machine's initial assembly and operation was only intended to prevent wrongful assembly or operation by buyer's employees when not under control of seller's specialist, (6) that such undertaking also did not exist as an independent and separate obligation of seller because assembly of machine, whether at seller's plant or on buyer's premises, came under seller's workmanship warranty, (7) that seller's inability to repair defects in machine caused buyer's limited repair remedy to fail in its essential purpose within meaning of UCC § 2-719(2), (8) that although failure of its limited remedy to achieve its essential purpose made available to buyer all remedies provided by Uniform Commercial Code, this did not mean that consequential damages, which buyer stipulated were its only damages, could be recovered by buyer under UCC §§ 2-714(3) and 2-715(2)(a), and (9) that since contract had been made by parties of relatively equal bargaining power and liability for consequential damages had been assumed by buyer, mere fact that seller's efforts to repair machine had failed was not enough to require that seller absorb consequential-damage losses that buyer had plainly agreed to bear. *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. Cal. 1978).

Remedial limitation clause contained within contract for manufacture, sale and delivery of railroad hopper cars, limiting manufacturer's liability to repair or re-

placement of defective parts, failed of its essential purpose and was therefore unenforceable where railroad cars were defective with respect to their structure and welding of certain crucial joints which precipitated serious cracking in underframe of cars, where manufacturer did not meet its obligation to repair or replace defective parts on railcars, and where railroad-buyer promptly notified manufacturer, pursuant to contract, of defects and afforded manufacturer opportunity to verify defects. *Soo Line R.R. v. Fruehauf Corp.*, 547 F.2d 1365 (8th Cir. Minn. 1977).

In action by buyer of tube mill against seller for breach of warranty: (1) where seller's offer and buyer's acceptance contained conflicting provisions as to warranties, neither provision became part of contract, and UCC implied warranty of merchantability, § 2-314, was in effect; (2) as to limitation of damages clause in seller's offer, since there was no question that tube mill was grossly defective on delivery, not only did limitation of remedies provision fail of its essential purpose, but is application would be unconscionable; (3) notwithstanding facts that when resale price of machine was coupled with award of damages, buyer would receive more than purchase price of machine, damage award was not improper; (4) warranty of merchantability was breached by seller since tube mill was not fit for ordinary purpose of producing quality salable square tubing. *Bosway Tube & Steel Corp. v. McKay Mach. Co.*, 65 Mich. App. 426, 237 N.W.2d 488 (1975).

In action between purchaser of outdoor signs and seller, seller's attempt to limit purchaser's remedy to replacement was ineffective since there was no agreement that such would be exclusive remedy and, additionally, any limited remedy failed of its essential purpose. *Benco Plastics, Inc. v. Westinghouse Elec. Corp.*, 387 F. Supp. 772 (E.D. Tenn. 1974).

13. —No failure of essential purpose.

In action by supplier of materials to recover payment therefor from contractor, limitation on contractor's remedies for breach of warranty—namely, that supplier would repair or replace defective parts and allow charges for repairs if they were

authorized in writing by supplier—did not fail in its essential purpose within meaning of UCC § 2-719(2), on alleged ground that supplier had not given written authorization for certain repairs that contractor performed at job site, where jury by special verdict found that supplier had not wrongfully refused to authorize contractor to make repairs on any items of equipment that did not conform to contract description. *Envirex, Inc. v. Ecological Recovery Assocs.*, 454 F. Supp. 1329 (M.D. Pa. 1978), *aff'd*, 601 F.2d 574 (3d Cir. Pa. 1979).

In buyer's suit against seller of refrigeration system installed on buyer's fishing boat for breach of warranty that system would be mechanically free of defects in materials and workmanship, where contract provided that seller's liability for breach of such warranty was limited to replacement of defective parts and that if seller did not replace defective parts within reasonable time, buyer's only remedy would be to rescind contract and to obtain refund of any part of purchase price that buyer had already paid, limited remedy afforded buyer under contract did not fail in its essential purpose under UCC § 2-719(2), so as to make available to buyer general remedy provisions of Uniform Commercial Code, because system's defects were immediately apparent and not latent, and buyer could obtain refund of any part of purchase price already paid if seller did not replace defective parts within reasonable time. *Marr Enters., Inc. v. Lewis Refrigeration Co.*, 556 F.2d 951 (9th Cir. Wash. 1977).

Claim by buyer of color television broadcasting equipment that contractual limitation of seller's liability to repair or replacement of defective equipment could not apply because limited remedy failed of its essential purpose was not supported by facts clearly showing that seller obeyed limitation by repairing and replacing items which buyer claimed were defective. *Fredonia Broadcasting Corp. v. RCA Corp.*, 481 F.2d 781 (5th Cir. Tex. 1973).

There was no failure of essential purpose within UCC § 2-719(2) which would permit court to award plaintiff cost of car rental which was expressly excluded by terms of auto seller's written warranty.

Russo v. Hilltop Lincoln-Mercury, Inc., 479 S.W.2d 211 (Mo. Ct. App. 1972).

Limited express warranty did not fail in its essential purpose under UCC § 2-719(2), where plaintiff admitted that on each and every occasion that a defect occurred, the same had been repaired; in absence of any evidence of willful failure or refusal to make repairs needed nor any allegation of dilatory, careless or negligent compliance with terms of limited express warranty, the limited warranty, as a matter of law, did not fail in its essential purpose. Lankford v. Rogers Ford Sales, 478 S.W.2d 248 (Tex. Civ. App. 1972), *ref. n.r.e.* (July 26, 1972).

Warranty limitation to replacement or repair of defective parts was not unconscionable within UCC § 2-719(3), nor did it fail of its essential purpose within UCC § 2-719(2) so as to preclude its assertion by auto manufacturer or dealer where, during first 18 months of purchase of new automobile, it was in repair shop for 45 days for about 50 different defects. Lankford v. Rogers Ford Sales, 478 S.W.2d 248 (Tex. Civ. App. 1972), *ref. n.r.e.* (July 26, 1972).

14. Limitation or exclusion of consequential damages.

Implied warranty of merchantability may not be waived or disclaimed in Mississippi as result of §§ 11-7-18 and 75-2-719(4). Beck Enters., Inc. v. Hester, 512 So. 2d 672 (Miss. 1987).

A seller of farm machinery breached its new equipment warranty and the implied warranty of merchantability found in § 75-2-314(2)(c) where neither a new grain drill nor a used combine sold to the purchaser were fit for the ordinary purposes for which such goods were to be used; the seller also breached the implied warranty of fitness for a particular purpose found in § 75-2-315 where the evidence established that the purchaser relied upon the skill of the seller's salesman who had explained to the purchaser all that he knew about farming and had assisted the purchaser in selecting the equipment that he would need in his initial farming operation. A new agricultural equipment warranty which warrants new agricultural equipment to be free of defects in material and workmanship at the

time of delivery to the first retail purchaser encompasses the proposition that the equipment will be in "field ready" condition; "field ready" condition simply means that the equipment is ready to be used in the field and is consistent with the warranty that the machinery is free of defects in material and workmanship at the time of delivery. The seller's attempt to avoid any warranty, express or implied, in relation to used equipment sold to the purchaser was prohibited by § 75-2-719(14). Massey-Ferguson, Inc. v. Evans, 406 So. 2d 15 (Miss. 1981).

Language contained in contract between buyer and seller of accounting machine that seller's "obligation if the equipment does not meet these warranties is limited solely to correcting the defect or failure, without charge," did not apply to implied warranty of fitness for particular purpose; but even if it did, buyer's remedy of revocation was saved, since nothing short of effective right of revocation would satisfy essential purpose of implied warranty of fitness for particular purpose where particular accounting machine delivered and installed by seller did not, and could not, solve buyer's problem of getting accurate payroll out on time, which was purpose for which it was purchased. NCR v. Adell Indus., Inc., 57 Mich. App. 413, 225 N.W.2d 785 (1975).

In action by buyer to recover for breach of contract for sale of computer core memories, limitation on consequential damages found in contract was valid, absent any evidence of unconscionability, under UCC § 2-714 and precluded recovery of damages for lost profits by buyer. Three-Seventy Leasing Corp. v. Ampex Corp., 528 F.2d 993 (5th Cir. Tex. 1976).

In connection with sale of electric power generating equipment, contract provisions governing warranties and remedies to effect that contract warranty was exclusive and in lieu of all other warranties whether written, oral or implied, including any warranty of merchantability or purpose, and that in no event, whether as result of breach of contract, alleged negligence, or otherwise, would seller be liable for damages for, *inter alia*, loss of profits, for cost of purchased or replacement power or for damages for loss of use of

power system, was sufficient to insulate seller under UCC § 2-719(1)(a) and (3) from liability for claim for cost of replacement power and lost profits and from claims predicated upon breach of implied warranty. *Ebasco Servs., Inc. v. Pennsylvania Power & Light Co.*, 402 F. Supp. 421 (E.D. Pa. 1975).

Clause in contract of sale for large electrical motor which provided that manufacturer of motor and its distributor would not be liable for indirect, special, consequential or liquidated damages or penalties whether in contract or in tort arising out of warranties, representations, instructions or defects from any cause in connection with sale of motor was effective express limitation on damages under UCC § 2-719 and, thus, barred purchaser of motor from recovering consequential damages against manufacturer or its distributor. *Cyclops Corp. v. Home Ins. Co.*, 75 Ohio Op. 2d 269, 389 F. Supp. 476 (W.D. Pa. 1975), *aff'd*, 523 F.2d 1050 (3d Cir. Pa. 1975).

15. —Conscionability.

Although all limitations of remedies are not per se unconscionable under UCC 2-719(3), the seller has the burden of establishing the validity of any limitation. *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

UCC § 2-719 generally leaves the seller free to limit remedies available for breach of warranty. However, the Uniform Commercial Code is stricter in allowing a limitation of remedies than it is in allowing an exclusion of warranties. Thus, UCC § 2-719(3) recognizes the validity of agreements that limit consequential damages, but any remedy limitations must be tested in terms of "unconscionability." *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

UCC § 2-719(3), by its use of word "unconscionable," incorporates standards set forth in UCC § 2-302(1) and (2), and finding of unconscionability was matter of law to be determined by court, without jury, although there might be taking of evidence under UCC § 2-302(2) as to contract's commercial setting, purpose, and effect. *Monsanto Co. v. Alden Leeds, Inc.*, 130 N.J. Super. 245, 326 A.2d 90 (1974).

In action to recover balance due on contract for manufacture and delivery of cartons and carton sealing machine, contract term limiting buyer's remedies in event of seller's breach was upheld against claims of unconscionability under UCC § 2-302 and buyer's counter claim for consequential damages under UCC § 2-719(3) was denied where affirmative defense of unconscionability had not been pleaded. *Rossotti Lithograph Corp. v. Townsend*, 50 Pa. D. & C.2d 451 (1970).

16. —Conscionability; bargaining position.

In buyer's action for breach of implied warranty of fitness of machine for boring tunnel in coal mine, where (1) seller warranted that machine would be free from defects in materials and workmanship, (2) such warranty was accompanied by disclaimer of all other warranties, express or implied, not set forth in writing signed by authorized representative of seller, (3) seller limited its liability for breach of warranty to repair or replacement of defective parts and also excluded all liability for consequential damages, (4) seller agreed to furnish a specialist to supervise installation and initial operation of machine, and (5) seller's offer to sell machine was accompanied by letter signed by seller's employee, who had no authority to make binding representations about machine, which stated that machine would bore at approximate rate of 2.5 feet per hour through hardest materials that buyer might expect to encounter in its mine, court held (1) that buyer accepted seller's offer by mailing purchase order to seller, (2) that by accepting such offer, buyer agreed to seller's terms on liability for breach of warranty, (3) that district court properly found that representation about machine's boring rate, which was contained in letter signed by employee of seller who was not authorized to make such representation, was not part of parties' agreement, since it was not set forth in document that parties intended to be final expression of their agreement within meaning of UCC § 2-202, (4) that as a result, there was no undertaking by seller that machine would bore at rate of 2.5 feet per hour, (5) that seller also had made no express undertaking to assemble machine

properly on buyer's premises, since provision in contract which stated that seller would furnish specialist to supervise machine's initial assembly and operation was only intended to prevent wrongful assembly or operation by buyer's employees when not under control of seller's specialist, (6) that such undertaking also did not exist as an independent and separate obligation of seller because assembly of machine, whether at seller's plant or on buyer's premises, came under seller's workmanship warranty, (7) that seller's inability to repair defects in machine caused buyer's limited repair remedy to fail in its essential purpose within meaning of UCC § 2-719(2), (8) that although failure of its limited remedy to achieve its essential purpose made available to buyer all remedies provided by Uniform Commercial Code, this did not mean that consequential damages, which buyer stipulated were its only damages, could be recovered by buyer under UCC §§ 2-714(3) and 2-715(2)(a), and (9) that since contract had been made by parties of relatively equal bargaining power and liability for consequential damages had been assumed by buyer, mere fact that seller's efforts to repair machine had failed was not enough to require that seller absorb consequential-damage losses that buyer had plainly agreed to bear. *S.M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363 (9th Cir. Cal. 1978).

In action between contractor, as purchaser of structural steel, and manufacturer of steel, contract clause barring claims for damages for late delivery of steel unless delay was not excusable under contractor's prime contract or was not of type for which extension of time could be granted under that contract, and barring damages in either case unless delay in delivering steel was sole cause of delay for which contractor was assessed and paid damages under prime contract, was not unconscionable under UCC § 2-719(3) where essentially same provision had been included in prior contractual arrangements between parties, both parties were financially mature and knowledgeable, and contract was negotiated at arms length by parties standing on equal footing. *Kansas City Structural Steel Co. v.*

L.G. Barcus & Sons, 217 Kan. 88, 535 P.2d 419 (1975).

In action by seller of sectional steel plate against buyer for balance due under contract of sale, in which contract contained provision limiting seller's warranty liability for defective material to replacement or refund of purchase price at seller's option: (1) limitation of liability clause was not unconscionable under UCC § 2-302, where contract was not made under circumstances involving oppression and unfair surprise, there was no great disparity of bargaining power between parties, and buyer was aware of at least one other company capable of supplying it with required plates; and (2) factual issue was presented on question of whether limitation of liability provision failed of its essential purpose within meaning of UCC § 2-719(2), where buyer alleged that plates delivered by seller did not conform to contractual respecifications in major respects, that defects could not be detected until construction had actually commenced, that seller failed to render adequate assistance when requested in that defective plates sent back to seller for corrective repairs were returned to buyer uncorrected, and that under these and totality of circumstances, refund of purchase price would have been totally inadequate remedy. *Earl M. Jorgensen Co. v. Mark Constr., Inc.*, 56 Haw. 466, 540 P.2d 978 (1975).

In action arising when nitrogen liquefaction plant furnished by defendant was unable to perform satisfactorily and required numerous costly repairs, plaintiff was unable to recover its lost profits where contractual provision barring recovery of lost profits and located in warranty paragraph of contract was neither misleading, unclear, nor unconscionable under UCC § 2-719, particularly in view of expertise of negotiators and complete absence of any evidence of disparity of bargaining power. *Cryogenic Equip., Inc. v. Southern Nitrogen, Inc.*, 490 F.2d 696 (8th Cir. Ark. 1974).

In action by soybean processor against installer of processing equipment for damages resulting from explosion at processor's plant: (1) lost profits sought by processor clearly fell within purview of

contract provision purporting to bar recovery of consequential damages; (2) contractual exclusion of consequential damages would not be stricken as unconscionable where contract was entered into in commercial setting by parties of equal bargaining power, where there was total lack of type of oppression or unfair surprise which typified findings of unconscionability in consumer sphere, where parties had been engaged in business endeavors for over 20 years, and where exclusion of liability often had been part of prior agreements; (3) and thus, provision was enforceable limitation on remedies available to processor under its contract theories. *Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co.*, 383 F. Supp. 606 (N.D. Iowa 1974).

Owners of corporate buyer were experienced attorney and businessman; held, provision of agreement for sale of dry cleaning machines which excluded liability of seller and manufacturer for consequential or special damages was not unconscionable. *K & C, Inc. v. Westinghouse Elec. Corp.*, 437 Pa. 303, 263 A.2d 390 (1970).

17. —Conscionability; form of disclaimer.

Limitation of damages for breach of implied warranty of merchantability contained in sales agreement for purchase of equipment was not modification of warranty and could be effected without specific reference to merchantability. *Orrox Corp. v. Rexnord, Inc.*, 389 F. Supp. 441 (M.D. Ala. 1975).

In action by purchaser of truck against seller for damages resulting from seller's failure to properly effectuate repairs in accordance with its warranty, where there was exclusionary clause contained in warranty, which stated in normal size print that seller was not liable for special or consequential damages, but where there were no discussions nor explicit negotiations between seller and buyer regarding limitations or disclaimers of liability and where clause was not conspicuous: (1) by its use of word "unconscionable," UCC § 2-719(3) conditions validity of exclusionary clause on one factor, the standards set forth in UCC § 2-302, and clause would be conscionable, in spite of

lack of "negotiations" or its "inconspicuousness," if buyer and seller, through prior contracts had established consistently adhered to policy of excluding consequential damages, or if it was recognized practice within trade to exclude consequential damages; (2) issue of unconscionability presented question of law for court, not issue of fact for jury, and since exclusionary clauses in clearly commercial transactions were prima facie conscionable, burden of establishing that clause was unconscionable was upon seller. *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 544 P.2d 20 (1975).

Language contained in manufacturer's warranty providing that manufacturer disclaimed any obligation other than replacement of defective parts within period of 6 months was not effective under UCC § 2-719 to limit manufacturer's liability for negligent manufacturer of airplane sold to buyer where language relied on by manufacturer appeared in its own standard warranty provision, which was not signed by either party, appearing on unnumbered page after index in aircraft owner's manual, and which buyer may or may not have had copy of at time agreement was signed. *Omni Flying Club, Inc. v. Cessna Aircraft Co.*, 366 Mass. 154, 315 N.E.2d 885 (1974).

To be effective, clause limiting remedies pursuant to UCC § 2-719 must be "by a writing and conspicuous," however, language in contract between buyer and seller of turbine generator was sufficiently conspicuous to bind buyer (and to exclude implied warranties of merchantability and fitness for purpose) where (1) limiting language was located on first page of contractual document titled "General Conditions"; (2) all of the type indicating such contractual conditions was large and readable (there was no fine print); (3) limiting language was simple, direct, and easily understood; (4) there was printed heading in capital letters which read: "Limitation of Liability"; (5) "person" against whom limiting language was to operate was prominent, sophisticated corporate entity. *Avenell v. Westinghouse Elec. Corp.*, 41 Ohio App. 2d 150, 324 N.E.2d 583 (1974).

Exclusionary language of truck warranty prohibiting recovery of commercial

losses was inconspicuous and unenforceable as matter of law. *Gramling v. Baltz*, 253 Ark. 352, 485 S.W.2d 183 (1972).

18. Conscionability; commercial loss.

In action for damages for sale of negligently manufactured film, (1) evidence was sufficient to support jury finding that at time of sale of film to plaintiff, trade usage existed, within meaning of UCC § 1-205(2), which limited commercial buyer's remedy to replacement of negligently manufactured film; (2) evidence also was sufficient to support finding that replacement of negligently manufactured film constituted plaintiff's sole remedy under UCC § 2-719(1)(b); (3) such limited remedy did not fail of its essential purpose under UCC § 2-719(2); and (4) such limited remedy also did not operate in unconscionable manner within meaning of UCC § 2-719(3) because it was reasonably adapted to general commercial background and needs of film industry. *Posttape Assocs. v. Eastman Kodak Co.*, 450 F. Supp. 407 (E.D. Pa. 1978).

Limitation of consequential damages in commercial transaction wherein the purchase of semiconductors was involved and such limitation was long standing practice in the industry was not unconscionable. *Architectural Aluminum Corp. v. Macarr, Inc.*, 70 Misc. 2d 495 (1972).

In commercial context, parties to contract of sale may agree to exclude liability for special or consequential damages; under such agreement, plaintiff-buyers were limited on breach of warranty claim to difference between purchase and resale prices. *K. & C., Inc. v. Ald, Inc.*, 117 Pitts. Legal J. 396 (Pa. 1969).

19. —Conscionability; personal injury.

In action by buyer against seller and manufacturer for breach of express and implied warranties attaching to tire that blew out and injured plaintiff, where plaintiff, who lacked sufficient evidence of tire's defect, contended that manufacturer's attempt in it as written guaranty to avoid liability for personal injuries was unconscionable under UCC 2-719(3), that such part of the guaranty should have been excised from the warranty agreement, and that the warranty agreement

as thus excised should have been submitted to the jury, court, on agreeing with plaintiff's contention, held that nothing in record overcame clear unconscionability of limiting plaintiff's remedy, as defendant's warranty had attempted to do, to repair or replacement of tire in suit, and that on new trial of case, plaintiff should proceed only on theory of breach of express warranty. *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

Under UCC § 2-719(3), which provides that a limitation of consequential damages for an injury to the person in the case of consumer goods is prima facie unconscionable, the presumption of unconscionability arises from the simultaneous presence of three things: (1) a contract clause excluding consequential damages, (2) an accident caused by a consumer product, and (3) resulting personal injuries. *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

The presumption of unconscionability created by UCC § 2-719(3) is not rebutted by a showing that there was no defect in the goods, since the absence of such a defect is irrelevant to the question of liability in an action for breach of warranty. *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

Action for breach of contract of sale, to which four-year period of limitations prescribed by New York UCC § 2-725(1) applies, includes action for personal injuries arising from breach of warranty in view of provisions of (1) New York UCC § 2-318, which explicitly states that seller's warranty, whether express or implied, extends to any natural person who is injured in person by breach of the warranty, (2) New York UCC § 2-715(2)(b), which states that consequential damages resulting from seller's breach include injury to person or property proximately resulting from any breach of warranty, and (3) New York UCC § 2-719(3), which makes a limitation of consequential damages for injury to the person caused by consumer goods prima facie unconscionable. *McCarthy v. Bristol Labs.*, 61 A.D.2d 196 (2d Dep't 1978).

Although contractual disclaimers limiting liability for personal injuries in sales of consumer goods are prima facie uncon-

scionable under Texas UCC § 2-719(3), Texas has no similar rule with regard to sale of land (construing Texas law; action under Federal Tort Claims Act by purchaser of used home from federal Department of Housing and Urban Development (HUD) for injuries caused by clogged ventilation pipe in home's heating system). *Graham v. United States*, 441 F. Supp. 741 (N.D. Tex. 1977).

In action by buyers of automobile tires against seller and manufacturer for personal injuries allegedly resulting from blowout of tire, clause purporting to limit buyers' remedy solely to replacement tire and purporting to exclude liability for both personal injury and property damage was unconscionable under UCC § 2-719(3), in absence of any evidence to contrary, and was ineffective. *McCarty v. E.J. Korvette, Inc.*, 28 Md. App. 421, 347 A.2d 253 (1975).

Where both manufacturer of new car and dealer had disclaimer clauses in their contracts with purchaser, which purportedly disclaimed all implied warranties, such disclaimer clauses did not violate provisions of UCC § 2-719(3), providing that limitation of consequential damages for injury to person in case of consumer goods is prima facie unconscionable. *Ford Motor Co. v. Moulton*, 511 S.W.2d 690 (Tenn. 1974), cert. denied, 419 U.S. 870, 95 S. Ct. 129, 42 L. Ed. 2d 109 (1974).

In action against tire manufacturer for breach of express warranty under UCC § 2-313 arising when tire failed and caused car to go out of control, contractual limitation of consequential damages to repair or replacement of tire was prima facie unconscionable under UCC § 2-719(3), notwithstanding fact that plaintiff suffered adverse verdict on strict liability theory. *Collins v. Uniroyal, Inc.*, 126 N.J. Super. 401, 315 A.2d 30 (1973), aff'd, 64 N.J. 260, 315 A.2d 16 (1974).

If pleaded defense of disclaimer and/or limitation of warranty is intended to exclude plaintiff from recovering damages for personal injuries sustained when auto went out of control on day of purchase, such disclaimer and/or limitation is prima facie unconscionable in absence of factual evidence indicating that disclaimer and/or limitation is commercially reasonable and

fair rather than oppressive and surprising, pleaded defense must be stricken as matter of law. *Walsh v. Ford Motor Co.*, 59 Misc. 2d 241 (1969).

20. —Course of dealing or trade usage.

Disclaimer of consequential damages under truck warranty, although arguably inconspicuous in that it was buried in fine print in "owner book", and although it had not been a subject of negotiation, could have been held conscionable if either (1) seller had adhered to a consistent policy of excluding consequential damages, or (2) it was recognized trade practice to exclude such damages from warranties. *Schroeder v. Fageol Motors, Inc.*, 86 Wash. 2d 256, 544 P.2d 20 (1975).

Provision on face of one page contract for sale of cabbage seed disclaiming warranties, express or implied, of merchantability and fitness for purpose and limiting seller's liability for breach of warranty or contract to purchase price of seeds, which was set off from other provisions on form and appeared in boldface print, was conspicuous within meaning of UCC § 1-201(10) and was effective to disclaim implied warranty of merchantability under UCC § 2-316(2); given inherent element of risk present in all agricultural enterprises, clause limiting liability to purchase price of seeds was valid under UCC § 2-719 and was not unconscionable under UCC § 2-302; inasmuch as buyer was commercial farmer, he was subject to standards of marketplace wherein he sought to operate and would be bound by order form which he signed notwithstanding claim that he was illiterate. *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 220 S.E.2d 361 (1975), review allowed, 289 N.C. 296, 222 S.E.2d 695 (1976), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

Cooperative marketing association that prepared grain purchase contracts was bound by provision therein to effect that damages, in case of default, would be determined by difference between contract price and market price of grain on March 30, notwithstanding price of grain had risen substantially by June 13, when farmer breached contracts; although contracts did not specifically provide that such damage provision was exclusive, pro-

vision would be interpreted as exclusive remedy in accord with UCC § 2-719(1)(b) since clause was designed to provide agreed method of computing loss in event of breach, in context it appeared clearly intended to be exclusive means of computing loss, and, in action against farmer, clause should be construed against its author, the marketing association; neither could it be said that contract provision had failed "of its essential purpose," and was therefore ineffective under UCC § 2-719(2), merely because it had become more onerous to one of the parties. *Farmers Union Grain Term. Ass'n v. Nelson*, 223 N.W.2d 494 (N.D. 1974).

Defaulting buyer's counterclaim for consequential damages flowing from seller's non-delivery of second knitting machine under contract for sale of 2 such machines should have been dismissed absolutely for failure to state a cause of action where express terms of contract, which buyer at all times affirmed by asserting seller's breach, absolved seller of any liability for consequential damages. *Singer Co. v. Alka Knitting Mills, Inc.*, 41 A.D.2d 856 (2d Dep't 1973).

Provision in contract for sale of electronic accounting computer equipment which precluded buyer from recovering any incidental or consequential damages was not unusual limitation of damages, was common in this type of commercial agreement, and was not unconscionable. *Bakal v. Burroughs Corp.*, 74 Misc. 2d 202 (1972).

21. —Fraud.

In action for breach of warranty and fraud on part of sellers in sale of bull, buyer's remedies were not limited under UCC § 719(1)(b) by paragraph in sales agreement which provided for buyers' remedy in event bull died, since (1) there was no provision that paragraph provided exclusive remedy and (2) contract clause limiting liability would not be applied in fraud action. *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974).

Absent demonstration of bad faith, fraud, or wilful or wanton conduct by telephone company, contractual limitation of liability for errors and omissions in its "yellow pages" advertising to pro rata abatement of charge paid for such adver-

tisement was reasonable and not against public policy; and it was within power of company and subscribers to its directory to make such contracts which become valid and binding limitations notwithstanding monopolistic quality of telephone utility company. *State ex rel. Mt. States Tel. & Tel. Co. v. District Court ex rel. Silver Bow*, 160 Mont. 443, 503 P.2d 526 (1972).

22. —Latent defects.

Limitations of remedy to return of purchase price of soybean inoculant, contained in manufacturer's promotional brochure and stamped on inoculant packages, and provisions of manufacturer's contract with retailer limiting damages to return of purchase price of inoculant and requiring any claim to be filed with manufacturer within 120 days after receipt of allegedly defective innoculant were unconscionable, both as to buyer of product and as between retailer and manufacturer, within meaning of UCC §§ 2-719(3) and 2-302, where alleged defect was latent, manufacturer knew that effectiveness of product was questionable, and exclusion would have had effect of foreclosing any recovery by buyer, a farmer, for large and foreseeable consequential damages for crop failure. *Majors v. Kalo Lab., Inc.*, 407 F. Supp. 20 (M.D. Ala. 1975).

When defect is not ordinarily discoverable until material has been processed, furnished to manufacturers, processed into materials, then manufactured into consumer goods, passed through the wholesale and retail trade into the hands of consumers, a clause within a sales agreement form limiting damage claims to the purchase price of the material is a remedy far below a bare minimum in quantum, and ineffective under Code § 2-719(2). *Neville Chem. Co. v. Union Carbide Corp.*, 294 F. Supp. 649 (W.D. Pa. 1968), vacated on other grounds, 422 F.2d 1205 (3d Cir. Pa. 1970), cert. denied, 400 U.S. 826, 91 S. Ct. 51, 27 L. Ed. 2d 55 (1970).

Where a sales contract expressly creates an unlimited express warranty of merchantability which in a separate clause purports to indirectly modify the warranty without expressly mentioning

the word merchantability, the language creating the unlimited express warranty must prevail over the time limitation insofar as the latter modifies the warranty, and the express warranty of merchantability includes latent shading defects and defendants may claim for such defects not reasonably discoverable within the time limits established by the contract if plaintiff was notified of these defects within a reasonable time after they were or should have been discovered. *Wilson Trading Corp. v. David Ferguson, Ltd.*, 23 N.Y.2d 398, 244 N.E.2d 685 (1968).

23. —Negligence.

Use of words "consequential damages," in clause purporting to limit seller's liability for damages, referred to contract rather than tort damages and, thus, did not impose limitations on its liability for negligence. *Berwind Corp. v. Litton Indus., Inc.*, 532 F.2d 1 (7th Cir. Ill. 1976).

There is no reason to read negligence exception into plain language of UCC § 2-719(3). *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603 (7th Cir. Ill. 1975).

24. Pleading.

In action to recover balance due on contract for manufacture and delivery of cartons and carton sealing machine, contract term limiting buyer's remedies in event of seller's breach was upheld against claims of unconscionability under UCC § 2-302 and buyer's counter claim for consequential damages under UCC § 2-719(3) was denied where affirmative defense of unconscionability had not been pleaded. *Rossotti Lithograph Corp. v. Townsend*, 50 Pa. D. & C.2d 451 (1970).

25. Evidence and burden of proof.

Although all limitations of remedies are not per se unconscionable under UCC 2-719(3), the seller has the burden of establishing the validity of any limitation. *Tuttle v. Kelly-Springfield Tire Co.*, 585 P.2d 1116 (Okla. 1978).

In action by seller against buyer to recover purchase price of plastic parts, trial court did not err in granting partial summary judgment in favor of seller on buyer's cross action for recovery of "actual, incidental, and consequential damages," where contract provided that seller should not be liable for special or consequential damages; under UCC § 2-719 seller was entitled to summary judgment when it properly proved limitation provision of contract and buyer was under duty to come forward with some evidence raising fact issue on its unconscionability defense to enforcement of provision. *Ganda, Inc. v. All Plastics Molding, Inc.*, 521 S.W.2d 940 (Tex. Civ. App. 1975), writ ref'd n.r.e., (Sept. 24, 1975).

In action by buyer to recover damages allegedly resulting from operational failure of ice maker purchased from defendant, contract provisions limiting measure of damages recoverable by limiting buyer's remedies to return of goods and repayment of price or to repair and replacement of nonconforming goods or parts, permissible under UCC § 2-719, were admissible in evidence, not in bar of any recovery, or as defense to action, but to be considered in determining whether buyer was entitled to recover more than nominal damages. *Kohlenberger, Inc. v. Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W.2d 555 (1974).

ATTORNEY GENERAL OPINIONS

The Mississippi Department of Information Technology Services deals in computer hardware, software, and computer services and has knowledge or skill peculiar to such transactions and so is clearly a "merchant" within the meaning of the statute. *Litchlitter*, May 29, 1998, A.G. Op. #98-0288.

Merchants can limit or disclaim implied warranties in offering computer hardware and computer software to the Mississippi Department of Information Technology

Services (ITS) or other state agencies through ITS; however, ITS can make it a condition of any bid process or request for proposals or other offer to purchase that the computer hardware and software solicited carry the implied warranties of merchantability and fitness for a particular purpose or, indeed, any other standard it deems necessary and advisable. *Litchlitter*, May 29, 1998, A.G. Op. #98-0288.

RESEARCH REFERENCES

ALR. Construction and effect of new motor vehicle warranty limiting manufacturer's liability to repair or replacement of defective parts. 2 A.L.R.4th 576.

Unconscionability, under UCC § 2-302 or § 2-719(3), of disclaimer of warranties or limitation or exclusion of damages in contract subject to UCC Article 2 (Sales). 38 A.L.R.4th 25.

Liability on implied warranties in sale of used motor vehicles. 47 A.L.R.5th 677.

Am Jur. 67A Am. Jur. 2d, Sales §§ 897, 900, 906, 908, 917-920.

Contractual modification or limitation of remedy, 6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1171-2:1173.

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1751 et seq (contractual modification or limitation of remedy).

2 Am Law Prod Liab 3d, Waiver, Exclusion, or Modification of Warranties § 22:38.

CJS. 77A C.J.S., Sales §§ 395, 406 et seq., 520 et seq.

Law Reviews. 1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss. L. J. 141, March 1983.

1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L. J. 467, August, 1987.

§ 75-2-720. Effect of “cancellation” or “rescission” on claims for antecedent breach.

Unless the contrary intention clearly appears, expressions of “cancellation” or “rescission” of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach.

SOURCES: Codes, 1942, § 41A:2-720; Laws, 1966, ch. 316, § 2-720, eff March 31, 1968.

Cross References — Waiver or renunciation of claim or right arising out of breach, see § 75-1-107.

JUDICIAL DECISIONS

1. In general.

In action for breach of contract to construct mechanical loading platforms for use in distribution center building, letter sent to defendant after it became clear that defendant would not perform which cancelled contract “without charge” could not as matter of law amount to waiver or renunciation of claim arising out of breach under UCC §§ 1-107 and 2-720; under UCC § 1-205, meaning to be given phrase “without charge” would require consideration of any course of dealing between parties and any applicable trade usage. *NCR v. UNARCO Indus., Inc.*, 490 F.2d 285 (7th Cir. Ill. 1974).

Plaintiff's acceptance of machines and continued use thereof after purported rejection of them as unsatisfactory did not under the particular circumstance that

alternate equipment was not available bar claims for damages for alleged breach of warranty, and likewise did not bar claims for alleged fraudulent misrepresentation. However, where the only proof of fraud was contained in plaintiff's pleadings, and was rebutted by defendant's uncontradicted affidavits, the trial judge correctly granted summary judgment in favor of defendant on the fraud claims. *Fablok Mills, Inc. v. Cocker Mach. & Foundry Co.*, 125 N.J. Super. 251, 310 A.2d 491 (App. Div. 1973), certification denied, 64 N.J. 317, 315 A.2d 405 (1973).

This section does not apply to a contract for the sale of the capital stock of a corporation and its subsidiaries which provided as a condition precedent to acceptance of the contract that the financial condition of such corporations at the time of closing

should not be less favorable than the statements as of a given prior date, so as to permit the buyer, after acceptance, to re-

cover damages by reason of the diminution in net worth of the corporations. In re Carter, 390 Pa. 365, 134 A.2d 908 (1957).

RESEARCH REFERENCES

ALR. Measure and elements of recovery of buyer rescinding sale of domestic animal for seller's breach of warranty. 35 A.L.R.2d 1273.

Necessity of real-estate purchaser's election between remedy of rescission and remedy of damages for fraud. 40 A.L.R.4th 627.

Am Jur. 67A Am. Jur. 2d, Sales §§ 882, 884-886.

6 Am. Jur. Pl & Pr Forms, Sales, Forms 2:1191, 2:1192 (claims for antecedent breach).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1811, 253:1812 (effect of cancellation or rescission on claims for antecedent breach).

CJS. 77 C.J.S., Sales §§ 147, 148.

§ 75-2-721. Remedies for fraud.

Remedies for material misrepresentation or fraud include all remedies available under this chapter for nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deemed inconsistent with a claim for damages or other remedy.

SOURCES: Codes, 1942, § 41A:2-721; Laws, 1966, ch. 316, § 2-721, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general.

"Benefit of bargain" rule aids defrauded person by calculating damages not from contract price, although that is often used to estimate value in absence of other evidence, but from value of goods as represented. Crook Motor Co. v. Goolsby, 703 F. Supp. 511 (N.D. Miss. 1988).

Plaintiff who successfully proves fraud is entitled to traditional remedies under tort law, to rescind contract and be put in status quo by recovery of purchase price, and may also invoke provisions of UCC. Beck Enters., Inc. v. Hester, 512 So. 2d 672 (Miss. 1987).

UCC § 2-721, providing that remedies for material misrepresentation or fraud include all remedies available under Art 2 for nonfraudulent breach, permits full "benefit-of-the-bargain" recovery to a defrauded person who is subject to the statute's provisions. Stout v. Turney, 22 Cal. 3d 718, 586 P.2d 1228 (1978).

In action by buyer who successfully revoked sale of mare which was erroneously

described in sales catalog, buyer was entitled to recover under UCC § 2-715 expenses of insuring, care, custody, and preservation of the mare, but was not entitled to damages for fraud under UCC § 2-721, since fraud was not proved by clear and convincing evidence. Keck v. Wacker, 413 F. Supp. 1377 (E.D. Ky. 1976).

Under UCC § 2-721 buyers of automobile were entitled to bring action both to rescind contract and to recover damages for fraud based on tortious conduct of seller in falsely representing car to be new one, thereby inducing buyer to enter into contract; although UCC makes no provision as to measure of damages, punitive damages could be recovered where breach was accompanied by fraudulent acts which were wanton, malicious and intentional. Z.D. Howard Co. v. Cartwright, 537 P.2d 345 (Okla. 1975).

Where buyer of used automobile sued seller for fraud, loss of use of personal vehicle was compensable; although UCC § 2-715(2) describes consequential dam-

ages in contract terminology ("reason to know") rather than in tort terminology ("natural and ordinary result"), Code does not require that "reason to know" formulation be applied in fraud suits to exclusion of other remedies, and right to consequential damages was presumably "remedy" within meaning of UCC § 2-721. *Wagner v. Dan Unfug Motors, Inc.*, 35 Colo. App. 102, 529 P.2d 656 (1974).

In action for breach of warranty and fraud on part of sellers in sale of bull, buyer's remedies were not limited under UCC § 719(1)(b) by paragraph in sales agreement which provided for buyers' remedy in event bull died, since (1) there was no provision that paragraph provided exclusive remedy and (2) contract clause limiting liability would not be applied in fraud action. *Lamb v. Bangart*, 525 P.2d 602 (Utah 1974).

Under UCC § 2-721, recovery of damages for fraudulent misrepresentation in sale of horse was not barred where plaintiff also sought to rescind purchase contract, since two theories were no longer inconsistent. *Toney v. Lambarth*, 514 S.W.2d 106 (Mo. Ct. App. 1974).

In action in tort by buyer of used car against seller for alleged fraudulent misrepresentation, buyer claiming that he purchased automobile with understanding that it had never been wrecked when in fact it had, language of clause in sales agreement that "no other agreement, promise, or understanding of any kind pertaining to this purchase will be recognized" did not prevent buyer from claiming that he relied on seller's misrepresentation; although UCC § 2-202 was intended to allow sellers to prevent buyers from making false claims of oral warranties in contract actions, parol evidence of alleged misrepresentation was admissible on question of fraud and deceit since UCC does not preclude action in tort based upon fraudulent misrepresentation and such action could not be controlled by

terms of contract itself. *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 208 S.E.2d 794, 71 A.L.R.3d 1054 (1974).

Plaintiff was entitled to recover exemplary damages in action on contract for home improvements which was allegedly procured by fraud and deceit based on false representations. *F.N. Roberts Pest Control Co. v. McDonald*, 132 Ga. App. 257, 208 S.E.2d 13 (1974).

Plaintiff's acceptance of machines and continued use thereof after purported rejection of them as unsatisfactory did not under the particular circumstance that alternate equipment was not available bar claims for damages for alleged breach of warranty, and likewise did not bar claims for alleged fraudulent misrepresentation. However, where the only proof of fraud was contained in plaintiff's pleadings, and was rebutted by defendant's uncontradicted affidavits, the trial judge correctly granted summary judgment in favor of defendant on the fraud claims. *Fablok Mills, Inc. v. Cocker Mach. & Foundry Co.*, 125 N.J. Super. 251, 310 A.2d 491 (App. Div. 1973), certification denied, 64 N.J. 317, 315 A.2d 405 (1973).

By making damages available in an action for rescission of contract this section does not otherwise change the traditional theory of election of remedies. *Associated Hdwe. Supply Co. v. Big Wheel Distrib. Co.*, 355 F.2d 114, 17 A.L.R.3d 998 (3d Cir. Pa. 1965).

The court was not called upon to interpret this section where, under the evidence, failure of plaintiffs who had purchased bus line to achieve anticipated profits could be attributed to causes other than the defendants' misrepresentations as to the number of fares the buses would carry daily, and the plaintiffs were not entitled to recover for alleged loss of profits upon rescission of the sales contract. *Myers v. Rubin*, 399 Pa. 363, 160 A.2d 559 (1960).

RESEARCH REFERENCES

ALR. Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract. 41 A.L.R.2d 1173.

Necessity of real-estate purchaser's election between remedy of rescission and remedy of damages for fraud. 40 A.L.R.4th 627.

Am Jur. 67A Am. Jur. 2d, Sales §§ 1166, 1216 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Form 2:463 (power to transfer; answer; defense; goods purchased in good faith and for value from purchaser who defrauded seller).

6 Am. Jur. Pl & Pr Forms, Sales, Form 2:951 (remedies; instruction to jury; liberal administration of remedies).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales,

§§ 253:1821, 253:1822 (remedies for fraud).

13 Am. Jur. Trials, Misrepresentation in Automobile Sales §§ 1 et seq.

34 Am. Jur. Trials 343, Bad Faith Tort Remedy For Breach of Contract.

5 Am. Jur. Proof of Facts, Fraud, Proof No. 1 (proof of fraud).

CJS. 77 C.J.S., Sales §§ 50 et seq.

§ 75-2-722. Who can sue third parties for injury to goods.

Where a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property or an insurable interest in the goods; and if the goods have been destroyed or converted a right of action is also in the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is no arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to the contract;

(c) either party may with the consent of the other sue for the benefit of whom it may concern.

SOURCES: Codes, 1942, § 41A:2-722; Laws, 1966, ch. 316, § 2-722, eff March 31, 1968.

JUDICIAL DECISIONS

1. In general.

Plaintiff, buyer of beef from defendant packing company, was not entitled to recover from packer for breach of implied warranty of merchantability under UCC § 2-314, following buyer's receipt of partially spoiled beef, where plaintiff prosecuted claim against carrier and breached its fiduciary duty under UCC § 2-722 by settling claim against carrier without consulting seller, where plaintiff failed to make sufficient proof of seller's fault in defective shipment, and where, even if seller had been at fault, plaintiff failed to apportion fault between carrier and seller with sufficient certainty to support judgment

against seller. *Greisler Bros. v. Packerland Packing Co.*, 392 F. Supp. 206 (E.D. Wis. 1975).

One who obtained special property and insurable interest in compressor by bill of sale is authorized to bring suit for injury to compressor predicated on negligent fire destruction by third party. *National Compressor Corp. v. Carrow*, 417 F.2d 97 (8th Cir. Mo. 1969).

Seller was not precluded from recovering price of lost shipment from buyer because seller has pressed damage claim against carrier; any recovery by seller from carrier would be held by it subject to its own interest as fiduciary for buyer.

Ninth St. E., Ltd. v. Harrison, 5 Conn. Cir. Ct. 597, 259 A.2d 772 (1968).

Buyer has special property interest in tractor within Code § 2-501, where he was shown tractor on seller's store premises and told that it was buyers, even though, at that time, tractor did not conform to sales contract provision for cab; where such property interest was free and clear of security interest of seller's reposessor, action for damages may be main-

tained by buyer against reposessor under Code § 2-722. *Draper v. Minneapolis-Moline, Inc.*, 100 Ill. App. 2d 324, 241 N.E.2d 342 (3d Dist. 1968).

The fact that the risk of loss has passed to the buyer does not prevent suit by the seller against a third person causing the damage to the goods to which the contract relates. *Leist v. Schattie*, 197 Pa. Super. 456, 179 A.2d 277 (1962).

RESEARCH REFERENCES

ALR. Recovery of value of use of property wrongfully attached. 45 A.L.R.2d 1221.

Finance company's liability in connection with consumer fraud practices of party selling goods or services. 18 A.L.R.4th 824.

Am Jur. 67 Am. Jur. 2d, Sales § 409.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1201-2:1205 (suits against third parties for injury to goods).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1831, 253:1832 (who can sue third parties for injuries to goods).

§ 75-2-723. Proof of market price; time and place.

(1) If an action based on anticipatory repudiation comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price (Section 2-708 or Section 2-713) [Sections 75-2-708 or 75-2-713] shall be determined according to the price of such goods prevailing at the time when the aggrieved party learned of the repudiation.

(2) If evidence of a price prevailing at the times or places described in this chapter is not readily available the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than the one described in this chapter offered by one party is not admissible unless and until he has given the other party such notice as the court finds sufficient to prevent unfair surprise.

SOURCES: Codes, 1942, § 41A:2-723; Laws, 1966, ch. 316, § 2-723, eff March 31, 1968.

Cross References — Damages for buyer's nonacceptance or repudiation as subject to subd (2) of this section, see § 75-2-708(1).

Damages for seller's nondelivery or repudiation as subject to this section, see § 75-2-713(1).

JUDICIAL DECISIONS

1. In general.

Seller's assignee, in suit for deficiency judgment following sale of repossessed collateral, was properly denied recovery where evidence showed (1) that assignee did not sell collateral in commercially reasonable manner required by UCC § 9-504(3), (2) that debtor was not notified of sale, and (3) that assignee's sole witness did not know how sale had been conducted, or whether numerous bids had been solicited in order to get best price obtainable for collateral, or what market value of collateral was at time of sale. In

such case, which was tried without a jury, since trial court was deprived of knowledge of amount that assignee should have realized from commercially reasonable sale and no evidence was introduced as to collateral's market value, trial court under UCC § 2-723(2) could look to market value of collateral on date of its purchase by debtor and reasonably view such value as continuing until sale of collateral, with result that no deficiency was owed by debtor to assignee. *Aetna Fin. Co. v. Ables*, 559 S.W.2d 139 (Tex. Civ. App. 1977).

RESEARCH REFERENCES

ALR. Necessity that buyer, relying on market price as measure of damages for seller's breach of sale contract, show that goods in question were available for market price shown. 20 A.L.R.2d 819.

Am Jur. 67A Am. Jur. 2d, Sales §§ 888 et seq.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:1221-2:1223 (proof of market price).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1841 et seq (proof of market price; time and place).

CJS. 78 C.J.S., Sales §§ 395, 406 et seq.

§ 75-2-724. Admissibility of market quotations.

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such market shall be admissible in evidence. The circumstances of the preparation of such a report may be shown to affect its weight but not its admissibility.

SOURCES: Codes, 1942, § 41A:2-724; Laws, 1966, ch. 316, § 2-724, eff March 31, 1968.

Cross References — Who may provide market quotations by wire, see § 87-1-13.

JUDICIAL DECISIONS

1. In general.

Testimony by finance company employee to effect that "Red Book" of used car values was used in Arkansas offices (their number not being specified) of his own employer fell short of establishing that "Red Book" was trade journal or periodical

and, thus, testimony of employee as to value of used car based on "Red Book" valuation was not admissible under UCC § 2-724. *Rowe Auto & Trailer Sales, Inc. v. King*, 257 Ark. 484, 517 S.W.2d 946 (1975).

RESEARCH REFERENCES

ALR. Necessity that buyer, relying on market price as measure of damages for seller's breach of sale contract, show that goods in question were available for market at price shown. 20 A.L.R.2d 819.

Am Jur. 29 Am. Jur. 2d, Evidence § 405.

67A Am. Jur. 2d, Sales § 888.

6 Am. Jur. Pl & Pr Forms (Rev), Sales, Forms 2:1221-2:1223 (proof of market price).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1851 et seq (Admissibility of market quotations).

§ 75-2-725. Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within six (6) years after the cause of action has accrued.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six (6) months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this code becomes effective.

SOURCES: Codes, 1942, § 41A:2-725; Laws, 1966, ch. 316, § 2-725, eff March 31, 1968.

Cross References — Limitation of action on contracts, see § 15-1-49.

JUDICIAL DECISIONS

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|---|---|
| 1. In general. | 10. —Personal injury actions based on breach of warranty. |
| 2. Substantive or procedural nature of provision. | 11. —Personal injury actions based on breach of warranty; illustrative cases. |
| 3. Distinction between oral and written contract. | 12. —Personal injury actions based on strict liability. |
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| 5. —Actions against manufacturer who is not seller. | 14. —Suits based on security of financing agreements. |
| 6. —Actions involving personal services. | 15. When statute begins to run. |
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17. —Date of sale or delivery.
18. Explicit extension of warranty to future performance.
19. —Implied warranty.
20. Actions that will toll statute of limitations.
21. Timeliness of institution of particular actions.
22. —Breach of warranty.
23. —Personal injury actions.
24. —Personal injury actions: breach of warranty.
25. Pleading.

1. In general.

In breach of warranty action to recover damages for defects in roof of plaintiff's new steel plant, where evidence showed (1) that defendant had manufactured and sold insulation and components of roof membrane to plaintiff, and (2) that defendant had also recommended specifications for, and design of, roof and had performed certain inspection services, court held (1) that statute of limitations prescribed by UCC § 2-725(1) was inapplicable because action involved dispute over construction contract instead of contract that provided only for sale of raw materials for roof, (2) that even if UCC § 2-725(1) did apply to action, its four-year limitation period would bar plaintiff's breach of warranty claim, since language in defendant's advertising literature concerning built-up roofs did not amount to warranty that explicitly extended to future performance within meaning of future-warranty exception contained in UCC § 2-725(2), on which plaintiff relied, and (3) that defendant knew of plaintiff's expectations concerning roof and also that plaintiff might have relied on defendant's design expertise did not transform representations in defendant's advertising literature, which discussed present characteristics of its roofing materials and their successful use in other roofs, into explicit warranties of future performance (applying Illinois law; holding that plaintiff was relegated to its common-law remedies for breach of contract). *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 453 F. Supp. 527 (W.D. Pa. 1978), *aff'd* in part, *rev'd* in part, 626 F.2d 280 (3d Cir. Pa. 1980).

In action by buyer of computer system for damages for system's failure to function properly, court held (1) that parties' designation under UCC § 1-105(1) of Massachusetts law to govern their sales contract was immaterial, since buyer's breach-of-contract claims were governed by limitation period contained in UCC § 2-725(1), which had been adopted by both New York and Massachusetts; (2) that contract in suit was not one for performance of services, as alleged by buyer, but was one for purchase of goods within meaning of UCC § 2-106(1); (3) that action was not timely commenced by buyer, since breach had occurred in January, 1971 and buyer did not commence suit until August 14, 1975, which was more than four years after cause of action accrued; (4) that UCC § 2-725(2), which deals with warranty that explicitly extends to future performance and provides that discovery of breach must await such performance, did not apply, since warranty under UCC § 2-725(2) must expressly refer to the future and implied warranty alleged by buyer, by its very nature, did not do so; and (5) that seller's attempts to repair computer system did not toll running of statute of limitations prescribed by UCC § 2-725(1). *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), *rev'd* on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

Mississippi UCC § 2-725(1), providing that action for breach of contract of sale must be commenced within six years after cause of action accrued, applies to cause of action for breach of implied warranties of merchantability and fitness for particular purpose attaching to color television set. *Maly v. Magnavox Co.*, 460 F. Supp. 47 (N.D. Miss. 1978).

Four-year limitation period in District of Columbia UCC § 2-725(1) applies to actions involving sales contracts which are brought by the United States under District of Columbia UCC law. *United States v. Framen Steel Supply Co.*, 435 F. Supp. 681 (S.D.N.Y. 1977).

This section, as enacted in Pennsylvania, makes no distinction between sealed and unsealed instruments, and provides a four-year statute of limitations for "any

contract for sale." *Associates Disct. Corp. v. Palmer*, 47 N.J. 183, 219 A.2d 858 (1966).

2. Substantive or procedural nature of provision.

Limitations statute for breach of contracts for sale under this section as enacted in Pennsylvania is procedural and not substantive. *Natale v. Upjohn Co.*, 356 F.2d 590 (3d Cir. Del. 1966).

An action for breach of warranty, express or implied, existed in Pennsylvania long before the adoption of the Uniform Commercial Code, and the Code did not create a new cause of action for the statute of limitations contained in the Code as adopted in that state is not a part of a substantive right. *Lewis v. Food Mach. & Chem. Corp., John Bean Div.*, 245 F. Supp. 195 (W.D. Mich. 1965).

3. Distinction between oral and written contract.

Action for price of goods, wares and merchandise sold and delivered to buyer on open account was not time barred by the general statute of limitations of three years for oral contracts even though the purchases were incurred more than three but less than five years prior to filing of action, since, under UCC § 10-102 and 2-102, the five-year period of limitations of UCC § 2-725 superseded the pre-existing general statute and abrogated distinctions between oral and written sales contracts for purposes of statutes of limitations. *Sesow v. Swearingen*, 552 P.2d 705 (Okla. 1976).

In action to recover for gasoline purchased under retail dealer's contract, trial court erred in entering summary judgment for buyers on ground that action was barred by two-year statute of limitations relating to actions on contracts, obligations or liabilities not founded on instrument in writing; action, being one for price due seller, was governed by provisions of UCC § 2-725(1), even if sales contract was oral. *Hachten v. Stewart*, 42 Cal. App. 3d Supp. 1 (App. Dep't Super. 1974).

4. Applicability to particular types of actions.

Action for wrongful death arising out of crash of helicopter manufactured by de-

fendant based on breach of express and implied warranties was governed by 4-year statute of limitations contained in UCC § 2-725. *Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp.*, 425 F. Supp. 81 (D. Conn. 1977), on reconsideration, 505 F. Supp. 1049 (D. Conn. 1981).

Count of complaint which asserted that plaintiff relied to its ultimate damage on defendant's fraudulent representations as to capabilities of computer system which plaintiff purchased to replace existing system clearly alleged fraud in the inducement, a cause of action governed by 6-year limitation period; counts alleging misrepresentations and concealments made after execution of the contract did not state claims separate from the breach of contract cause of action, and were governed by the 4-year limitation period applicable to contract actions. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737 (2d Cir. N.Y. 1979).

In personal injury action based on breach of warranty attaching to boiler manufactured by defendant which, after having been sold by defendant to third person in 1962 and resold by such person in 1964 to plaintiff's employer, exploded and injured plaintiff in May, 1967, two-year statute of limitations for personal injuries, instead of four-year statute prescribed by UCC § 2-725(1) for breach of contract, applied and barred plaintiff's claim, since UCC § 2-725(1) does not, under any construction, apply to third-party personal injuries caused by defective product. *Salvador v. Atlantic Steel Boiler Co.*, 256 Pa. Super. 330, 389 A.2d 1148 (1978).

In action for personal injuries sustained from breach of implied warranty in sale of intrauterine device, applicable statute of limitations was four-year statute prescribed by UCC § 2-725(1) for breach of contract of sale and not the non-UCC, two-year statute of limitations prescribed for personal injuries generally. *Branden v. Gerbie*, 62 Ill. App. 3d 138, 379 N.E.2d 7 (1st Dist. 1978).

Under UCC § 3-802(1)(b), the holder of a note taken for an underlying contract has a choice of remedies: he can sue on the note itself or on the underlying contract (action on note in which court held that

since UCC Article 3 has no statute of limitations, six-year period of limitations applicable to actions on an express or implied obligation applied, instead of four-year statute contained in UCC § 2-725(1)). *O'Neill v. Steppat*, 270 N.W.2d 375 (S.D. 1978).

Contract for sale of trucks was not contract for sale of goods and, thus, was not governed by four-year statute of limitations contained in UCC § 2-725(1) where contract was executed simultaneously with contract for sale of truck manufacturing plant and where contract for sale of trucks was merely incidental and collateral to main object of effecting transfer of truck manufacturing plant. *Dynamics Corp. of Am. v. International Harvester Co.*, 429 F. Supp. 341 (S.D.N.Y. 1977).

Non-UCC statute of limitations applicable to actions for injuries arising from construction of any improvement to real property, and not statute of limitations contained in UCC § 2-725(1), applied to action for breach of implied warranty that house built by defendant was constructed in reasonably workmanlike manner and was fit for habitation, since house was not personalty but was improvement to real property within meaning of non-UCC statute of limitations. *Sponseller v. Meltebeke*, 280 Or. 361, 570 P.2d 974 (1977).

Plaintiff who contracted to compile, edit and publish pamphlets and other printed materials for defendants was entitled to benefit of four year statute of limitations under UCC § 2-725, since printed pamphlets and related materials were goods within meaning of UCC § 2-105(1) and since UCC statute of limitations prevailed over general statute of limitations in action based on contract for sale of goods. *Lake Wales Publishing Co. v. Florida Visitor, Inc.*, 335 So. 2d 335 (Fla. App. 1976).

Action by purchaser of floor tiles for breach of implied warranties was governed not by UCC § 7-725, but by state's 3-year limitation period applicable to actions for injury to property; action accrued when purchaser discovered or reasonably should have had knowledge of defect. *Southgate Community Sch. Dist. v. West Side Constr. Co.*, 399 Mich. 72, 247 N.W.2d 884 (1976).

Action by Michigan buyer against Ohio seller for breach of express and implied warranties, arising out of sale of diseased fish, seeking damages for loss of income and loss of business reputation, was governed by four-year statute of limitations contained in UCC § 2-725. *Roundhouse v. Owens-Illinois, Inc.*, 405 F. Supp. 868 (W.D. Mich. 1975).

Six-year limitation period relating to contracts in general, rather than more restrictive four-year statute of limitations specified in UCC, applied to action for breach of implied warranties or merchantability and fitness for use in connection with rental of scaffold. *Owens v. Patent Scaffolding Co.*, 50 A.D.2d 866 (2d Dep't 1975).

In action by purchasers of new homes against contractor who built homes and seller of bricks used therein for damages resulting from defective brick: (1) contracts between purchasers and contractor did not provide for "sale" as that term is used in UCC Article 2 and, thus, were not governed by four-year statute of limitations contained in § 2-725, but rather by general six-year limitations for breach of contract; (2) conversely, only relationship between purchasers and seller of bricks was that of buyers and seller, which was governed by UCC Article 2, and, since more than four years passed between respective purchases from seller and alleged breach of warranty, action was barred. *DeMatteo v. White*, 233 Pa. Super. 339, 336 A.2d 355 (1975).

In action by seller to recover purchase price of goods under contract which provided, among other things, that payment would be evidenced by trade acceptances executed by buyer and, further, that defendant guaranteed buyer's full performance, where buyer, upon receipt of goods, executed trade acceptances to which defendant was not a party, and where buyer defaulted on trade acceptances and goods were never paid for, defendant's liability under contract was limited to 4 years under UCC § 2-725(1) rather than by 6 year limitation applicable to trade acceptances. *American Trading Co. v. Fish*, 78 Misc. 2d 210 (1974), *aff'd*, 50 A.D.2d 764, 376 N.Y.S.2d 1014 (1975), leave to appeal granted in part, dismissed

in part, 39 N.Y.2d 987, 387 N.Y.S.2d 234, 355 N.E.2d 289 (1976), rev'd, 42 N.Y.2d 20, 396 N.Y.S.2d 617, 364 N.E.2d 1309 (1977).

Four-year limitation provision of UCC § 2-725 was applicable to action brought by seller of three air conditioner compressors against purchaser for unpaid balance due. *Big D Serv. Co. v. Climatrol Indus., Inc.*, 514 S.W.2d 148 (Tex. Civ. App. 1974), writ refused, 523 S.W.2d 236 (Tex. 1975).

In action against manufacturer of birth control pills and association from whom pills were purchased arising when plaintiff suffered stroke, lack of privity between plaintiff and manufacturer under UCC § 2-318 was of no consequence and 4 year statute of limitations under UCC § 2-725 governed; birth control association which gave advice and dispensed birth control pills was engaged in sale of goods as required by Code and plaintiff's failure to allege that pills did not prevent contraception would not bar recovery on theory of breach of implied warranty of fitness for particular purpose under UCC § 2-315; however, under UCC § 2-607(3)(a), plaintiff was required to notify association of alleged breach of implied warranty. *Berry v. G.D. Searle & Co.*, 56 Ill. 2d 548, 309 N.E.2d 550, 70 A.L.R.3d 304 (1974).

Action for breach of warranty of good title relative to contract for sale of ball bearings and other automotive equipment was within 4-year limitation provision of UCC, but fraud action arising out of alleged false representations in regard to title was governed by 5-year limit of Limitations Act. *Best Bearings, Inc. v. Challenger Parts Rebuilders, Inc.*, 10 Ill. App. 3d 404, 294 N.E.2d 118 (2d Dist. 1973).

Action for breach of implied warranty in sale of goods by written contract is governed by 4-year statute of limitations since this statute relates to specific subject matter of sales, unlike general statutes of limitations dealing with actions for injuries to person or property. *Val Decker Packing Co. v. Corn Prods. Sales Co.*, 23 Ohio Misc. 162, 411 F.2d 850 (6th Cir. Ohio 1969).

The Pennsylvania Motor Vehicles Sales Financing Act contains no statute of limitations which might conflict with this section as enacted in that state, and Pennsyl-

vania courts have applied the provisions of both laws together when deciding cases involving motor vehicle sales. *Associates Dist. Corp. v. Palmer*, 47 N.J. 183, 219 A.2d 858 (1966).

5. —Actions against manufacturer who is not seller.

Plaintiff, the subpurchaser of a defective used crane, may not recover its economic loss resulting from the inability to make use of the defective crane from defendant, the manufacturer of the crane, under the theory of breach of warranty since there is no contractual relationship between the parties and therefore no warranty either express or implied under the Uniform Commercial Code; the extended protection of warranty to persons who may reasonably be expected to use, consume or be affected by goods, is afforded only to natural persons who suffer personal injuries (Uniform Commercial Code, § 2-318) or to subpurchasers who justifiably relied upon representations made by the manufacturer to the public through advertising and in labels tagged to the goods themselves (see *Randy Knitwear v. American Cyanamid Co.*, 11 NY2d 5) a plaintiff, which purchased the crane "as is", assumed risks based on the prior use of the crane and cannot show justifiable reliance and, in any event, since the crane was delivered to the initial purchaser in 1970, the action based on breach of warranty is barred by the Statute of Limitations. *Steckmar Nat'l Realty & Inv. Corp. v. JI Case Co.*, 99 Misc. 2d 212 (1979).

In action commenced more than three years from date of accident by purchasers of new automobile against vehicle's manufacturer, manufacturer of tires with which vehicle was equipped, and seller of vehicle for injuries sustained from blowout of front tire, two-year statute of limitations governing suits for personal injuries applied (instead of four-year statute of limitations prescribed by UCC § 2-725 for breach of contract of sale) and barred maintenance of such action against defendant vehicle manufacturer and defendant tire manufacturer, since UCC § 2-725 applies only to situations involving buyer-seller relationship (as distinguished from noncontractual warranty actions against manufacturers) and no buyer-seller rela-

tionship existed between plaintiffs and defendant manufacturers. *Plouffe v. Goodyear Tire & Rubber Co.*, 118 R.I. 288, 373 A.2d 492 (1977).

UCC § 2-725 does not govern action for breach of manufacturer's obligations to third-party beneficiary where manufacturer was not seller of allegedly defective product causing injury. *Kelly v. Ford Motor Co.*, 110 R.I. 83, 290 A.2d 607 (1972).

6. —Actions involving personal services.

Four-year limitation period in UCC § 2-725(1) applies to contracts for sale of goods and not to contracts for furnishing of services. *Shead v. Grissett*, 566 S.W.2d 318 (Tex. Civ. App. 1978).

Defendant auto dealer, which improperly applied a manufacturer's rustproofing material to plaintiff's automobile resulting in rust damage, is liable to the plaintiff for consequential damages, i.e., the cost of repairing his car, since the application of the rustproofing material was a contract between the plaintiff and defendant which the defendant breached by improper application and inadequate inspection and the defendant cannot claim as a defense the terms of section 2-719 of the Uniform Commercial Code that limits a buyer's remedies to the return of the goods and repayment of the price since the contract is for services and not a sales contract and for the same reason the four-year Statute of Limitations under section 2-725 of the Uniform Commercial Code is not applicable but rather the six-year Statute of Limitations under CPLR 213. *Perlmutter v. Don's Ford, Inc.*, 96 Misc. 2d 719 (1978).

In hospital's suit against decedent's heirs for disposing of property inherited from decedent without first paying hospital's bill for services rendered to decedent before her death, two-year period of limitations, instead of four-year period prescribed by UCC § 2-725(1), applied since essence of plaintiff's claim was furnishing of healing services and not sale of medicines. *Potts v. W.Q. Richards Mem. Hosp.*, 558 S.W.2d 939 (Tex. Civ. App. 1977).

Where contract for purchase and installation of prefabricated overhead doors charged lump sum for equipment and installation making it a nondivisible mixed

contract, contract was for sale of goods as defined in UCC § 2-105 as service element did not dominate subject matter even though overhead doors were useless without performance of installation services; thus UCC statute of limitations governed. *Meyers v. Henderson Constr. Co.*, 147 N.J. Super. 77, 370 A.2d 547 (L. Div. 1977).

Sod, trees and shrubs sold by nurseryman were goods within meaning of UCC § 2-105(1); thus, contract for sale and installation of trees and shrubs and sale and placing of substantial amount of sod was contract for sale of goods governed by four-year statute of limitations contained in UCC § 2-725(1), notwithstanding contract in question also involved rendering of substantial amount of services. *Burton v. Artery Co.*, 279 Md. 94, 367 A.2d 935 (1977).

Where design services which steel supplier provided under contract were incidental to basic purpose of contract, which was provision of structural steel to be used in construction of container handling facility, essence of transaction was sale of goods and supplier's action for breach of contract was barred by 4-year statute of limitations of UCC § 2-725; fact that specially designed product to fulfill needs of project was required did not negate characterization of transaction as sale of goods. *Belmont Indus., Inc. v. Bechtel Corp.*, 425 F. Supp. 524 (E.D. Pa. 1976).

Action by funeral parlor to recover payment for funeral was not barred by four-year statute of limitations contained in UCC § 2-725; essence of contractual relationship between plaintiff and defendant was one in which service predominated, furnishing of casket was but incidental feature of transaction, and, thus, transaction was not "sale" within ambit of UCC, but one for services. *Joseph P. Suchy, Inc. v. Stuerzel*, 82 Misc. 2d 40 (1975).

UCC four year statute of limitations for sale of goods bars action brought by former franchise holder alleging automobile manufacturer's alleged breach of contractual obligation to repurchase unused and undamaged parts held by plaintiff at termination of franchise; six year statute of limitations for personal service contract, inapplicable. *Campana Pontiac, Inc. v. GMC*, 46 Pa. D. & C.2d 486 (1969).

7. —Action on open account.

Action on open account against buyers of health foods purchased for resale was subject to six-year period of limitations prescribed by Mississippi UCC § 2-725(1), instead of three-year period fixed by non-UCC statute for actions on open account or account stated (holding that buyers were neither farmers nor consumers of health foods purchased, so as to be exempt from six-year limitation period prescribed by UCC § 2-725(1)). *Hughes v. Collegedale Distribs.*, 355 So. 2d 79 (Miss. 1978).

Action by wholesale grocer against customer to recover for groceries purchased on open account was governed by four-year statute of limitations, UCC § 2-725. *Kinsey v. Hubby-Reese Co.*, 530 S.W.2d 846 (Tex. Civ. App. 1975).

Four-year limitation period provided for by Code § 2-725 is applicable to suit arising out of sales on open account. *Ideal Bldrs. Hdwe. Co. v. Cross Constr. Co.*, 491 S.W.2d 228 (Tex. Civ. App. 1972).

8. —Causes of action which predate adoption of UCC.

UCC's four year limitations statute does not apply to breach of warranty action where sale occurred prior to Code's effective date. *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 253 N.E.2d 207 (1969), reargument denied, 26 N.Y.2d 751 (1970), but see, *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275 (1975).

Code § 2-725 which sets forth limitations for commencement of actions for breach of contracts for sales governed by UCC was not applicable to action for injuries resulting when drive shaft of construction elevator broke and caused elevator to fall, because Code became effective after sale of elevator in question. *Hager v. Brewer Equip. Co.*, 17 N.C. App. 489, 195 S.E.2d 54, 57 A.L.R.3d 861 (1973).

Breach of warranty action accrued at time defendant sold allegedly defective soy beans to plaintiffs, which was prior to effective date of UCC, so that 4 year statute of limitations provided for in § 2-725 was not applicable. *Hall v. Gurley Milling Co.*, 347 F. Supp. 13 (E.D.N.C. 1972).

It was within the discretion of the Ohio legislature to reduce the limitation period for the bringing of an action for breach of warranty on a contract executed prior to July 1, 1962 as to which the breach occurred after July 1, 1962 from fifteen to four years. *Ohio Brass Co. v. Allied Prods. Corp.*, 64 Ohio Op. 2d 303, 339 F. Supp. 417 (N.D. Ohio 1972).

Cause of action for breach of warranty was governed by UCC even though contract for sale was entered into prior to effective date of UCC, where delivery occurred subsequent to effective date, and accrual of cause of action was a time no earlier than commencement of delivery and no later than conclusion of delivery. *Ohio Brass Co. v. Allied Prods. Corp.*, 64 Ohio Op. 2d 303, 339 F. Supp. 417 (N.D. Ohio 1972).

Third-party action which automobile dealer brought against manufacturer on theories of strict liability in tort and implied warranty for judgment recovered against it in main action arising out of accident allegedly caused by defect in automobile were subject to the six year statute of limitations from the date of the original sale of the automobile unless the evidence showed that the sale was made on or after September 26, 1964, in which event the four year statute of limitations would apply. *Ibach v. Grant Donaldson Serv., Inc.*, 38 A.D.2d 39 (4th Dep't 1971).

The limitation period contained in this section is inapplicable to transaction occurring prior to the date upon which the Uniform Commercial Code took effect. *Mendel v. Pittsburgh Plate Glass Co.*, 57 Misc. 2d 45 (1967), aff'd, 29 A.D.2d 918, 290 N.Y.S.2d 186 (4 Dep't 1968), aff'd, 25 N.Y.2d 340, 305 N.Y.S.2d 490, 253 N.E.2d 207 (1969), reargument denied, 26 N.Y.2d 751, 309 N.Y.S.2d 1031 (1970).

The statute of limitations of the Code does not apply to events occurring before the effective date of the Code. *Konar v. Monro Muffler Shops, Inc.*, 28 A.D.2d 642 (4th Dep't 1967).

Code statute of limitations is inapplicable to complaint alleging injury prior to effective date of Code. *Raskin v. Shulton, Inc.*, 92 N.J. Super. 315, 223 A.2d 284 (App. Div. 1966).

9. —Charge card transactions.

Action by credit card issuer against card holder to recover balance due on holder's account was governed by 10 year limitation applicable to written contracts, including promises to pay money, and was not barred by UCC § 2-725, the 4-year statute of limitations governing contracts for sale of goods. *Harris Trust & Sav. Bank v. McCray*, 21 Ill. App. 3d 605, 316 N.E.2d 209, 2 A.L.R.4th 671 (1st Dist. 1974).

UCC four year statute of limitations for sale of goods applies to bar action brought by store for price of items purchased by customer on charge account; six year statute of limitations on action to collect debt, inapplicable. *Gimbel Bros. v. Cohen*, 46 Pa. D. & C.2d 747 (1969).

10. —Personal injury actions based on breach of warranty.

Prescriptive periods applicable to claims brought by statutory heirs arising from alleged wrongful death of decedent were not tolled during pendency of prior wrongful death actions, inasmuch as wrongful death statute did not operate to bar any other action unless matter was decided on its merits, and in further view of fact that plaintiffs were active in state court litigation involving same subject matter before the court; plaintiffs' active involvement in state court action and their filing of prior lawsuit in federal court absolutely destroyed their argument that they were prohibited by law from bringing suit, furthermore, their participation in such earlier lawsuits negated any suspension of limitation period applicable under state law. *Brown v. Dow Chem. Co.*, 777 F. Supp. 504 (S.D. Miss. 1989).

An action for breach of a contract of sale, as provided for in section 2-725 of the Uniform Commercial Code, includes an action for personal injury arising from a breach of warranty. *McCarthy v. Bristol Labs.*, 61 A.D.2d 196 (2d Dep't 1978).

The special Statute of Limitations of four years in section 2-725 of the Uniform Commercial Code governing actions for breach of a contract of sale, where applicable, supplants the general Statute of Limitations of three years for personal injury actions in CPLR 214 (subd 5). *McCarthy v. Bristol Labs.*, 61 A.D.2d 196 (2d Dep't 1978).

Action for breach of contract of sale, to which four-year period of limitations prescribed by New York UCC § 2-725(1) applies, includes action for personal injuries arising from breach of warranty in view of provisions of (1) New York UCC § 2-318, which explicitly states that seller's warranty, whether express or implied, extends to any natural person who is injured in person by breach of the warranty, (2) New York UCC § 2-715(2)(b), which states that consequential damages resulting from seller's breach include injury to person or property proximately resulting from any breach of warranty, and (3) New York UCC § 2-719(3), which makes a limitation of consequential damages for injury to the person caused by consumer goods prima facie unconscionable. *McCarthy v. Bristol Labs.*, 61 A.D.2d 196 (2d Dep't 1978).

UCC § 2-725 is applicable to a personal injury action based upon breach of warranty. *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088 (N.D.N.Y. 1977).

Under Indiana law, 4-year statute of limitations contained in UCC § 2-725 was applicable to cause of action for breach of warranty sounding in tort, rather than 2-year limitation period applicable to actions for injuries to persons or property. *Waldron v. Armstrong Rubber Co.*, 64 Mich. App. 626, 236 N.W.2d 722 (1975).

In action seeking damages for personal injuries resulting from automobile accident which plaintiff alleged was caused by manufacturing defect, UCC § 2-725, providing a four-year limitation period for action for breach of contract of sale, was inapplicable, even though plaintiff couched action in terms of breach of warranty. *Becker v. Volkswagen of Am., Inc.*, 52 Cal. App. 3d 794 (1st Dist. 1975).

Personal injury claim based upon breach of warranty is distinct from personal injury claim based on negligence and under Code can be commenced within 4 years after cause of action has occurred. *Salvador v. I.H. English of Phila., Inc.*, 224 Pa. Super. 377, 307 A.2d 398 (1973), aff'd, 457 Pa. 24, 319 A.2d 903 (1974).

A personal injury action based on breach of warranty, even though arising out of the consequences of a sale, is not subject to UCC § 2-725 limitations stat-

ute. *Heavner v. Uniroyal, Inc.*, 118 N.J. Super. 116, 286 A.2d 718 (App. Div. 1972), *aff'd*, 63 N.J. 130, 305 A.2d 412 (1973).

Four year statute of limitations governing personal injury actions based upon breach of warranty is calculated from date of breach of warranty, and not from date of accident giving rise to injuries. *Hoffman v. A. B. Chance Co.*, 339 F. Supp. 1385 (M.D. Pa. 1972).

Four-year limitations period for personal injury actions based upon breach of warranty is calculated, under UCC § 2-725(2), from date of breach of warranty, i.e. tender of delivery, and not from date of accident giving rise to injuries. *Hoffman v. A. B. Chance Co.*, 339 F. Supp. 1385 (M.D. Pa. 1972).

Where an action is correctly brought within the framework of the UCC, here an action for breach of warranty, the applicable statute of limitations is that of the UCC, here UCC § 2-725, although the damages sought are for personal injuries. *Sinka v. Northern Com. Co.*, 491 P.2d 116 (Alaska 1971).

Four-year statute of limitations under Code § 2-725 is applicable to personal injury actions based upon breach of warranty. *Hoeflich v. William S. Merrell Co.*, 288 F. Supp. 659 (E.D. Pa. 1968).

The four-year period of limitations provided in subsection (1) controlled an action in assumpsit charging breaches of express and implied warranties on the part of a gas company safely to deliver that commodity to the plaintiffs' home and that the breach of such warranties resulted in personal injuries, and an earlier two-year statute no longer applied. *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964).

11. —Personal injury actions based on breach of warranty; illustrative cases.

In suit by hospital cashier who was injured while operating cash register manufactured by defendant manufacturer-seller after it had been delivered by buyer to hospital, court held, with respect to plaintiff's breach-of-implied-warranty claims, (1) that under Mississippi UCC § 1-105(1), which sets forth specific conflict-of-laws rule for warranty claims, Mississippi law governed the rights and du-

ties of parties with regard to (a) disclaimers of implied warranties of merchantability or fitness, (b) limitation of remedies for breach of such warranties, and (c) necessity of privity of contract to maintain action for breach of warranty; (2) that rule of Mississippi UCC § 1-105(1), as expressly stated therein, applied notwithstanding agreement by parties that laws of another state or of foreign nation governed parties' rights and duties; (3) that under Mississippi UCC § 1-105(1), application of Mississippi substantive law on privity of contract, warranty disclaimers, and limitation of remedies in warranty action was authorized only if transaction that gave rise to warranty claim bore some reasonable and appropriate relation to Mississippi; (4) that facts of case showed that transactions that gave rise to plaintiff's warranty claim did not bear any relation to Mississippi and did not warrant application of Mississippi substantive law; (5) that under conflict-of-law "center-of-gravity" doctrine, Alabama had most significant relation to transactions in suit; (6) that since Alabama's breach-of-warranty statute of limitations (see Alabama UCC § 2-725(1) and (2)) would be regarded as procedural, Mississippi's breach-of-warranty statute of limitations (see Mississippi UCC § 2-725(1) and (2)) governed case; and (7) that under Mississippi UCC § 2-725(1) and (2), plaintiff's warranty claim was barred because tender of delivery of cash register that caused plaintiff's injuries had occurred more than six years before accrual of plaintiff's cause of action. *Jackson v. National Semi-Conductor Data Checker/DTS, Inc.*, 660 F. Supp. 65 (S.D. Miss. 1986).

Action by hospital patient for damages for personal injuries arising from breach of warranty attaching to drugs manufactured by defendants and administered to plaintiff during her confinement was governed by four-year period of limitations prescribed by New York UCC § 2-725(1) for actions for breach of contract of sale, instead of three-year period prescribed by New York's general personal-injuries limitation statute, since UCC action for breach of contract of sale includes action for personal injuries stemming from

breach of warranty (observing that four-year period of limitations prescribed by New York UCC § 2-725(1) might also be applicable because, on basis of record on appeal, a contract for sale of the drugs to plaintiff herself could not be summarily ruled out). *McCarthy v. Bristol Labs.*, 61 A.D.2d 196 (2d Dep't 1978).

In personal injury action based on breach of warranty attaching to boiler manufactured by defendant which, after having been sold by defendant to third person in 1962 and resold by such person in 1964 to plaintiff's employer, exploded and injured plaintiff in May, 1967, two-year statute of limitations for personal injuries, instead of four-year statute prescribed by UCC § 2-725(1) for breach of contract, applied and barred plaintiff's claim, since UCC § 2-725(1) does not, under any construction, apply to third-party personal injuries caused by defective product. *Salvador v. Atlantic Steel Boiler Co.*, 256 Pa. Super. 330, 389 A.2d 1148 (1978).

In action for personal injuries sustained from breach of implied warranty in sale of intrauterine device, applicable statute of limitations was four-year statute prescribed by UCC § 2-725(1) for breach of contract of sale and not the non-UCC, two-year statute of limitations prescribed for personal injuries generally. *Branden v. Gerbie*, 62 Ill. App. 3d 138, 379 N.E.2d 7 (1st Dist. 1978).

Airplane passenger could maintain action for personal injuries against airplane manufacturer, based on breach of implied warranty under UCC § 2-715, notwithstanding passenger was not in privity with manufacturer, and thus plaintiff could avail herself of 4-year statute of limitations provided in UCC § 2-725 which commenced to run from date of injury. *Roberts v. General Dynamics, Convair Corp.*, 425 F. Supp. 688 (S.D. Tex. 1977).

In action by husband and wife against manufacturer of plastic container for damages resulting when container fell from shelf and contents spilled onto wife's body, UCC § 2-725 statute of limitations for breach of warranty actions was inapplicable because under UCC § 2-318, plaintiffs were beyond scope of statutory

warranty protection and action was governed by two-year statute of limitations for actions for injuries to rights of another. *Moss v. Polyco, Inc.*, 522 P.2d 622 (Okla. 1974).

Code's 4 year statute of limitations was applicable to action against manufacturer of contraceptive drug to recover damages for personal injuries resulting from alleged breach of implied warranty that drug was not fit for purpose for which it was sold. *Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 512 P.2d 776 (1973).

UCC § 2-725 is specific statute of limitations dealing with sales contracts, and operated to repeal general statutes which dealt generally with same class or type of actions, but would not affect shorter limitation period of statute dealing specifically with actions brought as consequence of injuries sustained while skiing. *Weiner v. Sherburne Corp.*, 57 F.R.D. 636 (D. Vt. 1972).

Plaintiffs' survival actions for personal injuries resulting from an alleged breach of warranty in sale of pearl kerosene was governed by 4-year limitations statute of UCC § 2-725, rather than general 2-year negligence statute, notwithstanding that damages sought were for fatal personal injuries. *Sinka v. Northern Com. Co.*, 491 P.2d 116 (Alaska 1971).

Four year statute of limitations applied to claims of breach of implied warranties of merchantability and fitness for particular purpose, in action for injuries sustained by purchaser of allegedly defective ladder; only common-law negligence and strict liability counts of complaint were barred in action commenced more than one year from date of sale of ladder to purchaser. *Layman v. Keller Ladders, Inc.*, 224 Tenn. 396, 455 S.W.2d 594 (1970).

Under a complaint alleging that plaintiff purchased from the defendant a coffee maker; that when the contract of sale was entered into there was an implied warranty from the defendant to the plaintiff that the coffee maker was fit for the purpose for which it was to be used; and that plaintiff was injured when the coffee maker broke causing boiling water to fall on plaintiff's leg causing personal injuries, the essence of the case was breach of

contract, rather than negligence, and the four year statute of limitations applicable to implied warranty of fitness applied rather than the three year statute applicable to actions for personal injuries. *Bort v. Sears, Roebuck & Co.*, 58 Misc. 2d 889 (1969).

Third party complaint filed more than 4 years after original action was brought against restaurant proprietor for hepatitis allegedly caused by eating raw clams in restaurant was barred by statute of limitations provision that breach of contract action must be commenced within four years after cause of action accrued. *Schmitz v. DiNicola*, 28 Conn. Supp. 385, 264 A.2d 14 (1969).

Count alleging fall upon ice caused by breach of implied warranty that ice skates were fit for purpose of skating was not within confines of implied warranty sections of Code and four year limitation of Code § 2-725, but was barred by three year statute of limitations as to tort actions. *Abate v. Barkers of Wallingford, Inc.*, 27 Conn. Supp. 46, 229 A.2d 366 (1967).

Where the insurer or the purchaser of a swimming pool installed by the seller in 1955 paid, in 1964, the claim of a person injured by diving into the pool in 1961, and brought an action in 1965 against the seller of the pool to recover the amount paid to the injured person, it was held by a Federal Court applying Massachusetts law that insofar as the action was based on breach of contract and breach of warranty in the sale of the pool, the action was required by c. 260, § 2 to be brought within 6 years after the cause of action accrued, that such cause accrued, by reference also to c. 106, § 2-725(2), when delivery of the pool was made, regardless of the buyer's knowledge of the breach, and that the action brought 10 years after the installation of the pool was barred by the statute of limitations. *Wolverine Ins. Co. v. Tower Iron Works, Inc.*, 370 F.2d 700 (1st Cir. Mass. 1966).

12. —Personal injury actions based on strict liability.

In products liability action by purchaser of automobile against manufacturer for injuries allegedly resulting from manufacturer's breach of express and implied war-

ranties of fitness: (1) cause of action was governed by UCC four-year statute of limitations, § 2-725, rather than general three-year statute; (2) nor was action barred under UCC by lack of privity. *Reid v. Volkswagen of Am., Inc.*, 512 F.2d 1294 (6th Cir. Mich. 1975).

In action for personal injuries based on strict products liability theory arising when child's arm was caught in laundry extractor, UCC § 2-725 statute of limitations governing breach of warranty causes of action relating to sales contracts was inapplicable. *Rivera v. Berkeley Super Wash, Inc.*, 44 A.D.2d 316 (2d Dep't 1974), reargument denied, 45 A.D.2d 734, 357 N.Y.S.2d 1010 (2d Dep't 1974), aff'd sub nom. *Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 373 N.Y.S.2d 39, 335 N.E.2d 275, 91 A.L.R.3d 445 (1975).

Product liability action for personal injuries alleging, inter alia, breach of implied warranties was governed by two-year statute of limitations and not by five-year statute found in UCC § 2-725. *Nichols v. Eli Lilly & Co.*, 501 F.2d 392 (10th Cir. Okla. 1974).

Cause of action for strict products liability was governed by normal three-year tort statute of limitations, commencing at time of injury, and was not barred by four-year contract statute of limitations, UCC § 2-725, commencing at time of sale. *Simmons v. Albany Boys Club, Inc.*, 80 Misc. 2d 19 (1974).

UCC 4-year statute of limitations was not applicable to strict liability claim against helicopter manufacturer. *Anderson v. Fairchild Hiller Corp.*, 358 F. Supp. 976 (D. Alaska 1973).

Code § 2-725 does not apply to strict liability consumer-user action against manufacture for consequential personal injury and property damage, and such an action is controlled by general statutes of limitations. *Heavner v. Uniroyal, Inc.*, 63 N.J. 130, 305 A.2d 412 (1973).

13. —Suits based on sale and delivery of goods.

Four-year statute of limitations under UCC § 2-725, and not the two-year statute of limitations imposed by a non-code statute, was applicable to action founded on breach of contract for sale and delivery

of materials. *Smith v. Post-Tensioned Sys.*, 537 S.W.2d 144 (Civ. App. 1976).

In action by purchaser of new car for breach of warranty, normal 4 year statute of limitations under UCC § 2-725(1) was not reduced by reason of manufacturer's "new vehicle warranty" covering defects in material or workmanship for "period of 12 months or 12,000 miles, which ever first occurs," since provision was not one year statute of limitations but established period during which cause of action might accrue for failure to repair or replace defect in material or workmanship. *Dennin v. GMC*, 78 Misc. 2d 451 (1974).

Four year statute of limitations provided in UCC § 2-725(1), applied to action to recover for goods sold and delivered. *Reiss v. Pacific Steel Pool Corp.*, 73 Misc. 2d 78 (1973).

Four year statute of limitations provided for in UCC § 2-725(1) was applicable to action to recover for goods sold and delivered, and prevailed over CPLR provision for 6 year statute of limitations. *Reiss v. Pacific Steel Pool Corp.*, 73 Misc. 2d 78 (1973).

14. —Suits based on security of financing agreements.

Four-year period of limitations in District of Columbia UCC § 2-725(1) did not apply to action by United States on behalf of federal Agency for International Development (AID) against seller of steel to recover for breach of financing agreement between agency and seller that was caused by seller's delivery of nonconforming steel to importer in foreign country, even though such financing agreement provided that it was to be governed by District of Columbia law, since agency and seller were not in buyer-seller relationship and no title to specific goods passed under the financing contract. UCC Article 2 does not apply to contracts by which parties obtain financing to buy or to sell goods, even though such financing contracts bear some relationship to separate contract for sale of goods (construing Dist of Col law, and holding that action was governed by six-year limitation period prescribed by 28 USCA § 2415 for contract actions by United States). *United States v. Framen Steel Supply Co.*, 435 F. Supp. 681 (S.D.N.Y. 1977).

Action for breach by buyer of written installment agreement, executed by buyer after having defaulted on original contract of sale, is governed by four-year statute of limitations prescribed by UCC § 2-725(1) and not by 15-year, non-UCC statute of limitations for written contracts generally. In such case, installment agreement was subject to scope of UCC Article 2, even though it was not executed contemporaneously with original contract of sale, since under UCC § 2-102, provisions of Article 2 apply to "transactions in goods" and term "transaction," as used in UCC § 2-102, encompasses a far wider activity than a "sale." *May Co. v. Trusnik*, 54 Ohio App. 2d 71, 375 N.E.2d 72 (1977).

Correct statute of limitation for action by seller against buyer under retail installment sales "security agreement" by which buyer became obligated to pay specified sum in monthly instalments, was UCC §§ 2-725 and not limitation statute applicable to actions upon written contract. *Mysel v. Gross*, 70 Cal. App. 3d Supp. 10 (Super. 1977).

Action under Code § 9-504(2) to recover surplus from resale of repossessed article was more closely related to security aspects of contract than it was to that part which concerned original sale, so that action was governed, not by 4 year statute of limitations in Code Sales Article, but by general contract statute of limitations of 6 years. *Chaney v. Fields Chevrolet Co.*, 264 Or. 21, 503 P.2d 1239, 59 A.L.R.3d 1199 (1972).

A suit for a deficiency judgment after repossession and sale of automobile subject to Pennsylvania "bailment lease security agreement" is nothing but a simple in personam action for that part of the sales price which remains unpaid, is an action to enforce the obligation of the buyer to pay the full sale price to the seller, and is an obligation existing as essential element of all sales irrespective of whether they are accompanied by a security agreement. *Associates Disct. Corp. v. Palmer*, 47 N.J. 183, 219 A.2d 858 (1966).

A deficiency action brought against one purchasing an automobile under Pennsylvania bailment lease security agreement must be considered more closely related to the sales aspect rather than to the secu-

rity aspect of the transaction, and is consequently controlled by the limitation period of this section. *Associates Dist. Corp. v. Palmer*, 47 N.J. 183, 219 A.2d 858 (1966).

15. When statute begins to run.

In action by buyer of forging machine for seller's breach of both its express performance warranties and its repair-and-replacement-of-parts warranty, where (1) delivery and installation of machine took place in October, 1967, (2) buyer, on December 29, 1967, sent letter to seller which detailed machine's performance defects, (3) seller for five months attempted to repair machine, but stopped such efforts on June 21, 1968, (4) buyer filed suit for breach of seller's warranties on May 29, 1969, and (5) contract between parties contained one-year limitation period for bringing such suit, which was minimum period allowed by UCC § 2-725(1), court held (1) that under UCC § 2-725(2), cause of action for breach of warranty accrues on initial installation of product, regardless of whether it functions properly, as long as seller's warranty does not extend to future performance, (2) that in present case, seller's express performance warranties explicitly extended to future performance for period of one year, since seller had expressly warranted machine's performance for such period, (3) that as a result, buyer's cause of action on such warranties accrued, under UCC § 2-725(2), when buyer discovered, or should have discovered, that machine was defective, as long as such defects occurred during machine's warranty period, (4) that since parties' contract provided for one-year limitation period for bringing suit for breach of contract, and since buyer had discovered and reported machine's defects to seller by letter on December 29, 1967, buyer's failure to institute suit until May 29, 1969, which was more than one year after discovery of defects, caused such suit to be barred under UCC § 2-725(2), (5) that seller was not estopped to assert statute of limitations as defense because of its spending over five months in attempting to repair machine, since such repair efforts did not toll running of statute under Ohio law, which applied to case under UCC § 2-725(4), (6) that buyer's cause of

action for seller's breach of its express warranty to repair or replace defective parts was not barred by contract's one-year period of limitations, since seller's repair efforts were terminated on June 21, 1968 and buyer's suit was filed within a year thereafter on May 29, 1969, and (7) that buyer's failure to notify seller of its breach of repair-or-replacement-of-defective-parts warranty, which was required by UCC § 2-607(3)(a), was fatal to buyer's cause of action on such warranty. *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 12 Ohio Op. 3d 246, 587 F.2d 813 (6th Cir. Ohio 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979).

Where defendant undertook to deliver entire computer system, ready to function immediately, breach of that undertaking occurred upon date of installation of system, not when defendant ceased to attempt to correct deficiencies in system, for purposes of UCC § 2-725, subd 1. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), rev'd on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

Where essence of plaintiff's claim was failure to provide computer system operational from installation, and failure was asserted to have been apparent from date of installation, cause of action accrued upon that date. *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), rev'd on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

Where suit on sales contract was commenced more than four years after contract became in default, but less than four years after last partial payment had been made and accepted, partial payment made on contract commenced running of UCC § 2-725 four-year statute of limitations again under same circumstances that partial payment on any other contract would commence statute of limitations running anew under general law of state, and therefore suit was not barred by statute of limitations. *Hamilton v. Pearce*, 15 Wash. App. 133, 547 P.2d 866 (1976).

Assuming that implied warranty was associated with washing machine manufacturer by foreign manufacturer, breach of warranty occurred when tender of de-

livery was made prior to enactment of long-armed statute and prior to its effective date; therefore, use of long-armed statute to obtain jurisdiction over foreign manufacturer would be impermissibly retroactive notwithstanding injury to user of washing machine which occurred in 1971. *AB CTC v. Morejon*, 324 So. 2d 625 (Fla. 1975), conformed to, 326 So. 2d 459 (Fla. App. 1976).

Operative date for determining whether 4-year Code or 6-year pre-code statute of limitations applied to action for breach of warranty was date when transaction was entered into, rather than date when action accrued. *Great Atl. & Pac. Tea Co. v. Rust Eng'g Co.*, 75 Misc. 2d 920 (1973).

Where the buyer is a political subdivision which cannot make payment for goods until the seller's claim has been audited, a refusal to audit the claim constitutes the breach of the contract by the buyer so that the period of the statute of limitations runs from that date. *J.C. Georg Serv. Corp. v. Town of Summit*, 28 A.D.2d 578 (3d Dep't 1967).

16. —Date of injury or discovery of breach.

In breach of warranty action to recover damages for defects in roof of plaintiff's new steel plant, where evidence showed (1) that defendant had manufactured and sold insulation and components of roof membrane to plaintiff, and (2) that defendant had also recommended specifications for, and design of, roof and had performed certain inspection services, court held (1) that statute of limitations prescribed by UCC § 2-725(1) was inapplicable because action involved dispute over construction contract instead of contract that provided only for sale of raw materials for roof, (2) that even if UCC § 2-725(1) did apply to action, its four-year limitation period would bar plaintiff's breach of warranty claim, since language in defendant's advertising literature concerning built-up roofs did not amount to warranty that explicitly extended to future performance within meaning of future-warranty exception contained in UCC § 2-725(2), on which plaintiff relied, and (3) fact that defendant knew of plaintiff's expectations concerning roof and also that plaintiff might have relied on defendant's design

expertise did not transform representations in defendant's advertising literature, which discussed present characteristics of its roofing materials and their successful use in other roofs, into explicit warranties of future performance (applying Illinois law; holding that plaintiff was relegated to its common-law remedies for breach of contract). *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 453 F. Supp. 527 (W.D. Pa. 1978), *aff'd in part, rev'd in part*, 626 F.2d 280 (3d Cir. Pa. 1980).

In action by buyer of forging machine for seller's breach of both its express performance warranties and its repair-and-replacement-of-parts warranty, where (1) delivery and installation of machine took place in October, 1967, (2) buyer, on December 29, 1967, sent letter to seller which detailed machine's performance defects, (3) seller for five months attempted to repair machine, but stopped such efforts on June 21, 1968, (4) buyer filed suit for breach of seller's warranties on May 29, 1969, and (5) contract between parties contained one-year limitation period for bringing such suit, which was minimum period allowed by UCC § 2-725(1), court held (1) that under UCC § 2-725(2), cause of action for breach of warranty accrues on initial installation of product, regardless of whether it functions properly, as long as seller's warranty does not extend to future performance, (2) that in present case, seller's express performance warranties explicitly extended to future performance for period of one year, since seller had expressly warranted machine's performance for such period, (3) that as a result, buyer's cause of action on such warranties accrued, under UCC § 2-725(2), when buyer discovered, or should have discovered, that machine was defective, as long as such defects occurred during machine's warranty period, (4) that since parties' contract provided for one-year limitation period for bringing suit for breach of contract, and since buyer had discovered and reported machine's defects to seller by letter on December 29, 1967, buyer's failure to institute suit until May 29, 1969, which was more than one year after discovery of defects, caused such suit to be barred under UCC § 2-725(2), (5) that

seller was not estopped to assert statute of limitations as defense because of its spending over five months in attempting to repair machine, since such repair efforts did not toll running of statute under Ohio law, which applied to case under UCC § 2-725(4), (6) that buyer's cause of action for seller's breach of its express warranty to repair or replace defective parts was not barred by contract's one-year period of limitations, since seller's repair efforts were terminated on June 21, 1968 and buyer's suit was filed within a year thereafter on May 29, 1969, and (7) that buyer's failure to notify seller of its breach of repair-or-replacement-of-defective-parts warranty, which was required by UCC § 2-607(3)(a), was fatal to buyer's cause of action on such warranty. *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 12 Ohio Op. 3d 246, 587 F.2d 813 (6th Cir. Ohio 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979).

Where limitation period was a controlling issue in homeowner's action against sewage system manufacturer for breach of express warranty, trial court should have made findings of fact as to when homeowner discovered, or should have discovered, malfunction of sewage system. *Daughtry v. Jet Aeration Co.*, 91 Wash. 2d 704, 592 P.2d 631 (1979).

In diversity action instituted to recover damages for malfunctioning of heating and ventilating equipment, where plaintiff, a Pennsylvania corporation, purchased goods from Ohio corporation by order placed at Ohio corporation's Pennsylvania office; where defendant, a Wisconsin corporation, subsequently acquired Ohio corporation and communicated with plaintiff concerning performance of goods in such manner as to cause plaintiff to believe that it was dealing with Wisconsin corporation and not Ohio corporation; where goods were ordered on January 24, 1969, found to be defective on November 24, 1971, and action was commenced in federal district court in Pennsylvania in May, 1976; and where defendant contended that six-year Wisconsin statute of limitations applied to case, (1) district court sitting in Pennsylvania was required to apply Pennsylvania conflict-of-

law rules; (2) although it was not clear whether contract was formed in Pennsylvania or Ohio, under Pennsylvania law, if place of formation of contract differed from place of performance, law of place of performance governed; (3) since goods in suit were to be installed in Pennsylvania school, Pennsylvania was place of performance; (4) under Pennsylvania UCC § 2-725(1) and (2), latest date on which four-year statute of limitations applicable to actions for breach of contract of sale began to run was November 24, 1971, when breach was discovered; and (5) action was therefore barred because it was not brought until May, 1976. *Bohrer-Reagan Corp. v. Modine Mfg. Co.*, 433 F. Supp. 578 (E.D. Pa. 1977).

Airplane passenger could maintain action for personal injuries against airplane manufacturer, based on breach of implied warranty under UCC § 2-715, notwithstanding passenger was not in privity with manufacturer, and thus plaintiff could avail herself of 4-year statute of limitations provided in UCC § 2-725 which commenced to run from date of injury. *Roberts v. General Dynamics, Convair Corp.*, 425 F. Supp. 688 (S.D. Tex. 1977).

In action by employees under third-party-beneficiary-of-warranty provisions in Alabama version of UCC § 2-318 for silicosis injuries allegedly sustained as result of breach of warranties made in connection with sale of sandblasting hoods and respirators used by plaintiffs in their work, four-year statute of limitations prescribed by Alabama version of UCC § 2-725(1) applied and began to run from time of plaintiffs' injury. Accordingly, (1) since under Alabama law silicosis is deemed to be continuing injury time of which is determined by last date of exposure, and (2) since last date of exposure is deemed to be last date of employment in work causing such injury, statute of limitations in present case began to run on last date plaintiffs used the defective hoods and respirators in their employment. *Simmons v. American Mut. Liab. Ins. Co.*, 433 F. Supp. 747 (S.D. Ala. 1976), aff'd sub nom. *Love v. American Mut. Liab. Ins. Co.*, 560 F.2d 1021 (5th Cir. Ala. 1977), aff'd, 560 F.2d 1022 (5th Cir. Ala. 1977).

Action for personal injuries against manufacturer of propane truck which exploded, based on breach of warranty, was governed by four year statute of limitations under UCC § 2-725 and cause of action arose on date of injury. *Morton v. Texas Welding & Mfg. Co.*, 408 F. Supp. 7 (S.D. Tex. 1976).

Cause of action against helicopter manufacturer for breach of express and implied warranties relating to merchantability (failure to supply certain information relating to servicing helicopters as required by contract) accrued when breach was or should have been discovered under UCC § 2-725(2). *Klondike Helicopters, Ltd. v. Fairchild Hiller Corp.*, 334 F. Supp. 890 (N.D. Ill. 1971).

Breach of warranty action relating to purchase of mining equipment was barred by Code § 2-725 where tender of delivery of equipment was made more than six years before filing of action; exception within Code § 2-725(2) for prospective warranties could not be invoked where alleged breach was discovered within few months of buyer's operation of equipment and considerably more than four years prior to filing of action. *Bobo v. Page Eng'g Co.*, 285 F. Supp. 664 (W.D. Pa. 1967), aff'd, 395 F.2d 991 (3d Cir. Pa. 1968).

The period of the statute of limitations begins to run from the knowledge of the wrong or the time when the injured person should have acquired knowledge thereof. *Carney v. Barnett*, 278 F. Supp. 572 (E.D. Pa. 1967).

In applying the rule that the period of the statute of limitations commences to run when knowledge of the breach should have been acquired, the term "knowledge" refers to the knowledge of the injured person and not to his personal representative, where the injured person dies. *Carney v. Barnett*, 278 F. Supp. 572 (E.D. Pa. 1967).

An action begun in 1962, predicated on a breach of warranty arising out of the sale of a potato harvester bought in 1956, was barred by the statute of limitations, since even if it be considered that the breach of warranty was not discovered and could not have been discovered until the 1957 harvest, the statute would have run during the potato harvesting season

of 1961. *Lewis v. Jacobsen*, 30 Pa. D. & C.2d 623 (1962).

In an action for breach of warranty the plaintiff must aver the date that harm was sustained, as it is that date on which the statute of limitations begins to run, and a pleading is not sufficient when the plaintiff merely avers the later date on which the plaintiff learned of the cause of the injury. *Gionfriddo v. Helene Curtis Indus., Inc.*, 110 Pitts. Legal J. 171 (Pa. 1962).

17. —Date of sale or delivery.

A cause of action for breach of warranty of title, arising from the sale of a bulldozer accrued when tender of delivery of the bulldozer was made. *Huff v. Hobgood*, 549 So. 2d 951 (Miss. 1989).

In suit by hospital cashier who was injured while operating cash register manufactured by defendant manufacturer-seller after it had been delivered by buyer to hospital, court held, with respect to plaintiff's breach-of-implied-warranty claims, (1) that under Mississippi UCC § 75-1-105(1), which sets forth specific conflict-of-laws rule for warranty claims, Mississippi law governed the rights and duties of parties with regard to (a) disclaimers of implied warranties of merchantability or fitness, (b) limitation of remedies for breach of such warranties, and (c) necessity of privity of contract to maintain action for breach of warranty; (2) that rule of Mississippi UCC § 75-1-105(1), as expressly stated therein, applied notwithstanding agreement by parties that laws of another state or of foreign nation governed parties' rights and duties; (3) that under Mississippi UCC § 75-1-105(1), application of Mississippi substantive law on privity of contract, warranty disclaimers, and limitation of remedies in warranty action was authorized only if transaction that gave rise to warranty claim bore some reasonable and appropriate relation to Mississippi; (4) that facts of case showed that transactions that gave rise to plaintiff's warranty claim did not bear any relation to Mississippi and did not warrant application of Mississippi substantive law; (5) that under conflict-of-law "center-of-gravity" doctrine, Alabama had most significant relation to transactions in suit; (6) that since Ala-

bama's breach-of-warranty statute of limitations (see Alabama UCC § 2-725(1) and (2)) would be regarded as procedural, Mississippi's breach-of-warranty statute of limitations (see Mississippi UCC § 75-2-725(1) and (2)) governed case; and (7) that under Mississippi UCC § 75-2-725(1) and (2), plaintiff's warranty claim was barred because tender of delivery of cash register that caused plaintiff's injuries had occurred more than six years before accrual of plaintiff's cause of action. *Jackson v. National Semi-Conductor Data Checker/DTS, Inc.*, 660 F. Supp. 65 (S.D. Miss. 1986).

Where (1) buyer purchased capsule-filling machine from defendant, (2) machine was delivered on April 10, 1972, and (3) buyer sued for breach of contract and breach of warranty on September 8, 1976, court held (1) that four-year period of limitations prescribed by UCC § 2-725(1) barred plaintiff's cause of action, (2) that in absence of explicit warranty extending to future performance, such four-year period would be calculated from April 10, 1972, which was date of delivery of machine, and (3) that making of repairs on machine, by itself, was insufficient to toll statute (holding that summary judgment should not have been entered against plaintiff, since plenary hearing should have been held to determine whether defendant was estopped to assert statute of limitations as defense). *Biocraft Lab., Inc. v. USM Corp.*, 163 N.J. Super. 570, 395 A.2d 521 (App. Div. 1978).

Four-year statute of limitations contained in UCC § 2-725(1) barred plaintiff airline's action for breach of express and implied warranties in sale and lease to plaintiff of four airplanes, which allegedly had cracks in wings of each aircraft, since (1) under UCC § 2-725(2) such four-year period began to run at time of tender of delivery of airplanes, (2) statute made aggrieved party's knowledge of breach of contract irrelevant, and (3) plaintiff, under facts of case, was precluded from successfully asserting equitable estoppel and fraudulent concealment under UCC § 2-725(4) to toll statute of limitations. Also since, under UCC §§ 2-314 through 2-318, Uniform Commercial Code remedy was available for breach of express and

implied warranties, no right to common-law action for breach of such warranties existed. *Alaska Airlines, Inc. v. Lockheed Aircraft Corp.*, 430 F. Supp. 134 (D. Alaska 1977).

Action for breach of implied warranty of merchantability of fertilizer was barred by six-year statute of limitations contained in Mississippi UCC § 2-725(1) where buyer bought fertilizer, and fertilizer was delivered to buyer, in May, 1969, but buyer's action for breach of warranty was not filed until June, 1975. In such case, statute began to run from date of tender of delivery, as provided in Mississippi UCC § 2-725(2), and not from date when breach was or should have been discovered, as contended by seller, since provision in Mississippi UCC § 2-725(2) concerning accrual of cause of action on latter date applied only to warranties that "explicitly" extended to future performance of goods and warranty in issue was merely implied warranty. *Rutland v. Swift Chem. Co.*, 351 So. 2d 324 (Miss. 1977).

Where infant was injured on October 28, 1973 by manure spreader manufactured by defendant; where spreader was manufactured in 1961 and sold to infant's parents on December 7, 1966; and where, on May 15, 1974, action for damages for infant's injuries was instituted containing causes based on theory of strict products liability and theory of breach of implied warranty of merchantability, (1) cause of action based on breach of warranty was separate and distinct from cause based on strict products liability; (2) three-year statute of limitations governing personal injuries applied to strict products liability claim and did not bar such claim, since action was timely commenced on May 15, 1974; and (3) cause of action based on breach of warranty was barred by four-year statute of limitations prescribed by UCC § 2-725, since spreader was purchased in 1966. *Ribley v. Harsco Corp.*, 57 A.D.2d 234 (3d Dep't 1977).

Breach of warranty action, alleging that oral contraceptive caused blindness, was barred by four-year statute of limitations in UCC § 2-725, where plaintiff made her last purchase of the contraceptive more than four years prior to commencing her action. *Raymond v. Eli Lilly & Co.*, 412 F.

Supp. 1392 (D.N.H. 1976), *aff'd*, 556 F.2d 628 (1st Cir. N.H. 1977).

Breach of warranty action for injuries allegedly caused by defective automobile exhaust pipe was barred by four year statute of limitations of UCC § 2-725(1), notwithstanding that injuries were incurred within four years prior to service of summons and complaint, where more than four years elapsed between date of automobile sale and service of summons and complaint. *Weinstein v. GMC*, 51 A.D.2d 335 (1st Dep't 1976).

Action for breach of contract to supply steel pier forms for construction of bridge was barred by UCC § 2-725(1) and (2) where supplier delivered it to construction site on November 17, 1970, pier form was set in position on November 19, and next day employees of buyer began pouring concrete into it, but before that process was completed, on or about December 7, pier form collapsed, and where buyer filed action against supplier on November 22, 1974, notwithstanding buyer accepted pier forms for towing only and reserved right to conduct later inspections and to reject goods if they did not conform to specifications of contract. Cause of action for breach of warranty accrues when tender of delivery is made whether or not buyer at that time "accepts" goods, as that term is used in Code, or, on other hand, withholds acceptance until he or she has had opportunity to fully inspect for defects, and this is so even if defect does not appear until after limitations period had run. Fact that buyer's contract with seller expressly incorporated by reference document issued by state roads commission which set standards for construction materials to be used on bridges and included detailed standards for pier forms such as one involved in present lawsuit did not constitute warranty "explicitly extend[ing] to future performance" under UCC § 2-725(2) absent language in contract that explicitly warranted future performance. *Raymond-Dravo-Langensfelder v. Microdot, Inc.*, 425 F. Supp. 614 (D. Del. 1976).

Cause of action for breach of warranty accrues at time of delivery regardless of time when breach is discovered, and third-party action for indemnity, brought 9

years after delivery, was barred. *Morrisette v. Sears, Roebuck & Co.*, 114 N.H. 384, 322 A.2d 7 (1974).

In the absence of a warranty explicitly extending to future performance, the cause of action here accrued on the date when tender of delivery occurred. *Binkley Co. v. Teledyne Mid-America Corp.*, 333 F. Supp. 1183 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. Mo. 1972).

Under UCC § 2-725(2) in the absence of a warranty explicitly extending to future performance and where there is no reference to a future time in language of warranty, words do not consist of an "explicit" warranty of future performance in and of themselves—the cause of action accrued on the date when the tender of delivery occurred. *Binkley Co. v. Teledyne Mid-America Corp.*, 333 F. Supp. 1183 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. Mo. 1972).

In breach of warranty action, cause of action accrues when breach occurs, i.e. tender of delivery, regardless of aggrieved party's lack of knowledge; this is consistent with pre-Code law that breach occurred at time of sale and not at time of discovery. *Constable v. Colonie Truck Sales, Inc.*, 37 A.D.2d 1011 (3d Dep't 1971), appeal denied, 30 N.Y.2d 484, 333 N.Y.S.2d 1025, 284 N.E.2d 163 (1972).

Warranty limitations statute running from date of auto sales applies to third-party action where auto dealer sought to recover from manufacturer in strict tort and implied warranty for amount of judgment entered against manufacturer in main action. *Ibach v. Grant Donaldson Serv., Inc.*, 38 A.D.2d 39 (4th Dep't 1971).

Code § 2-725(2) fully supports rule that breach of warranty cause of action accrues at time of delivery of goods. *Arrow Transp. Co. v. Fruehauf Corp.*, 289 F. Supp. 170 (D. Or. 1968).

Statute of limitations within Code § 2-725 begins to run when tender of delivery is made regardless of aggrieved party's lack of knowledge of breach of warranty and regardless of time of accident directly giving rise to damages claimed. *Hoeflich v. William S. Merrell Co.*, 288 F. Supp. 659 (E.D. Pa. 1968).

Buyer's claim to equitable setoff in seller's suit for balance due on open account

for non-fat dry milk sales matured under the provisions of this section upon tender of delivery of the commodity. *Champlain Milk Prods., Inc. v. M.E. Franks, Inc.*, 26 A.D.2d 988 (3d Dep't 1966).

The statute of limitations set forth in subsection (1) of this section against an action for breach by a manufacturer of an implied warranty of fitness begins to run from the date when the goods are delivered to the purchaser, and it was immaterial that the buyer of a cylinder of gas did not discover that the valve attached to it was defective until approximately 18 months after its purchase when an explosion occurred causing injuries, where the cylinder was purchased in March of 1956 and suit was not filed until July of 1960. *Rufo v. Bastian-Blessing Co.*, 417 Pa. 107, 207 A.2d 823 (1965).

18. Explicit extension of warranty to future performance.

Warranty of material and workmanship in helicopter engine purchase agreement does not constitute warrant explicitly extending to future performance of helicopter engines, so as to lift bar of statute of limitations in § 75-2-725, where warranty simply guaranteed condition of goods at time of delivery. *Crouch v. GE Co.*, 699 F. Supp. 585 (S.D. Miss. 1988).

An express warranty which makes no reference at all to any future date should not be allowed to extend past the limitations period. Thus, if a manufacturer warrants that a machine will meet certain performance warranties, but does not mention how long such warranties are to continue, the statute of limitations, under UCC § 2-725(2), begins to run when the machine is delivered. However, if an express warranty extends for a specific period of time, the policy reasons behind strict application of the limitations period do not apply. For example, if an automobile is warranted to last for 24,000 miles or four years, the warranty extends to future performance, and if the car fails within the warranty period, the limitations period begins to run from the day the defect is, or should have been, discovered. *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 12 Ohio Op. 3d 246, 587 F.2d 813 (6th Cir. Ohio 1978), cert. denied, 441

U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979).

In action by buyer of forging machine for seller's breach of both its express performance warranties and its repair-and-replacement-of-parts warranty, where (1) delivery and installation of machine took place in October, 1967, (2) buyer, on December 29, 1967, sent letter to seller which detailed machine's performance defects, (3) seller for five months attempted to repair machine, but stopped such efforts on June 21, 1968, (4) buyer filed suit for breach of seller's warranties on May 29, 1969, and (5) contract between parties contained one-year limitation period for bringing such suit, which was minimum period allowed by UCC § 2-725(1), court held (1) that under UCC § 2-725(2), cause of action for breach of warranty accrues on initial installation of product, regardless of whether it functions properly, as long as seller's warranty does not extend to future performance, (2) that in present case, seller's express performance warranties explicitly extended to future performance for period of one year, since seller had expressly warranted machine's performance for such period, (3) that as a result, buyer's cause of action on such warranties accrued, under UCC § 2-725(2), when buyer discovered, or should have discovered, that machine was defective, as long as such defects occurred during machine's warranty period, (4) that since parties' contract provided for one-year limitation period for bringing suit for breach of contract, and since buyer had discovered and reported machine's defects to seller by letter on December 29, 1967, buyer's failure to institute suit until May 29, 1969, which was more than one year after discovery of defects, caused such suit to be barred under UCC § 2-725(2), (5) that seller was not estopped to assert statute of limitations as defense because of its spending over five months in attempting to repair machine, since such repair efforts did not toll running of statute under Ohio law, which applied to case under UCC § 2-725(4), (6) that buyer's cause of action for seller's breach of its express warranty to repair or replace defective parts was not barred by contract's one-year period of limitations, since seller's

repair efforts were terminated on June 21, 1968 and buyer's suit was filed within a year thereafter on May 29, 1969, and (7) that buyer's failure to notify seller of its breach of repair-or-replacement-of-defective-parts warranty, which was required by UCC § 2-607(3)(a), was fatal to buyer's cause of action on such warranty. *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 12 Ohio Op. 3d 246, 587 F.2d 813 (6th Cir. Ohio 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979).

Plaintiff employee's cause of action for injuries, based on breach of implied warranties of merchantability and fitness for particular purpose of crane purchased by plaintiff's employer, against manufacturer of crane was barred under UCC § 2-725(1) and (2) where (1) action was commenced more than four years after delivery of crane to employer, (2) "future-performance-of-goods" exception to normal accrual-of-cause-of-action rule contained in UCC § 725(2) did not apply to case, since Uniform Commercial Code did not intend that "implied" warranty could be "explicitly" extended to future performance, but contemplated that such exception should apply only to "express" warranties, and (3) "consumer-goods" exception to normal-accrual-of-cause-of-action rule in UCC § 2-725(2) also did not apply to case, since crane that injured plaintiff was "equipment" and not "consumer goods" under UCC § 2-103(3) and § 9-109(1) and (2). *Wright v. Cutler-Hammer, Inc.*, 358 So. 2d 444 (Ala. 1978).

In action for damages for breach of warranty in sale of underground electric cable, statement respecting cable in defendant's product literature-which stated that "excellent moisture resistant, ozone resistant, and aging characteristics of Everene (Cross-Linked) polyethylene insulation, combined with the...characteristics of [its] Trioseal Jacket, constitute a cable designed to give long and reliable service"-did not create warranty that explicitly extended to future performance of the goods within meaning of UCC § 2-725(2). *Homart Dev. Co. v. Graybar Elec. Co.*, 63 A.D.2d 727 (2d Dep't 1978).

Language in sales contract "if it appears within one year from date of shipment by

the company that the equipment...does not meet the warranty specified above..." was a specification of remedy to which buyer would be entitled should breach be discovered within first year, and not a warranty for future performance; thus, suit commenced four years after tender of delivery was barred by statute of limitations. *Centennial Ins. Co. v. GE Co.*, 74 Mich. App. 169, 253 N.W.2d 696 (1977).

Manufacturer's warranty that burial vault would give "satisfactory service at all times" explicitly extended to future performance, so that cause of action for breach accrued not on date of sale but on discovery of breach 12 years after sale, when it was discovered that water, vermin and other matter had leaked into vault. *Mittasch v. Seal Lock Burial Vault, Inc.*, 42 A.D.2d 573 (2d Dep't 1973).

Breach of warranty is breach of contract of sale, and statute of limitations begins to run at time merchandise is delivered, absent any specific and explicit extension of warranty to future performance. *Everhart v. Rich's, Inc.*, 128 Ga. App. 319, 196 S.E.2d 475 (1973).

In absence of warrant explicitly extending to future performance, cause of action for breach of warranty relating to welding machine accrued on date when tender of delivery occurred, despite contention that where machine does not perform when delivered but becomes operable only when installed, a warranty of present performance becomes a warranty of future performance at the date installation is completed and the machine performs properly. *Binkley Co. v. Teledyne Mid-America Corp.*, 460 F.2d 276 (8th Cir. Mo. 1972).

In trespass action for personal injuries allegedly arising from defects in door against defendant-manufacturer and defendant-middleman, attempt by middleman to assert crossclaim against manufacturer more than four years after sale of door did not meet requirements of UCC § 2-725 absent averment of explicit warranty extending to future performance of goods. *Coleman v. James A. Clancy & Co.*, 60 Del. Co. 50 (1972).

Only *explicit* warranties of future performance can delay accrual of cause of action for breach of warranty under UCC § 2-725(2), and where there was no ex-

explicit warranty of future performance provided for in contract none could be inferred from need for future testing to ascertain conformity of goods with contract. *Binkley Co. v. Teledyne Mid-America Corp.*, 333 F. Supp. 1183 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. Mo. 1972).

In absence of warranty of future performance, cause of action under this section accrued upon date of delivery of the last of 50 allegedly defective gasoline engines, and suit for breach of warranty filed more than four years after date of such delivery was barred. *Matlack, Inc. v. Butler Mfg. Co.*, 253 F. Supp. 972 (E.D. Pa. 1966).

A purchaser's counterclaim for breach of an express warranty of the performance of a heating system under extreme conditions was not barred four years after the system was delivered and installed, for the statute did not begin to run until such time as discovery of the breach could be made in winter weather. *Perry v. Augustine*, 37 Pa. D. & C.2d 416 (1965).

19. —Implied warranty.

Future performance exception to rule that statute of limitations runs from time of delivery is applicable where manufacturer's warranty explicitly provided that implied warranties are "limited to the duration of this [10 year] written warranty." *Richardson v. Clayton & Lambert Mfg. Co.*, 634 F. Supp. 1480 (N.D. Miss. 1986).

In action by buyer of computer system for damages for system's failure to function properly, court held (1) that parties' designation under UCC § 1-105(1) of Massachusetts law to govern their sales contract was immaterial, since buyer's breach-of-contract claims were governed by limitation period contained in UCC § 2-725(1), which had been adopted by both New York and Massachusetts; (2) that contract in suit was not one for performance of services, as alleged by buyer, but was one for purchase of goods within meaning of UCC § 2-106(1); (3) that action was not timely commenced by buyer, since breach had occurred in January, 1971 and buyer did not commence suit until August 14, 1975, which was more than four years after cause of action accrued; (4) that UCC § 2-725(2), which

deals with warranty that explicitly extends to future performance and provides that discovery of breach must await such performance, did not apply, since warranty under UCC § 2-725(2) must expressly refer to the future and implied warranty alleged by buyer, by its very nature, did not do so; and (5) that seller's attempts to repair computer system did not toll running of statute of limitations prescribed by UCC § 2-725(1). *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), *rev'd* on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

An implied warranty of fitness is not a warranty of "future performance," so as to defer accrual of a cause of action for purposes of the statute of limitations. *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088 (N.D.N.Y. 1977).

Under the normal rule, warranty causes of action for injuries caused by a defective prosthetic device accrued upon implantation of the device; representations that prosthetic devices were fit for their intended purpose were not warranties of "future performance," so as to defer accrual of cause of action until injury was discovered for purpose of the statute of limitations. *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088 (N.D.N.Y. 1977).

Although an express warranty can explicitly extend to future performance of goods within meaning of UCC § 2-725(2), an implied warranty, by its very nature, cannot extend to future performance. *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088 (N.D.N.Y. 1977).

In suit instituted on March 24, 1976 against manufacturer of defective prosthetic device implanted in plaintiff's breast on July 6, 1971 for breach of express and implied warranties, implied-warranty cause of action was barred by four-year period of limitations contained in UCC § 2-725(1), and exception in UCC § 2-725(2) to normal rule for accrual of cause of action for breach of warranty did not apply to case since such exception, which deals with warranty that explicitly extends to future performance of goods, does not comprehend implied warranties (applying New York law; holding that although express warranty allegedly made

by defendant apparently did not extend to future performance of prosthetic device in suit, so as to come within UCC § 2-725(2) and thus render timely plaintiff's cause of action for breach of express warranty, court would not decide whether such cause of action was time-barred, but would allow plaintiff to conduct further discovery concerning making of such warranty. *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088 (N.D.N.Y. 1977).

In personal injury action seeking damages for alleged breaches of express and implied warranties in connection with sale of new automobile, brought 4 years and 10 months after automobile was purchased, but within 4 years after buyer discovered breach, based on allegations that defect in automobile was plugged gasoline vent which caused gasoline vapors to be gathered by air conditioner and passed into passenger compartment, causing plaintiff's injuries, where manufacturer expressly warranted automobile against defects in material and workmanship in normal use for 12 months or 12,000 miles, whichever occurred first after date of delivery, but did not warrant performance without malfunction during term of warranty and only warranted that manufacturer would repair or replace defective parts, tested in light of plain meaning of language employed in UCC § 2-725(2), it could not be said that warranties, express and implied as alleged in plaintiff's petition, explicitly extended to future performance of plaintiff's automobile and that discovery of breach must have awaited time of such performance; thus, under UCC § 2-725(1) plaintiff's cause of action accrued when breach occurred on tender of delivery and action was barred by statute of limitations. *Voth v. Chrysler Motor Corp.*, 218 Kan. 644, 545 P.2d 371, 93 A.L.R.3d 680 (1976).

Action against machinery seller, alleging breach of warranty and breach of servicing agreement, instituted more than four years after delivery of machinery was time barred under UCC § 2-725(1)(2); even if warranty extended to future performance, where breach was discovered almost immediately upon delivery of machine, causes of action were time barred under UCC § 2-725(1)(2). *Gemini Typog-*

raphers, Inc. v. Mergenthaler Linotype Co., 48 A.D.2d 637 (1st Dep't 1975).

Action for breach of implied warranty of merchantability brought by buyer of tractor more than 4 years after delivery was barred by statute of limitations, UCC § 2-725, where seller made no explicit warranty or representation as to performance of tractor or representations, explicit or otherwise, as to future performance of tractor. *Wilson v. Massey-Ferguson, Inc.*, 21 Ill. App. 3d 867, 315 N.E.2d 580 (4th Dist. 1974).

Wrongful death action against automobile manufacturer based on breach of implied warranty was barred by statute of limitations, UCC § 2-725, where automobile was delivered by dealer to original purchaser more than five years before action was commenced; exception to limitations provision, that breach of warranty occurs when breach is or should be discovered where warranty "explicitly" extends to future performance of goods, does not apply to implied warranties. *GMC v. Tate*, 257 Ark. 347, 516 S.W.2d 602 (1974).

20. Actions that will toll statute of limitations.

In action by buyer of computer system for damages for system's failure to function properly, court held (1) that parties' designation under UCC § 1-105(1) of Massachusetts law to govern their sales contract was immaterial, since buyer's breach-of-contract claims were governed by limitation period contained in UCC § 2-725(1), which had been adopted by both New York and Massachusetts; (2) that contract in suit was not one for performance of services, as alleged by buyer, but was one for purchase of goods within meaning of UCC § 2-106(1); (3) that action was not timely commenced by buyer, since breach had occurred in January, 1971 and buyer did not commence suit until August 14, 1975, which was more than four years after cause of action accrued; (4) that UCC § 2-725(2), which deals with warranty that explicitly extends to future performance and provides that discovery of breach must await such performance, did not apply, since warranty under UCC § 2-725(2) must expressly refer to the future and implied warranty alleged by buyer, by its very

nature, did not do so; and (5) that seller's attempts to repair computer system did not toll running of statute of limitations prescribed by UCC § 2-725(1). *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), rev'd on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

Where (1) buyer purchased capsule-filling machine from defendant, (2) machine was delivered on April 10, 1972, and (3) buyer sued for breach of contract and breach of warranty on September 8, 1976, court held (1) that four-year period of limitations prescribed by UCC § 2-725(1) barred plaintiff's cause of action, (2) that in absence of explicit warranty extending to future performance, such four-year period would be calculated from April 10, 1972, which was date of delivery of machine, and (3) that making of repairs on machine, by itself, was insufficient to toll statute (holding that summary judgment should not have been entered against plaintiff, since plenary hearing should have been held to determine whether defendant was estopped to assert statute of limitations as defense). *Biocraft Lab., Inc. v. USM Corp.*, 163 N.J. Super. 570, 395 A.2d 521 (App. Div. 1978).

Action for breach of implied warranty of fitness for particular purpose of boat sold to plaintiff by defendant, which was filed more than four years after delivery of boat to plaintiff, was not timely under UCC § 2-725(1) because (1) warranty sued on, which was implied only and not explicit, did not extend to future performance of boat within meaning of UCC § 2-725(2), (2) statute of limitations was not tolled by defendant's efforts to repair boat's defects, (3) "time of discovery" rule also did not toll the statute, since plaintiff obviously knew of boat's defects during limitation period, but did not initiate any action thereon, and (4) defendant was not estopped from relying on statute of limitations because it, allegedly, had misled plaintiff into believing that there was only a one-year warranty on the boat and that such warranty had expired (also observing that defendant was under no obligation to inform plaintiff that statute of limitations was running). *Tomes v. Chrysler Corp.*, 60 Ill. App. 3d 707, 377 N.E.2d 224 (1st Dist. 1978).

Under UCC § 2-725(2), a breach of warranty generally occurs on delivery of the goods, regardless of the time of discovery of the breach. However, where there is an agreement to repair or to replace goods, the warranty is not breached until there is a refusal or failure to repair (reversing summary judgment for defendant in action for breach of warranty to repair and replace because question of fact existed as to whether plaintiff's cause had accrued prior to four-year limitation period prescribed by UCC § 2-725(1)). *Space Leasing Assocs. v. Atlantic Bldg. Sys.*, 144 Ga. App. 320, 241 S.E.2d 438 (1977).

Four-year statute of limitations contained in UCC § 2-725(1) barred plaintiff airline's action for breach of express and implied warranties in sale and lease to plaintiff of four airplanes, which allegedly had cracks in wings of each aircraft, since (1) under UCC § 2-725(2) such four-year period began to run at time of tender of delivery of airplanes, (2) statute made aggrieved party's knowledge of breach of contract irrelevant, and (3) plaintiff, under facts of case, was precluded from successfully asserting equitable estoppel and fraudulent concealment under UCC § 2-725(4) to toll statute of limitations. Also since, under UCC §§ 2-314 through 2-318, Uniform Commercial Code remedy was available for breach of express and implied warranties, no right to common-law action for breach of such warranties existed. *Alaska Airlines, Inc. v. Lockheed Aircraft Corp.*, 430 F. Supp. 134 (D. Alaska 1977).

In absence of express warranty explicitly guaranteeing future performance or quality of brick which was used in construction of home but which deteriorated, homeowner's cause of action for breach of implied warranty under UCC § 2-314 against manufacturer of brick accrued and limitations statute began to run under UCC § 2-725 from time brick was delivered; however, limitations statute was tolled by manufacturer's absence from state notwithstanding that it could have been served under long arm statute. *Beckmire v. Ristokrat Clay Prods. Co.*, 36 Ill. App. 3d 411, 343 N.E.2d 530 (2d Dist. 1976).

Commencement of action for breach of implied warranties in federal court did

not toll running of statute of limitations (UCC § 2-725) against action in state court. *Royal-Globe Ins. Cos. v. Hauck Mfg. Co.*, 233 Pa. Super. 248, 335 A.2d 460 (1975).

Action to recover increased customs duties and fines allegedly incurred as result of mislabeling of 40 drums of resin which plaintiffs ordered from defendant and which were shipped in October, 1964, was not barred by four-year statute of limitations applicable to contract for sale of goods under UCC § 2-725 where suit was commenced by service of summons on February 21, 1968, while complaint, alleging causes of action in negligence and contract, was served on February 23, 1973. *Fuchs & Lang Sun Chem. de Venezuela, C.A. v. Schenectady Chems., Inc.*, 43 A.D.2d 881 (3d Dep't 1974).

In action by purchaser of air conditioning units against seller and manufacturer for breach of warranty where installation of units was completed in April, 1964, discovery of breach was made in July, 1964, and complaint was filed in April, 1969, suit was clearly beyond four-year statutory requirement and statute was not tolled during period defendants attempted to repair units. *Zahler v. Star Steel Supply Co.*, 50 Mich. App. 386, 213 N.W.2d 269, 68 A.L.R.3d 1271 (1973).

Fraud will suspend running of UCC statute of limitations. *United States v. Pall Corp.*, 367 F. Supp. 976 (E.D.N.Y. 1973).

21. Timeliness of institution of particular actions.

In action by buyer of computer system for damages for system's failure to function properly, court held (1) that parties' designation under UCC § 1-105(1) of Massachusetts law to govern their sales contract was immaterial, since buyer's breach-of-contract claims were governed by limitation period contained in UCC § 2-725(1), which had been adopted by both New York and Massachusetts; (2) that contract in suit was not one for performance of services, as alleged by buyer, but was one for purchase of goods within meaning of UCC § 2-106(1); (3) that action was not timely commenced by buyer, since breach had occurred in January, 1971 and buyer did not commence suit

until August 14, 1975, which was more than four years after cause of action accrued; (4) that UCC § 2-725(2), which deals with warranty that explicitly extends to future performance and provides that discovery of breach must await such performance, did not apply, since warranty under UCC § 2-725(2) must expressly refer to the future and implied warranty alleged by buyer, by its very nature, did not do so; and (5) that seller's attempts to repair computer system did not toll running of statute of limitations prescribed by UCC § 2-725(1). *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765 (E.D.N.Y. 1978), rev'd on other grounds, 604 F.2d 737 (2d Cir. N.Y. 1979).

Action for damages arising out of sale of defective television equipment was time barred by four-year limitation of UCC § 2-725 where sale took place in April, 1969, buyer became aware of defects in March, 1970, and original complaint was filed on December 4, 1975; buyer's general allegations of fraudulent conduct on part of seller were not sufficient to transform claim into action for fraud and thus avoid statute. *Closed Circuit Corp. of Am. v. Jerrold Elecs. Corp.*, 426 F. Supp. 361 (E.D. Pa. 1977).

Creditor's account claim in probate proceedings clearly was not barred by four-year statute of limitations contained in UCC § 2-725(1) where invoices which constituted basis of claim bore February, 1974 and March, 1974 dates, and claim was filed in January, 1977. *Furniture Dynamics, Inc. v. Estate of Hurley*, 560 S.W.2d 486 (Tex. Civ. App. 1977).

Action for damages for breach of contract in sale of mobile home, which was instituted against seller and manufacturer of such home more than four years after cause of action accrued, was barred by four-year statute of limitations set forth in UCC § 2-725(1) (also holding that buyer's laches in bringing suit barred his right to rescission of sales contract and refund of purchase price paid for such home, and that such laches were based on analogous statute of limitations contained in UCC § 2-725(1)). *Brabender v. Kit Mfg. Co.*, 174 Mont. 63, 568 P.2d 547 (1977).

Action by partnership and its two partners to recover for economic losses alleg-

edly caused by deficient irrigation equipment leased from one defendant and defective pump parts manufactured by second defendant and sold by third defendant was not barred by UCC § 2-725(1) and (2), notwithstanding such action was not commenced within four years after cause of action accrued, where one partner had filed suit, in his name only, within four-year period, but action was dismissed upon stipulation of parties after trial court denied partner's motion to join partnership and other partner, and where present action by § 2-725(3); original action was not "voluntarily discontinued," within meaning of § 2-725(3), notwithstanding stipulation by which parties agreed that original action be dismissed without prejudice, since partner, to maintain suit, was forced to dismiss action so that another could be filed naming indispensable party plaintiffs. *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 560 P.2d 154 (1977).

In action by seller against guarantor of bankrupt buyer to recover amounts due on dishonored trade acceptances and bills of exchange issued by buyer to pay for goods sold, action was not barred by four-year statute of limitations governing contracts of sale that is set forth in UCC § 2-725(1), but was subject to six-year statute of limitations that applied to contracts generally because (1) defendant's guarantee was undertaking separate from underlying sales contract; (2) UCC Art 2 does not, expressly or by implication, provide that it is applicable to guarantees of contracts of sale; and (3) there was no statute which provided that provisions of Art 2 should supersede statutes of limitation governing contracts generally simply because undertaking is guarantee of contract of sale, rather than some other type of contract (holding that defendant's guarantee covered trade acceptances furnished seller by buyer and that action was timely because commenced within six-year period for bringing action on trade acceptances). *American Trading Co. v. Fish*, 42 N.Y.2d 20, 364 N.E.2d 1309 (1977).

Where claim by seller for rebates promised by buyer of cottonseed for 1971 accrued in August 1972, 4-year statute of

limitations under UCC § 2-725 had not run against claim when filed in May, 1976. *Tennessee Valley Cotton Oil Mill v. Oakland Gin Co.*, 341 So. 2d 153 (Ala. Civ. App. 1976).

In interpleader proceeding, claim of contractor for price of merchandise sold to subcontractor was barred by four year statute of limitations, where all transactions were prior to September 16, 1965 and suit was not filed until April 5, 1973. *Gevyn Constr. Corp. v. Affiliated Engrs, Inc.*, 375 F. Supp. 207 (W.D. Pa. 1974).

22. —Breach of warranty.

Prescriptive periods applicable to claims brought by statutory heirs arising from alleged wrongful death of decedent were not tolled during pendency of prior wrongful death actions, inasmuch as wrongful death statute did not operate to bar any other action unless matter was decided on its merits, and in further view of fact that plaintiffs were active in state court litigation involving same subject matter before the court; plaintiffs' active involvement in state court action and their filing of prior lawsuit in federal court absolutely destroyed their argument that they were prohibited by law from bringing suit, furthermore, their participation in such earlier lawsuits negated any suspension of limitation period applicable under state law. *Brown v. Dow Chem. Co.*, 777 F. Supp. 504 (S.D. Miss. 1989).

In an action by a nursing home against a supplier of roofing material for damages arising out of the cost of replacing a defective roof, the District Court properly granted summary judgment for the defendant on the ground that the action was barred by the applicable statute of limitations where the roofing material was delivered in 1972, there was no express warranty on the material, and the action was not commenced until 1980. *Ocean Springs Corp. v. Celotex Corp.*, 662 F.2d 353 (5th Cir. 1981).

Plaintiff, the subpurchaser of a defective used crane, may not recover its economic loss resulting from the inability to make use of the defective crane from defendant, the manufacturer of the crane, under the theory of breach of warranty since there is no contractual relationship between the parties and therefore no war-

ranty either express or implied under the Uniform Commercial Code; the extended protection of warranty to persons who may reasonably be expected to use, consume or be affected by goods, is afforded only to natural persons who suffer personal injuries (Uniform Commercial Code, § 2-318) or to subpurchasers who justifiably relied upon representations made by the manufacturer to the public through advertising and in labels tagged to the goods themselves (see *Randy Knitwear v. American Cyanamid Co.*, 11 NY2d 5) and plaintiff, which purchased the crane "as is", assumed risks based on the prior use of the crane and cannot show justifiable reliance and, in any event, since the crane was delivered to the initial purchaser in 1970, the action based on breach of warranty is barred by the Statute of Limitations. *Steckmar Nat'l Realty & Inv. Corp. v. JI Case Co.*, 99 Misc. 2d 212 (1979).

In action by buyer of forging machine for seller's breach of both its express performance warranties and its repair-and-replacement-of-parts warranty, where (1) delivery and installation of machine took place in October, 1967, (2) buyer, on December 29, 1967, sent letter to seller which detailed machine's performance defects, (3) seller for five months attempted to repair machine, but stopped such efforts on June 21, 1968, (4) buyer filed suit for breach of seller's warranties on May 29, 1969, and (5) contract between parties contained one-year limitation period for bringing such suit, which was minimum period allowed by UCC § 2-725(1), court held (1) that under UCC § 2-725(2), cause of action for breach of warranty accrues on initial installation of product, regardless of whether it functions properly, as long as seller's warranty does not extend to future performance, (2) that in present case, seller's express performance warranties explicitly extended to future performance for period of one year, since seller had expressly warranted machine's performance for such period, (3) that as a result, buyer's cause of action on such warranties accrued, under UCC § 2-725(2), when buyer discovered, or should have discovered, that machine was defective, as long as such defects occurred during machine's warranty period, (4) that since parties'

contract provided for one-year limitation period for bringing suit for breach of contract, and since buyer had discovered and reported machine's defects to seller by letter on December 29, 1967, buyer's failure to institute suit until May 29, 1969, which was more than one year after discovery of defects, caused such suit to be barred under UCC § 2-725(2), (5) that seller was not estopped to assert statute of limitations as defense because of its spending over five months in attempting to repair machine, since such repair efforts did not toll running of statute under Ohio law, which applied to case under UCC § 2-725(4), (6) that buyer's cause of action for seller's breach of its express warranty to repair or replace defective parts was not barred by contract's one-year period of limitations, since seller's repair efforts were terminated on June 21, 1968 and buyer's suit was filed within a year thereafter on May 29, 1969, and (7) that buyer's failure to notify seller of its breach of repair-or-replacement-of-defective-parts warranty, which was required by UCC § 2-607(3)(a), was fatal to buyer's cause of action on such warranty. *Standard Alliance Indus., Inc. v. Black Clawson Co.*, 12 Ohio Op. 3d 246, 587 F.2d 813 (6th Cir. Ohio 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979).

Mississippi UCC § 2-725(1), providing that action for breach of contract of sale must be commenced within six years after cause of action accrued, applies to cause of action for breach of implied warranties of merchantability and fitness for particular purpose attaching to color television set. *Maly v. Magnavox Co.*, 460 F. Supp. 47 (N.D. Miss. 1978).

Action for breach of express warranties attaching to sale of mobile home was barred by UCC § 2-725(1) and (2) where home was purchased on August 3, 1973, but suit was not instituted until September 12, 1977. *Steele v. Belmont Trailer Sales, Inc.*, 445 F. Supp. 53 (E.D. Mo. 1977).

In action by lessee of aircraft, aircraft's lessor-purchaser, and other against both rebuilder and installer of aircraft's defective landing-gear box for breach of warranty and strict liability in tort, where

landing-gear box was rebuilt on November 2, 1968 and installed in April, 1969, aircraft was purchased by lessor from installer of landing-gear box on June 3, 1969 and leased to plaintiff on November 6, 1970, and aircraft's left landing gear collapsed on November 23, 1970, while aircraft was in a landing rollout, plaintiff's breach of warranty claim was barred by four-year statute of limitations contained in UCC § 2-725(1) (holding that fact that plaintiff's breach of warranty claim was barred did not bar plaintiff's tort claims). *Chicago & S. Airlines v. Volpar, Inc.*, 54 Ill. App. 3d 609, 370 N.E.2d 54 (1st Dist. 1977).

Action by homeowner against contractor and supply company alleging breach of warranty with respect to certain building materials was not barred by UCC § 2-725 even though such building materials were delivered more than four years prior to date when action was commenced; contracts between parties did not provide for "sale" and general six-year limitation period for breach of contract, not four-year period of § 2-725, would apply. *DeMatteo v. White*, 233 Pa. Super. 339, 336 A.2d 355 (1975).

Action against seller and manufacturer of truck for breach of warranty was barred by UCC § 2-725 where it was filed more than four years after truck was delivered. *May Trucking Co. v. International Harvester Co.*, 97 Idaho 319, 543 P.2d 1159 (1975).

23. —Personal injury actions.

In action against manufacturer for personal injuries sustained by minor when her pajamas caught fire, four-year statute of limitations provided by UCC § 2-725(1) applied and began to run, under UCC § 2-725(2), from date of retail sale of pajamas to plaintiff's mother, instead of date on which manufacturer sold pajamas to retailer. In such case, although Uniform Commercial Code provided no clear answer to question as to when plaintiff's cause of action accrued because it does not specify to whom tender of delivery must be made in order to start running of the statute, nevertheless, since primary purpose for which warranties are made is to protect ultimate consumer, warranty should begin to run when ultimate con-

sumer receives goods and not when retailer obtains goods from manufacturer for resale (applying Pennsylvania law; refusing to adopt interpretation of UCC § 2-725(2) that might allow statute of limitations in UCC § 2-725(1) to run before injured consumer ever received goods that injured her). *Patterson v. Her Majesty Indus., Inc.*, 450 F. Supp. 425 (E.D. Pa. 1978).

In action by consumer, who was allegedly burned when pajamas she was wearing caught fire, against seller, manufacturer of pajamas, and manufacturer of fabric, cross claims of seller and manufacturer of pajamas against manufacturer of fabric were not barred, even though four-year statute of limitations for breach of warranty actions contained in UCC § 2-725 had run. *Infante v. Montgomery Ward & Co.*, 49 A.D.2d 72 (3d Dep't 1975).

24. —Personal injury actions: breach of warranty.

In suit by hospital cashier who was injured while operating cash register manufactured by defendant manufacturer-seller after it had been delivered by buyer to hospital, court held, with respect to plaintiff's breach-of-implied-warranty claims, (1) that under Mississippi UCC § 1-105(1), which sets forth specific conflict-of-laws rule for warranty claims, Mississippi law governed the rights and duties of parties with regard to (a) disclaimers of implied warranties of merchantability or fitness, (b) limitation of remedies for breach of such warranties, and (c) necessity of privity of contract to maintain action for breach of warranty; (2) that rule of Mississippi UCC § 1-105(1), as expressly stated therein, applied notwithstanding agreement by parties that laws of another state or of foreign nation governed parties' rights and duties; (3) that under Mississippi UCC § 1-105(1), application of Mississippi substantive law on privity of contract, warranty disclaimers, and limitation of remedies in warranty action was authorized only if transaction that gave rise to warranty claim bore some reasonable and appropriate relation to Mississippi; (4) that facts of case showed that transactions that gave rise to plaintiff's warranty claim did not bear any relation to Mississippi and did

not warrant application of Mississippi substantive law; (5) that under conflict-of-law "center-of-gravity" doctrine, Alabama had most significant relation to transactions in suit; (6) that since Alabama's breach-of-warranty statute of limitations (see Alabama UCC § 2-725(1) and (2)) would be regarded as procedural, Mississippi's breach-of-warranty statute of limitations (see Mississippi UCC § 2-725(1) and (2)) governed case; and (7) that under Mississippi UCC § 2-725(1) and (2), plaintiff's warranty claim was barred because tender of delivery of cash register that caused plaintiff's injuries had occurred more than six years before accrual of plaintiff's cause of action. *Jackson v. National Semi-Conductor Data Checker/DTS, Inc.*, 660 F. Supp. 65 (S.D. Miss. 1986).

Cause of action against manufacturers of asbestos products by one who alleged that as result of 30 years' work as insulation employee, he had developed asbestosis, and who based such cause on defendants' alleged breach of warranty of merchantability attaching to defendants' sales of asbestos products to plaintiff's employers, was barred by four-year statute of limitations set forth in UCC § 2-725(1), since defendants could only have sold products allegedly involved in plaintiff's injury to plaintiff's employers before termination of plaintiff's employment, and such termination occurred more than four years before service of process in action. *McKee v. Johns Manville Corp.*, 94 Misc. 2d 327 (1978), modified, 78 A.D.2d 577, 432 N.Y.S.2d 422 (4th Dep't 1980), aff'd, 54 N.Y.2d 1008, 446 N.Y.S.2d 244, 430 N.E.2d 1297 (1981), remittitur amended, 55 N.Y.2d 802, 447 N.Y.S.2d 437, 432 N.E.2d 139 (1981), appeal dismissed, cert. denied, 456 U.S. 967, 102 S. Ct. 2226, 72 L. Ed. 2d 840 (1982).

Cause of action for injuries caused by fall of high-lift machine on plaintiff, which was based on breach of express and implied warranties as provided by Uniform Commercial Code, was barred by statute of limitations set forth in UCC § 2-725(1) where more than five years had passed between time of plaintiff's injury and service of process on defendant. *Strenk v. Rausch Equip. Corp.*, 58 A.D.2d 986 (4th Dep't 1977).

Where infant was injured on October 28, 1973 by manure spreader manufactured by defendant; where spreader was manufactured in 1961 and sold to infant's parents on December 7, 1966; and where, on May 15, 1974, action for damages for infant's injuries was instituted containing causes based on theory of strict products liability and theory of breach of implied warranty of merchantability, (1) cause of action based on breach of warranty was separate and distinct from cause based on strict products liability; (2) three-year statute of limitations governing personal injuries applied to strict products liability claim and did not bar such claim, since action was timely commenced on May 15, 1974; and (3) cause of action based on breach of warranty was barred by four-year statute of limitations prescribed by UCC § 2-725, since spreader was purchased in 1966. *Ribley v. Harsco Corp.*, 57 A.D.2d 234 (3d Dep't 1977).

Four-year period of limitations prescribed by UCC § 2-725(1) did not bar action against supplier of intrauterine device for breach of implied warranties where action was instituted slightly more than two years after product was first used by plaintiff. *Hamilton v. Turner*, 377 A.2d 363 (Del. Super. 1977).

Breach of warranty action, alleging that oral contraceptive caused blindness, was barred by four-year statute of limitations in UCC § 2-725, where plaintiff made her last purchase of the contraceptive more than four years prior to commencing her action. *Raymond v. Eli Lilly & Co.*, 412 F. Supp. 1392 (D.N.H. 1976), aff'd, 556 F.2d 628 (1st Cir. N.H. 1977).

Breach of warranty action for injuries allegedly caused by defective automobile exhaust pipe was barred by four year statute of limitations of UCC § 2-725(1), notwithstanding that injuries were incurred within four years prior to service of summons and complaint, where more than four years elapsed between date of automobile sale and service of summons and complaint. *Weinstein v. GMC*, 51 A.D.2d 335 (1st Dep't 1976).

25. Pleading.

Personal injury action arising from breach of warranty in connection with sale of goods must be filed within four

years of date of sale, not of injury. *Peeke v. Penn Cent. Transp. Co.*, 403 F. Supp. 70 (E.D. Pa. 1975), *aff'd sub nom. Celotex Corp. v. Whiting Corp.*, 538 F.2d 318 (3d Cir. Pa. 1976), *aff'd*, 538 F.2d 320 (3d Cir. Pa. 1976), *aff'd sub nom. Penn Cent. Transp. Co. v. Celotex Corp.*, 538 F.2d 320 (3d Cir. Pa. 1976).

In action for damages for injury to property arising out of defendant's sale to plaintiff of allegedly defective roof-coating materials, plaintiff's claim under theory of breach of warranty was not barred by UCC § 2-725(1) where complaint on its face alleged that certain deliveries of such materials were tendered by defendant less than four years before commencement of action. *Stiles v. Porter Paint Co.*, 75 F.R.D. 617 (E.D. Tenn. 1976).

In action for personal injuries allegedly resulting from accident involving product manufactured by defendant, plaintiff's cause of action was founded in tort and was thus barred by two-year statute of limitations where plaintiff failed to plead such facts as would bring UCC § 2-725 statute of limitations into play on theory of "implied warranty." *O'Neal v. Black &*

Decker Mfg. Co., 523 P.2d 614 (Okla. 1974).

The defense of the statute of limitations will be deemed waived where it is not raised by the defendant in his answer to the plaintiff's complaint and there is a long delay before the defendant seeks to amend his answer to raise the defense of the statute. *Basko v. Winthrop Lab., Inc.*, 268 F. Supp. 26 (D. Conn. 1967).

This section is substantive and not procedural, and in a diversity action brought in Delaware where the plaintiff's injuries arose in Pennsylvania the shorter Delaware statute of limitations applied and the defendant's motion to dismiss was granted. *Natale v. Upjohn Co.*, 236 F. Supp. 37 (D. Del. 1964), *aff'd*, 356 F.2d 590 (3d Cir. Del. 1966).

Manufacturer defending an action predicated on breach of warranty and negligence would be permitted to amend its answer in order to affirmatively assert the defenses of statute of limitations, contributory negligence, and assumption of risk. *Harvey v. Eimco Corp.*, 32 F.R.D. 598 (E.D. Pa. 1963).

RESEARCH REFERENCES

ALR. Validity of contractual time period, shorter than statute of limitations, for bringing action. 6 A.L.R.3d 1197.

Applicability, as affected by change in parties, of statute permitting commencement of new action within specified time after failure of prior action not on merits. 13 A.L.R.3d 848.

Effect of statute permitting new action to be brought within specified period after failure of original action other than on the merits to limit period of limitations. 13 A.L.R.3d 979.

What statute of limitation applies to action for surplus of proceeds from sale of collateral. 59 A.L.R.3d 1205.

Promises or attempts by seller to repair goods as tolling statute of limitations for breach of warranty. 68 A.L.R.3d 1277.

What statute of limitations governs action arising out of transaction consummated by use of credit card. 2 A.L.R.4th 677.

Application, to security aspects of sales contract, of UCC § 2-725 limiting time for bringing actions for breach of sales contract. 16 A.L.R.4th 1335.

Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

What Constitutes Warranty Explicitly Extending to "Future Performance" for Purposes of UCC § 2-725(2). 81 A.L.R.5th 483.

Am Jur. 51 Am. Jur. 2d, Limitation of Actions §§ 134-141, 147 et seq., 169, 170 et seq., 210 et seq.

67A Am. Jur. 2d, Sales §§ 928, 930-932, 934-937, 946 et seq.

6 Am. Jur. Pl & Pr Forms (Rev ed), Sales, Forms 2:1231 et seq statute of limitations in contracts for sale).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code: Article 2 — Sales, §§ 253:1861 et seq (statute of limitations in sales agreements).

Jackson, Legislative reform of statutes of limitations in Mississippi: proposed interpretations, possible problems. 9 Miss College L R 231, Spring 1989.

4 Am Law Prod Liab 3d, Limitations of Actions; Statutes of Repose § 47:6.

CJS. 78 C.J.S., Sales §§ 327, 377.

Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

CHAPTER 2A

Uniform Commercial Code — Leases

Part 1.	General Provisions.....	75-2A-101
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PART 1.

GENERAL PROVISIONS.

SEC.	
75-2A-101.	Short title.
75-2A-102.	Scope.
75-2A-103.	Definitions and index of definitions.
75-2A-104.	Leases subject to other law.
75-2A-105.	Territorial application of chapter to goods covered by certificate of title.
75-2A-106.	Limitation on power of parties to consumer lease to choose applicable law and judicial forum.
75-2A-107.	Waiver or renunciation of claim or right after default.
75-2A-108.	Unconscionability.
75-2A-109.	Option to accelerate at will.

§ 75-2A-101. Short title.

This chapter shall be known and may be cited as the Uniform Commercial Code—Leases.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

Editor's Note — Laws, 1994, ch. 445, § 6, provides as follows:

“SECTION 6. All laws and parts of laws in conflict with the provisions of this chapter are repealed to the extent of any conflict.”

§ 75-2A-102. Scope.

This chapter applies to any transaction, regardless of form, that creates a lease.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 274 et seq.

§ 75-2A-103. Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires:

(a) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(b) "Cancellation" occurs when either party puts an end to the lease contract for default by the other party.

(c) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole.

(d) "Conforming" goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract.

(e) "Consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is an individual and who takes under the lease primarily for a personal, family or household purpose, if the total payments to be made under the lease contract, excluding payments for options to renew or buy, do not exceed Twenty-five Thousand Dollars (\$25,000.00).

(f) "Fault" means wrongful act, omission, breach or default.

(g) "Finance lease" means a lease with respect to which:

(i) The lessor does not select, manufacture, or supply the goods;

(ii) The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and

(iii) One (1) of the following occurs:

(A) The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

(B) The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

(C) The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

(D) If the lease is not a consumer lease, the lessor, before the lessee signs the lease contract, informs the lessee in writing (a) of the identity of the person supplying the goods to the lessor, unless the lessee has selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (b) that the lessee is entitled under this chapter to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (c) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

(h) “Goods” means all things that are movable at the time of identification to the lease contract, or are fixtures (Section 75-2A-309), but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals.

(i) “Installment lease contract” means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause “each delivery is a separate lease” or its equivalent.

(j) “Lease” means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(k) “Lease agreement” means the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this chapter. Unless the context clearly indicates otherwise, the term includes a sublease agreement.

(l) “Lease contract” means the total legal obligation that results from the lease agreement as affected by this chapter and any other applicable rules of law. Unless the context clearly indicates otherwise, the term includes a sublease contract.

(m) “Leasehold interest” means the interest of the lessor or the lessee under a lease contract.

(n) “Lessee” means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

(o) “Lessee in ordinary course of business” means a person who in good faith and without knowledge that the lease to him is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. “Leasing”

may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a preexisting lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(p) "Lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor.

(q) "Lessor's residual interest" means the lessor's interest in the goods after expiration, termination or cancellation of the lease contract.

(r) "Lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest.

(s) "Lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract.

(t) "Merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease.

(u) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

(v) "Purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift or any other voluntary transaction creating an interest in goods.

(w) "Sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease.

(x) "Supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease.

(y) "Supply contract" means a contract under which a lessor buys or leases goods to be leased.

(z) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default.

(2) Other definitions applying to this chapter and the sections in which they appear are:

"Accessions."

Section 75-2A-310(1).

"Construction mortgage."

Section 75-2A-309(1)(d).

"Encumbrance."

Section 75-2A-309(1)(e).

"Fixtures."

Section 75-2A-309(1)(a).

"Fixture filing."

Section 75-2A-309(1)(b).

"Purchase money lease."

Section 75-2A-309(1)(c).

(3) The following definitions in other chapters apply to this chapter:

"Account"

Section 75-9-102(a)(2).

“Between merchants”	Section 75-2-104(3).
“Buyer”	Section 75-2-103(1)(a).
“Chattel paper”	Section 75-9-102(a)(11).
“Consumer goods”	Section 75-9-102(a)(23).
“Document”	Section 75-9-102(a)(30).
“Entrusting”	Section 75-2-403(3).
“General intangible”	Section 75-9-102(a)(42).
“Good faith”	Section 75-2-103(1)(b).
“Instrument”	Section 75-9-102(a)(47).
“Merchant”	Section 75-2-104(1).
“Mortgage”	Section 75-9-102(a)(55).
“Pursuant to commitment”	Section 75-9-102(a)(68).
“Receipt”	Section 75-2-103(1)(c).
“Sale”	Section 75-2-106(1).
“Sale on approval”	Section 75-2-326.
“Sale or return”	Section 75-2-326.
“Seller”	Section 75-2-103(1)(d).

(4) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2001, ch. 495, § 11, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, in (3), revised several section references, and substituted “General intangible” for “General intangibles”.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 274 et seq.

§ 75-2A-104. Leases subject to other law.

(1) A lease, although subject to this chapter, is also subject to any applicable:

(a) Certificate of title statute of this state, including, but not limited to, those pertaining to motor vehicles in Chapter 21, Title 63, Mississippi Code of 1972;

(b) Certificate of title statute of another jurisdiction (Section 75-2A-105); or

(c) Consumer protection statute of this state, or final consumer protection decision of a court of this state existing on the effective date of this chapter.

(2) In case of conflict between this chapter, other than Sections 75-2A-105, 75-2A-304(3) and 75-2A-305(3), and a statute or decision referred to in subsection (1), the statute or decision controls.

(3) Failure to comply with an applicable law has only the effect specified therein.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 274 et seq.

§ 75-2A-105. Territorial application of chapter to goods covered by certificate of title.

Subject to the provisions of Section 75-2A-304(3) and 75-2A-305(3), with respect to goods covered by a certificate of title issued under a statute of this state or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (a) surrender of the certificate, or (b) four (4) months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 274 et seq.

§ 75-2A-106. Limitation on power of parties to consumer lease to choose applicable law and judicial forum.

(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within thirty (30) days thereafter or in which the goods are to be used, the choice is not enforceable.

(2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 297.

§ 75-2A-107. Waiver or renunciation of claim or right after default.

Any claim or right arising out of an alleged default or breach of warranty may be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 317 et seq.

§ 75-2A-108. Unconscionability.

(1) If the court as a matter of law finds a lease contract or any clause of a lease contract to have been unconscionable at the time it was made, the court may refuse to enforce the lease contract, or it may enforce the remainder of the lease contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) With respect to a consumer lease, if the court as a matter of law finds that a lease contract or any clause of a lease contract has been induced by unconscionable conduct or that unconscionable conduct has occurred in the collection of a claim arising from a lease contract, the court may grant appropriate relief.

(3) Before making a finding of unconscionability under subsection (1) or (2), the court, on its own motion or that of a party, shall afford the parties a reasonable opportunity to present evidence as to the setting, purpose and effect of the lease contract or clause thereof, or of the conduct.

(4) In an action in which the lessee claims unconscionability with respect to a consumer lease:

(a) If the court finds unconscionability under subsection (1) or (2), the court shall award reasonable attorney's fees to the lessee.

(b) If the court does not find unconscionability and the lessee claiming unconscionability has brought or maintained an action he knew to be groundless, the court shall award reasonable attorney's fees to the party against whom the claim is made.

(c) In determining attorney's fees, the amount of the recovery on behalf of the claimant under subsections (1) and (2) is not controlling.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

ALR. Parol evidence to show that lease of personalty, absolute on its face, is conditional sale. 57 A.L.R.2d 1076.

Warranties in connection with leasing or hiring of chattels. 68 A.L.R.2d 850.

"Unconscionability" as ground for refusing enforcement of contract for sale of goods or agreement collateral thereto. 18 A.L.R.3d 1305.

Bailee's duty to insure bailed property. 28 A.L.R.3d 513.

Validity and construction of state and municipal enactments regulating lobbying. 42 A.L.R.3d 1046.

Application of warranty provisions of Uniform Commercial Code to bailments. 48 A.L.R.3d 668.

Time for revocation of acceptance of goods under UCC § 2-608(2). 65 A.L.R.3d 354.

Who bears risk of loss of goods under UCC § 2-509, 2-510. 66 A.L.R.3d 145.

What constitutes "property" obtained within extortion statute. 67 A.L.R.3d 1021.

Construction and effect of UCC § 2-316(2) providing that implied warranty disclaimer must be "conspicuous." 73 A.L.R.3d 248.

Who is "person in business of selling goods of that kind" within provision of UCC § 1-201(9) defining buyer in ordinary course of business for purposes of UCC § 9-307(1). 73 A.L.R.3d 338.

Danger to reputation as within penal extortion statute requiring threat of "injury to the person." 74 A.L.R.3d 1255.

Bailee's liability as affected by bailment condition that bailor procure insurance. 83 A.L.R.3d 519.

Who is "buyer in ordinary course of business" under Uniform Commercial Code. 87 A.L.R.3d 11.

Who is "merchant" under UCC § 2-314(1) dealing with implied warranties of merchantability. 91 A.L.R.3d 876.

What constitutes "goods" within the scope of UCC Article 2. 4 A.L.R.4th 912.

Construction and effect of UCC § 2-613 governing casualty to goods identified to a contract, without fault of buyer or seller. 51 A.L.R.4th 537.

What constitutes "good faith" under UCC § 1-208 dealing with "insecure" or "at will" acceleration clauses. 85 A.L.R.4th 284.

Am Jur. 3A Am. Jur. Legal Forms 2d, Bailments and Personal Property Leases §§ 36:67.1 (choice of law), 36:67.2 (choice of forum).

§ 75-2A-109. Option to accelerate at will.

(1) A term providing that one (1) party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import must be construed to mean that he has power to do so only if he in good faith believes that the prospect of payment or performance is impaired.

(2) With respect to a consumer lease, the burden of establishing good faith under subsection (1) is on the party who exercised the power; otherwise the burden of establishing lack of good faith is on the party against whom the power has been exercised.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 311.

PART 2.

FORMATION AND CONSTRUCTION OF LEASE CONTRACT.

SEC.

- | | |
|------------|--|
| 75-2A-201. | Statute of frauds. |
| 75-2A-202. | Final written expression: parol or extrinsic evidence. |
| 75-2A-203. | Seals inoperative. |
| 75-2A-204. | Formation in general. |
| 75-2A-205. | Firm offers. |
| 75-2A-206. | Offer and acceptance in formation of lease contract. |
| 75-2A-207. | Course of performance or practical construction. |

75-2A-208.	Modification, rescission and waiver.
75-2A-209.	Lessee under finance lease as beneficiary of supply contract.
75-2A-210.	Express warranties.
75-2A-211.	Warranties against interference and against infringement; lessee's obligation against infringement.
75-2A-212.	Implied warranty of merchantability.
75-2A-213.	Implied warranty of fitness for particular purpose.
75-2A-215.	Cumulation and conflict of warranties express or implied.
75-2A-216.	Third-party beneficiaries of express and implied warranties.
75-2A-217.	Identification.
75-2A-218.	Insurance and proceeds.
75-2A-219.	Risk of loss.
75-2A-220.	Effect of default on risk of loss.
75-2A-221.	Casualty to identified goods.

§ 75-2A-201. Statute of frauds.

(1) A lease contract is not enforceable by way of action or defense unless:

(a) The total payments to be made under the lease contract, excluding payments for options to renew or buy, are less than One Thousand Dollars (\$1,000.00); or

(b) There is a writing, signed by the party against whom enforcement is sought or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term.

(2) Any description of leased goods or of the lease term is sufficient and satisfies subsection (1)(b), whether or not it is specific, if it reasonably identifies what is described.

(3) A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the lease contract is not enforceable under subsection (1)(b) beyond the lease term and the quantity of goods shown in the writing.

(4) A lease contract that does not satisfy the requirements of subsection (1), but which is valid in other respects, is enforceable:

(a) If the goods are to be specially manufactured or obtained for the lessee and are not suitable for lease or sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) With respect to goods that have been received and accepted by the lessee.

(5) The lease term under a lease contract referred to in subsection (4) is:

(a) If there is a writing signed by the party against whom enforcement is sought or by that party's authorized agent specifying the lease term, the term so specified;

(b) If the party against whom enforcement is sought admits in that party's pleading, testimony or otherwise in court a lease term, the term so admitted; or

(c) A reasonable lease term.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 296 et seq. 36:75 (optional lease provisions; general considerations).

3A Am. Jur. Legal Forms 2d, Bailments and Personal Property Leases §§ 36:71-

§ 75-2A-202. Final written expression: parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:

(a) By course of dealing or usage of trade or by course of performance; and

(b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 296 et seq.

§ 75-2A-203. Seals inoperative.

The affixing of a seal to a writing evidencing a lease contract or an offer to enter into a lease contract does not render the writing a sealed instrument and the law with respect to sealed instruments does not apply to the lease contract or offer.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments §§ 296 et seq.

§ 75-2A-204. Formation in general.

(1) A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a lease contract.

(2) An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined.

(3) Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonable certain basis for giving an appropriate remedy.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 296 et seq.

§ 75-2A-205. Firm offers.

An offer by a merchant to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed three (3) months. Any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 296 et seq.

§ 75-2A-206. Offer and acceptance in formation of lease contract.

(1) Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.

(2) If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 296 et seq.

§ 75-2A-207. Course of performance or practical construction.

(1) If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement.

(2) The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other; but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade.

(3) Subject to the provisions of Section 75-2A-208 on modification and waiver, course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 311.

§ 75-2A-208. Modification, rescission and waiver.

(1) An agreement modifying a lease contract needs no consideration to be binding.

(2) A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party.

(3) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2), it may operate as a waiver.

(4) A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 300, 320.

§ 75-2A-209. Lessee under finance lease as beneficiary of supply contract.

(1) The benefit of a supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising therefrom.

(2) The extension of the benefit of a supplier's promises and of warranties to the lessee (Section 75-2A-209(1)) does not: (i) modify the rights and obligations of the parties to the supply contract, whether arising therefrom or otherwise, or (ii) impose any duty or liability under the supply contract on the lessee.

(3) Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission.

(4) In addition to the extension of the benefit of the supplier's promises and of warranties to the lessee under subsection (1), the lessee retains all rights that the lessee may have against the supplier which arise from an agreement between the lessee and the supplier or under other law.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 299 et seq.

§ 75-2A-210. Express warranties.

(1) Express warranties by the lessor are created as follows:

(a) Any affirmation of fact or promise made by the lessor to the lessee which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

(c) Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 299 et seq.

§ 75-2A-211. Warranties against interference and against infringement; lessee's obligation against infringement.

(1) There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest.

(2) Except in a finance lease there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like.

(3) A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by way of infringement or the like that arises out of compliance with the specifications.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 299 et seq.

§ 75-2A-212. Implied warranty of merchantability.

(1) Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must be at least such as:

(a) Pass without objection in the trade under the description in the lease agreement;

(b) In the case of fungible goods, are of fair average quality within the description;

(c) Are fit for the ordinary purposes for which goods of that type are used;

(d) Run, within the variation permitted by the lease agreement, of even kind, quality and quantity within each unit and among all units involved;

(e) Are adequately contained, packaged and labeled as the lease agreement may require; and

(f) Conform to any promises or affirmations of fact made on the container or label.

(3) Other implied warranties may arise from course of dealing or usage of trade.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 299 et seq.

§ 75-2A-213. Implied warranty of fitness for particular purpose.

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 299 et seq.

§ 75-2A-215. Cumulation and conflict of warranties express or implied.

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant. In ascertaining that intention, the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or model or general language of description.

(b) A sample from an existing bulk displaces inconsistent general language of description.

(c) Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 299 et seq.

§ 75-2A-216. Third-party beneficiaries of express and implied warranties.

A warranty to or for the benefit of a lessee under this chapter, whether express or implied, extends to any natural person who is in the family or household of the lessee or who is a guest in the lessee's home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. This section does not displace principles of law and equity that extend a warranty to or for the benefit of a lessee to other persons. The operation of this section may not be excluded, modified or limited, but an exclusion, modification or limitation of the warranty, including any with respect to rights and remedies, effective against the lessee is also effective against any beneficiary designated under this section.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

§ 75-2A-217. Identification.

Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement, identification occurs:

- (a) When the lease contract is made if the lease contract is for a lease of goods that are existing and identified;
- (b) When the goods are shipped, marked or otherwise designated by the lessor as goods to which the lease contract refers, if the lease contract is for a lease of goods that are not existing and identified; or
- (c) When the young are conceived, if the lease contract is for a lease of unborn young of animals.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 304 et seq.

§ 75-2A-218. Insurance and proceeds.

(1) A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them.

(2) If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification

to the lessee that identification is final, may substitute other goods for those identified.

(3) Notwithstanding a lessee's insurable interest under subsections (1) and (2), the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee.

(4) Nothing in this section impairs any insurable interest recognized under any other statute or rule of law.

(5) The parties by agreement may determine that one or more parties have an obligation to obtain and pay for insurance covering the goods and by agreement may determine the beneficiary of the proceeds of the insurance.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 305.

§ 75-2A-219. Risk of loss.

(1) Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee. In the case of a finance lease, risk of loss passes to the lessee.

(2) Subject to the provisions of this chapter on the effect of default on risk of loss (Section 75-2A-220), if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

(a) If the lease contract requires or authorizes the goods to be shipped by carrier

(i) And it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier; but

(ii) If it does require delivery at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the lessee when the goods are there duly so tendered as to enable the lessee to take delivery.

(b) If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgement by the bailee of the lessee's right to possession of the goods.

(c) In any case not within subsection (a) or (b), the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 306, 307.

§ 75-2A-220. Effect of default on risk of loss.

(1) Where risk of loss is to pass to the lessee and the time of passage is not stated:

(a) If a tender or delivery of goods so fails to conform to the lease contract as to give a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance.

(b) If the lessee rightfully revokes acceptance, he, to the extent of any deficiency in his effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning.

(2) Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 324 et seq.

§ 75-2A-221. Casualty to identified goods.

If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to the lease agreement or Section 75-2A-219, then:

(a) If the loss is total, the lease contract is avoided; and

(b) If the loss is partial or the goods have so deteriorated as to no longer conform to the lease contract, the lessee may nevertheless demand inspection and at his option either treat the lease contract as avoided or, except in a finance lease that is not a consumer lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 324 et seq.

PART 3.

EFFECT OF LEASE CONTRACT.

SEC.

- 75-2A-301. Enforceability of lease contract.
75-2A-302. Title to and possession of goods.
75-2A-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.
75-2A-304. Subsequent lease of goods by lessor.
75-2A-305. Sale or sublease of goods by lessee.
75-2A-306. Priority of certain liens arising by operation of law.
75-2A-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.
75-2A-308. Special rights of creditors.
75-2A-309. Lessor's and lessee's rights when goods become fixtures.
75-2A-310. Lessor's and lessee's rights when goods become accessions.
75-2A-311. Priority subject to subordination.

§ 75-2A-301. Enforceability of lease contract.

Except as otherwise provided in this chapter, a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods and against creditors of the parties.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 308.

§ 75-2A-302. Title to and possession of goods.

Except as otherwise provided in this chapter, each provision of this chapter applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 313.

§ 75-2A-303. Alienability of party's interest under lease contract or of lessor's residual interest in goods; delegation of performance; transfer of rights.

(1) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to Chapter 9, Secured Transactions, by reason of Section 75-9-109(a)(3).

(2) Except as provided in subsection (3) of Section 75-9-705, a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (4).

(4) Subject to subsections (3) and Section 75-9-407:

(a) If a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in Section 75-2A-501(2);

(b) If paragraph (a) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

(5) A transfer of "the lease" or of "all my rights under the lease," or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract.

(6) Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default.

(7) In a consumer lease, to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2001, ch. 495, § 12, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, substituted “Section 75-9-109(a)(3)” for “Section 75-9-102(1)(b)” in (1); in (2), substituted “subsection (3) of Section 75-9-705” for “subsections (3) and (4),” and substituted “subsection (4)” for “subsection (5)”; deleted former (3) and redesignated the remaining subsections accordingly; substituted “subsection (4)” for “subsection (5)” in present (3); and substituted “Section 75-9-407” for “(4)” in present (4).

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments (subleasing), 36:76 (assignment by lessee) § 312.

3A Am. Jur. Legal Forms 2d, Bailments and Personal Property Leases §§ 36:75

§ 75-2A-304. Subsequent lease of goods by lessor.

(1) Subject to Section 75-2A-303, a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and except as provided in subsection (2) and Section 75-2A-527(4), takes subject to the existing lease contract. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence. If goods have been delivered under a transaction of purchase, the lessor has that power even though:

- (a) The lessor’s transferor was deceived as to the identity of the lessor;
- (b) The delivery was in exchange for a check which is later dishonored;
- (c) It was agreed that the transaction was to be a “cash sale”; or
- (d) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor’s and the existing lessee’s rights to the goods, and takes free of the existing lease contract.

(3) A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 312-316.

§ 75-2A-305. Sale or sublease of goods by lessee.

(1) Subject to the provisions of Section 75-2A-303, a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer, and except as provided in subsection (2) and Section 75-2A-511(4), takes subject to the existing lease contract. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence. When goods have been delivered under a transaction of lease the lessee has that power even though:

- (a) The lessor was deceived as to the identity of the lessee;
- (b) The delivery was in exchange for a check which is later dishonored;

or

- (c) The delivery was procured through fraud punishable as larcenous under the criminal law.

(2) A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to the extent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract.

(3) A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a statute of this state or of another jurisdiction takes no greater rights than those provided both by this section and by the certificate of title statute.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments (subleasing), 36:76 (assignment by lessee), § 316.

3A Am. Jur. Legal Forms 2d, Bailments
and Personal Property Leases §§ 36:75

§ 75-2A-306. Priority of certain liens arising by operation of law.

If a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a lease contract, a lien upon those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee

under the lease contract or this chapter unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 190.

§ 75-2A-307. Priority of liens arising by attachment or levy on, security interests in, and other claims to goods.

(1) Except as otherwise provided in Section 75-2A-306, a creditor of a lessee takes subject to the lease contract.

(2) Except as otherwise provided in subsection (3), and in Sections 75-2A-306 and 75-2A-308, a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable.

(3) Except as otherwise provided in Sections 75-9-317, 75-9-321 and 75-9-323, a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor.

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2001, ch. 495, § 13, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, rewrote the section.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 190, 309.

§ 75-2A-308. Special rights of creditors.

(1) A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent under any statute or rule of law, but retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent.

(2) Nothing in this chapter impairs the rights of creditors of a lessor if the lease contract (a) becomes enforceable, not in current course of trade but in satisfaction of or as security for a preexisting claim for money, security, or the like, and (b) is made under circumstances which under any statute or rule of law apart from this chapter would constitute the transaction a fraudulent transfer or voidable preference.

(3) A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law, but retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 309, 310.

§ 75-2A-309. Lessor's and lessee's rights when goods become fixtures.

(1) In this section:

(a) Goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law;

(b) A "fixture filing" is the filing, in the office where a record of a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of Section 75-9-502(a) and (b);

(c) A lease is a "purchase money lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable;

(d) A mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates; and

(e) "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests.

(2) Under this chapter a lease may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under this chapter of ordinary building materials incorporated into an improvement on land.

(3) This chapter does not prevent creation of a lease of fixtures pursuant to real estate law.

(4) The perfected interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

(a) The lease is a purchase money lease, the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is perfected by a fixture filing before the goods become fixtures or within ten (10) days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate; or

(b) The interest of the lessor is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encum-

brancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate.

(5) The interest of a lessor of fixtures, whether or not perfected, has priority over the conflicting interest of an encumbrancer or owner of the real estate if:

(a) The fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are goods subject to a consumer lease, and before the goods become fixtures the lease contract is enforceable; or

(b) The conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable; or

(c) The encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures; or

(d) The lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

(6) Notwithstanding subsection (4)(a) but otherwise subject to subsections (4) and (5), the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage.

(7) In cases not within the preceding subsections, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate.

(8) If the interest of a lessor of fixtures, including the lessor's residual interest, has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (i) on default, expiration, termination or cancellation of the lease agreement but subject to the lease agreement and this chapter, or (ii) if necessary to enforce other rights and remedies of the lessor or lessee under this chapter, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the real estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party see king removal gives adequate security for the performance of this obligation.

(9) Even though the lease agreement does not create a security interest, the interest of a lessor of fixtures, including the lessor's residual interest, is

perfected by filing a financing statement as a fixture filing for leased goods that are or are to become fixtures in accordance with the relevant provisions of the Chapter on Secured Transactions (Chapter 9).

SOURCES: Laws, 1994, ch. 445, § 1; Laws, 2001, ch. 495, § 14, eff from and after Jan. 1, 2002.

Amendment Notes — The 2001 amendment, effective January 1, 2002, in (1)(b), inserted “record of a” following “office where a,” and substituted “Section 75-9-502(a) and (b)” for “Section 75-9-402(5).”

§ 75-2A-310. Lessor’s and lessee’s rights when goods become accessions.

(1) Goods are “accessions” when they are installed in or affixed to other goods.

(2) The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in subsection (4).

(3) The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in subsection (4) but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of such interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole.

(4) The interest of a lessor or a lessee under a lease contract described in subsection (2) or (3) is subordinate to the interest of

(a) A buyer in the ordinary course of business or a lessee in the ordinary course of business of any interest in the whole acquired after the goods became accessions; or

(b) A creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract.

(5) When under subsections (2) or (3) and (4) a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (a) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and this chapter, or (b) if necessary to enforce his other rights and remedies under this chapter, remove the goods from the whole, free and clear of all interests in the whole, but he must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

§ 75-2A-311. Priority subject to subordination.

Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

PART 4.

PERFORMANCE OF LEASE CONTRACT: REPUDIATED, SUBSTITUTED AND EXCUSED.

SEC.

- 75-2A-401. Insecurity: adequate assurance of performance.
- 75-2A-402. Anticipatory repudiation.
- 75-2A-403. Retraction of anticipatory repudiation.
- 75-2A-404. Substituted performance.
- 75-2A-405. Excused performance.
- 75-2A-406. Procedure on excused performance.
- 75-2A-407. Irrevocable promises: finance leases.

§ 75-2A-401. Insecurity: adequate assurance of performance.

(1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he has not already received the agreed return.

(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed thirty (30) days after receipt of a demand by the other party.

(4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.

(5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 311.

§ 75-2A-402. Anticipatory repudiation.

If either party repudiates a lease contract with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may:

- (a) For a commercially reasonable time, await retraction of repudiation and performance by the repudiating party;
- (b) Make demand pursuant to Section 75-2A-401 and await assurance of future performance adequate under the circumstances of the particular case; or
- (c) Resort to any right or remedy upon default under the lease contract or this chapter, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction. In addition, whether or not the aggrieved party is pursuing one of the foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of this chapter on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods (Section 75-2A-524).

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 311.

§ 75-2A-403. Retraction of anticipatory repudiation.

(1) Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has cancelled the lease contract or materially changed the aggrieved party's position or otherwise indicated that the aggrieved party considers the repudiation final.

(2) Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under Section 75-2A-401.

(3) Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 311.

§ 75-2A-404. Substituted performance.

(1) If without fault of the lessee, the lessor and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted.

(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation:

(a) The lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means of payment that is commercially a substantial equivalent; and

(b) If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 311.

§ 75-2A-405. Excused performance.

Subject to Section 75-2A-404 on substituted performance, the following rules apply:

(a) Delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with paragraphs (b) and (c) is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid.

(b) If the causes mentioned in paragraph (a) affect only part of the lessor's or the supplier's capacity to perform, he shall allocate production and deliveries among his customers but at his option may include regular customers not then under contract for sale or lease as well as his own requirements for further manufacture. He may so allocate in any manner that is fair and reasonable.

(c) The lessor seasonably shall notify the lessee and in the case of a finance lease the supplier seasonably shall notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under paragraph (b), of the estimated quota thus made available for the lessee.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A **Am. Jur.** 2d, Bailments
§ 311.

§ 75-2A-406. Procedure on excused performance.

(1) If the lessee receives notification of a material or indefinite delay or an allocation justified under Section 75-2A-405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 75-2A-510):

(a) Terminate the lease contract (Section 75-2A-505(2)); or

(b) Except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(2) If, after receipt of a notification from the lessor under Section 75-2A-405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding thirty (30) days, the lease contract lapses with respect to any deliveries affected.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A **Am. Jur.** 2d, Bailments
§ 311.

§ 75-2A-407. Irrevocable promises: finance leases.

(1) In the case of a finance lease that is not a consumer lease the lessee's promises under the lease contract become irrevocable and independent upon the lessee's acceptance of the goods.

(2) A promise that has become irrevocable and independent under subsection (1):

(a) Is effective and enforceable between the parties, and by or against third parties including assignees of the parties; and

(b) Is not subject to cancellation, termination, modification, repudiation, excuse or substitution without the consent of the party to whom the promise runs.

(3) This section does not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent upon the lessee's acceptance of the goods.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 311.

PART 5.

DEFAULT.

Article A.	In General	75-2A-501
Article B.	Default by Lessor	75-2A-508
Article C.	Default by Lessee	75-2A-523

ARTICLE A.

IN GENERAL.

SEC.

75-2A-501.	Default: procedure.
75-2A-502.	Notice after default.
75-2A-503.	Modification or impairment of rights and remedies.
75-2A-504.	Liquidation of damages.
75-2A-505.	Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.
75-2A-506.	Statute of limitations.
75-2A-507.	Proof of market rent: time and place.

§ 75-2A-501. Default: procedure.

(1) Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and this chapter.

(2) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in this chapter and, except as limited by this chapter, as provided in the lease agreement.

(3) If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceeding, arbitration, or the like, in accordance with this chapter.

(4) Except as otherwise provided in Section 75-1-106(1) or this chapter or the lease agreement, the rights and remedies referred to in subsections (2) and (3) are cumulative.

(5) If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under this part as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case this part does not apply.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 317.

§ 75-2A-502. Notice after default.

Except as otherwise provided in this chapter or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 317, 319.

§ 75-2A-503. Modification or impairment of rights and remedies.

(1) Except as otherwise provided in this chapter, the lease agreement may include rights and remedies for default in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter.

(2) Resort to a remedy provided under this chapter or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail of its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in this chapter.

(3) Consequential damages may be liquidated under Section 75-2A-504, or may otherwise be limited, altered or excluded unless the limitation, alteration or exclusion is unconscionable. Limitation, alteration or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation, alteration or exclusion of damages where the loss is commercial is not prima facie unconscionable.

(4) Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by this chapter.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 320.

§ 75-2A-504. Liquidation of damages.

(1) Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to lessor's residual interest, may be liquidated in the lease agreement but only at an amount or by a formula that is reasonable in light of the then anticipated harm caused by the default or other act or omission.

(2) If the lease agreement provides for liquidation of damages, and such provision does not comply with subsection (1), or such provision is an exclusive or limited remedy that circumstances cause to fail of its essential purpose, remedy may be had as provided in this chapter.

(3) If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency (Section 75-2A-525 or 75-2A-526), the lessee is entitled to restitution of any amount by which the sum of his payments exceeds:

(a) The amount to which the lessor is entitled by virtue of terms liquidating the lessor's damages in accordance with subsection (1); or

(b) In the absence of those terms, twenty percent (20%) of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, the lesser of such amount or Five Hundred Dollars (\$500.00).

(4) A lessee's right to restitution under subsection (3) is subject to offset to the extent the lessor establishes:

(a) A right to recover damages under the provisions of this chapter other than subsection (1) of this section; and

(b) The amount or value of any benefits received by the lessee directly or indirectly by reason of the lease contract.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 321.

§ 75-2A-505. Cancellation and termination and effect of cancellation, termination, rescission, or fraud on rights and remedies.

(1) On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the cancelling party also retains any remedy for default of the whole lease contract or any unperformed balance.

(2) On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives.

(3) Unless the contrary intention clearly appears, expressions of “cancellation,” “rescission,” or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default.

(4) Rights and remedies for material misrepresentation or fraud include all rights and remedies available under this chapter for default.

(5) Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 322.

§ 75-2A-506. Statute of limitations.

(1) An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four (4) years after the cause of action accrued. By the original lease contract the parties may reduce the period of limitation to not less than one (1) year.

(2) A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later.

(3) If an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within six (6) months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action that have accrued before this chapter becomes effective.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 214 et seq.

§ 75-2A-507. Proof of market rent: time and place.

(1) Damages based on market rent (Section 75-2A-519 or 75-2A-528) are determined according to the rent for the use of the goods concerned for a lease

term identical to the remaining lease term of the original lease agreement and prevailing at the times specified in Sections 75-2A-519 and 75-2A-528.

(2) If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in this chapter is not readily available, the rent prevailing within any reasonable time before or after the time described or at any other place or for a different lease term which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place.

(3) Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in this chapter offered by one (1) party is not admissible unless and until he has given the other party notice the court finds sufficient to prevent unfair surprise.

(4) If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 214 et seq.

ARTICLE B.

DEFAULT BY LESSOR.

SEC.

- 75-2A-508. Lessee's remedies.
- 75-2A-509. Lessee's rights on improper delivery; rightful rejection.
- 75-2A-510. Installment lease contracts: rejection and default.
- 75-2A-511. Merchant lessee's duties as to rightfully rejected goods.
- 75-2A-512. Lessee's duties as to rightfully rejected goods.
- 75-2A-513. Cure by lessor of improper tender or delivery; replacement.
- 75-2A-514. Waiver of lessee's objections.
- 75-2A-515. Acceptance of goods.
- 75-2A-516. Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over.
- 75-2A-517. Revocation of acceptance of goods.
- 75-2A-518. Cover; substitute goods.
- 75-2A-519. Lessee's damages for nondelivery, repudiation, default and breach of warranty in regard to accepted goods.
- 75-2A-520. Lessee's incidental and consequential damages.
- 75-2A-521. Lessee's right to specific performance or replevin.
- 75-2A-522. Lessee's right to goods on lessor's insolvency.

§ 75-2A-508. Lessee's remedies.

(1) If a lessor fails to deliver the goods in conformity to the lease contract (Section 75-2A-509) or repudiates the lease contract (Section 75-2A-402), or a lessee rightfully rejects the goods (Section 75-2A-509) or justifiably revokes acceptance of the goods (Section 75-2A-517), then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 75-2A-510), the lessor is in default under the lease contract and the lessee may:

(a) Cancel the lease contract (Section 75-2A-505(1));

(b) Recover so much of the rent and security as has been paid and is just under the circumstances;

(c) Cover and recover damages as to all goods affected whether or not they have been identified to the lease contract (Sections 75-2A-518 and 75-2A-520), or recover damages for nondelivery (Sections 75-2A-519 and 75-2A-520);

(d) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may also:

(a) If the goods have been identified, recover them (Section 75-2A-522);

or

(b) In a proper case, obtain specific performance or replevy the goods (Section 75-2A-521).

(3) If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in Section 75-2A-519(3).

(4) If a lessor has breached a warranty, whether express or implied, the lessee may recover damages (Section 75-2A-519(4)).

(5) On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation and care and custody and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to Section 75-2A-527(5).

(6) Subject to the provisions of Section 75-2A-407, a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 324.

§ 75-2A-509. Lessee's rights on improper delivery; rightful rejection.

(1) Subject to the provisions of Section 75-2A-510 on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods.

(2) Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 329.

§ 75-2A-510. Installment lease contracts: rejection and default.

(1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (2) and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.

(2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 330.

§ 75-2A-511. Merchant lessee's duties as to rightfully rejected goods.

(1) Subject to any security interest of a lessee (Section 75-2A-508(5)), if a lessor or a supplier has no agent or place of business at the market of rejection, a merchant lessee, after rejection of goods in his possession or control, shall follow any reasonable instructions received from the lessor or the supplier with

respect to the goods. In the absence of those instructions, a merchant lessee shall make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) If a merchant lessee (subsection (1)) or any other lessee (Section 75-2A-512) disposes of goods, he is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the expenses include no disposition commission, to such commission as is usual in the trade, or if there is none, to a reasonable sum not exceeding ten percent (10%) of the gross proceeds.

(3) In complying with this section or Section 75-2A-512, the lessee is held only to good faith. Good faith conduct hereunder is neither acceptance or conversion nor the basis of an action for damages.

(4) A purchaser who purchases in good faith from a lessee pursuant to this section or Section 75-2A-512 takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of this chapter.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 331.

§ 75-2A-512. Lessee's duties as to rightfully rejected goods.

(1) Except as otherwise provided with respect to goods that threaten to decline in value speedily (Section 75-2A-511) and subject to any security interest of a lessee (Section 75-2A-508(5)):

(a) The lessee, after rejection of goods in the lessee's possession, shall hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection;

(b) If the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account or ship them to the lessor or the supplier or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in Section 75-2A-511; but

(c) The lessee has no further obligations with regard to goods rightfully rejected.

(2) Action by the lessee pursuant to subsection (1) is not acceptance or conversion.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 331.

§ 75-2A-513. Cure by lessor of improper tender or delivery; replacement.

(1) If any tender or delivery by the lessor or the supplier is rejected because nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract.

(2) If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he seasonably notifies the lessee.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 332.

§ 75-2A-514. Waiver of lessee's objections.

(1) In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default:

(a) If, stated seasonably, the lessor or the supplier could have cured it (Section 75-2A-513); or

(b) Between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.

(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent on the face of the documents.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 333.

§ 75-2A-515. Acceptance of goods.

(1) Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and

(a) The lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity; or

(b) The lessee fails to make an effective rejection of the goods (Section 75-2A-509 (2)).

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 334.

§ 75-2A-516. Effect of acceptance of goods; notice of default; burden of establishing default after acceptance; notice of claim or litigation to person answerable over.

(1) A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered.

(2) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured. Acceptance does not of itself impair any other remedy provided by this chapter or the lease agreement for nonconformity.

(3) If a tender has been accepted:

(a) Within a reasonable time after the lessee discovers or should have discovered any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified;

(b) Except in the case of a consumer lease, within a reasonable time after the lessee receives notice of litigation for infringement or the like (Section 75-2A-211) the lessee shall notify the lessor or be barred from any remedy over for liability established by the litigation; and

(c) The burden is on the lessee to establish any default.

(4) If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over the following apply:

(a) The lessee may give the lessor or the supplier, or both, written notice of the litigation. If the notice states that the person notified may come in and defend and that if the person notified does not do so that person will be bound in any action against that person by the lessee by any determination of fact common to the two (2) litigations, then unless the person notified after seasonable receipt of the notice does come in and defend that person is so bound.

(b) The lessor or the supplier may demand in writing that the lessee turn over control of the litigation including settlement if the claim is one for infringement or the like (Section 75-2A-211) or else be barred from any

remedy over. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over control the lessee is so barred.

(5) Subsections (3) and (4) apply to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like (Section 75-2A-211).

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 335.

§ 75-2A-517. Revocation of acceptance of goods.

(1) A lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if the lessee has accepted it:

(a) Except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured;
or

(b) Without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance.

(2) Except in the case of a finance lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee.

(3) If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor.

(4) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(5) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 337.

§ 75-2A-518. Cover; substitute goods.

(1) After a default by a lessor under the lease contract of the type described in Section 75-2A-508(1), or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-102(3) and 75-2A-503), if a lessee's cover is by a lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (i) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (ii) any incidental or consequential damages, less expenses saved in consequence of the lessor's default.

(3) If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and Section 75-2A-519 governs.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 338.

§ 75-2A-519. Lessee's damages for nondelivery, repudiation, default and breach of warranty in regard to accepted goods.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-102(3) and 75-2A-503), if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under Section 75-2A-518(2), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value, as of the date of the default, of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(2) Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

(3) Except as otherwise agreed, if the lessee has accepted goods and given notification (Section 75-2A-516(3)), the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default.

(4) Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 339.

§ 75-2A-520. Lessee's incidental and consequential damages.

(1) Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the default.

(2) Consequential damages resulting from a lessor's default include:

(a) Any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 340.

§ 75-2A-521. Lessee's right to specific performance or replevin.

(1) Specific performance may be decreed if the goods are unique or in other proper circumstances.

(2) A decree for specific performance may include any terms and conditions as to payment of the rent, damages, or other relief that the court deems just.

(3) A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 341.

§ 75-2A-522. Lessee's right to goods on lessor's insolvency.

(1) Subject to subsection (2) and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract (Section 75-2A-217) on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within ten (10) days after receipt of the first installment of rent and security.

(2) A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 344.

ARTICLE C.

DEFAULT BY LESSEE.

SEC.

- | | |
|------------|---|
| 75-2A-523. | Lessor's remedies. |
| 75-2A-524. | Lessor's right to identify goods to lease contract. |
| 75-2A-525. | Lessor's right to possession of goods. |
| 75-2A-526. | Lessor's stoppage of delivery in transit or otherwise. |
| 75-2A-527. | Lessor's rights to dispose of goods. |
| 75-2A-528. | Lessor's damages for nonacceptance, failure to pay, repudiation or other default. |
| 75-2A-529. | Lessor's action for the rent. |
| 75-2A-530. | Lessor's incidental damages. |
| 75-2A-531. | Standing to sue third parties for injury to goods. |
| 75-2A-532. | Lessor's rights to residual interest. |

§ 75-2A-523. Lessor's remedies.

(1) If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section 75-2A-510), the lessee is in default under the lease contract and the lessor may:

(a) Cancel the lease contract (Section 75-2A-505(1));

(b) Proceed respecting goods not identified to the lease contract (Section 75-2A-524);

(c) Withhold delivery of the goods and take possession of goods previously delivered (Section 75-2A-525);

(d) Stop delivery of the goods by any bailee (Section 75-2A-526);

(e) Dispose of the goods and recover damages (Section 75-2A-527), or retain the goods and recover damages (Section 75-2A-528), or in a proper case recover rent (Section 75-2A-529);

(f) Exercise any other rights or pursue any other remedies provided in the lease contract.

(2) If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under subsection (1), the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default.

(3) If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease. In addition, unless otherwise provided in the lease contract:

(a) If the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in subsection (1) or (2); or

(b) If the default does not substantially impair the value of the lease contract to the lessor, the lessor may recover as provided in subsection (2).

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§§ 341 et seq.

3A Am. Jur. Legal Forms 2d, Bailments
and Personal Property Leases §§ 36:109-
36:115 (events constituting default).

§ 75-2A-524. Lessor's right to identify goods to lease contract.

(1) A lessor aggrieved under Section 75-2A-523(1) may:

(a) Identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control; and

(b) Dispose of goods (Section 75-2A-527(1)) that demonstrably have been intended for the particular lease contract even though those goods are unfinished.

(2) If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments (Right of lessor to prevent default by lessee) § 343.

3A Am. Jur. Legal Forms 2d, Bailments and Personal Property Leases § 36:115

§ 75-2A-525. Lessor's right to possession of goods.

(1) If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods.

(2) After a default by the lessee under the lease contract of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a) or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor which is reasonably convenient to both parties. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises (Section 75-2A-527).

(3) The lessor may proceed under subsection (2) without judicial process if it can be done without breach of the peace or the lessor may proceed by action.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments § 344.

§ 75-2A-526. Lessor's stoppage of delivery in transit or otherwise.

(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.

(2) In pursuing its remedies under subsection (1), the lessor may stop delivery until

- (a) Receipt of the goods by the lessee;
- (b) Acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee hold the goods for the lessee; or
- (c) Such an acknowledgement to the lessee by a carrier via reshipment or as warehouseman.

(3)(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.

(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.

(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 345.

§ 75-2A-527. Lessor's rights to dispose of goods.

(1) After a default by a lessee under the lease contract of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a) or after the lessor refuses to deliver or takes possession of goods (Section 75-2A-525 or 75-2A-526), or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance thereof by lease, sale or otherwise.

(2) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-102(3) and 75-2A-503), if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover from the lessee as damages (i) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, (ii) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreement applicable to that period of the new lease term which is comparable to the then remaining term of the original lease agreement, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default.

(3) If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under subsection (2), or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and Section 75-2A-528 governs.

(4) A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under this section takes the goods free of the original lease contract and any rights of the original lessee even though the lessor fails to comply with one or more of the requirements of this chapter.

(5) The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest (Section 75-2A-508(5)).

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 346.

§ 75-2A-528. Lessor's damages for nonacceptance, failure to pay, repudiation or other default.

(1) Except as otherwise provided with respect to damages liquidated in the lease agreement (Section 75-2A-504) or otherwise determined pursuant to agreement of the parties (Sections 75-1-102(3) and 75-2A-503), if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement that for any reason does not qualify for treatment under Section 75-2A-527(2), or is by sale or otherwise, the lessor may recover from the lessee as damages for a default of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a), or, if agreed, for other default of the lessee, (i) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (ii) the present value as of the date determined under clause (i) of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default.

(2) If the measure of damages provided in subsection (1) is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under Section 75-2A-530, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 347.

§ 75-2A-529. Lessor's action for the rent.

(1) After default by the lessee under the lease contract of the type described in Section 75-2A-523(1) or 75-2A-523(3)(a) or, if agreed, after other default by the lessee, if the lessor complies with subsection (2), the lessor may recover from the lessee as damages:

(a) For goods accepted by the lessee and not repossessed by or tendered to the lessor, and for conforming goods lost or damaged within a commercially reasonable time after risk of loss passes to the lessee (Section 75-2A-219), (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default; and

(b) For goods identified to the lease contract if the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that effort will be unavailing, (i) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (ii) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (iii) any incidental damages allowed under Section 75-2A-530, less expenses saved in consequence of the lessee's default.

(2) Except as provided in subsection (3), the lessor shall hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control.

(3) The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to subsection (1). If the disposition is before the end of the remaining lease term of the lease agreement, the lessor's recovery against the lessee for damages is governed by Section 75-2A-527 or Section 75-2A-528, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgment exceeds the recovery available pursuant to Section 75-2A-527 or 75-2A-528.

(4) Payment of the judgment for damages obtained pursuant to subsection (1) entitles the lessee to the use and possession of the goods not then disposed of for the remaining lease term of and in accordance with the lease agreement.

(5) After a lessee has wrongfully rejected or revoked acceptance of goods, has failed to pay rent then due, or has repudiated (Section 75-2A-402), a lessor who is held not entitled to rent under this section must nevertheless be awarded damages for nonacceptance under Sections 75-2A-527 and 75-2A-528.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 348.

§ 75-2A-530. Lessor's incidental damages.

Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 349.

§ 75-2A-531. Standing to sue third parties for injury to goods.

(1) If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract (a) the lessor has a right of action against the third party, and (b) the lessee also has a right of action against the third party if the lessee:

- (i) Has a security interest in the goods;
- (ii) Has an insurable interest in the goods; or
- (iii) Bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed.

(2) If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, his suit or settlement, subject to his own interest, is as a fiduciary for the other party to the lease contract.

(3) Either party with the consent of the other may sue for the benefit of whom it may concern.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 323.

§ 75-2A-532. Lessor's rights to residual interest.

In addition to any other recovery permitted by this chapter or other law, the lessor may recover from the lessee an amount that will fully compensate

the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee.

SOURCES: Laws, 1994, ch. 445, § 1, eff from and after July 1, 1994.

RESEARCH REFERENCES

Am Jur. 8A Am. Jur. 2d, Bailments
§ 350.

CHAPTER 3

Uniform Commercial Code — Negotiable Instruments

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Editor's Note — Chapter 3 of the UCC was substantially rewritten by laws 1992, ch. 420, effective January 1, 1993. The following table shows where provisions of the former UCC Chapter 3 now appear in the new UCC Chapter 3:

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PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

SEC.	
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§ 75-3-101. Short title.

This chapter may be cited as Uniform Commercial Code — Negotiable Instruments.

SOURCES: Former § 75-3-101: Codes, 1942, § 41A:3-101; Laws, 1966, ch. 316, § 3-101; Laws, 1992 ch. 420, § 1, eff from and after January 1, 1993.

Comparable Laws from other States — Alabama Code, §§ 7-3-101 through 7-3-605.

Arkansas Code Annotated, §§ 4-3-101 through 4-3-605.

Georgia Code Annotated, §§ 11-3-101 through 11-3-605.

Louisiana Revised Statutes Annotated, §§ 10:3-101 et seq.

Tennessee Code Annotated, §§ 47-7-101 through 47-7-603.

Texas Business and Commerce Code, § 3.101 et seq.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-101.

11. In general.

12. Installment contracts.

13. Holders in due course.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-101.

11. In general.

Where a trust deed made specific reference to the indebtedness as evidenced by defendant's note, of even date, the deed

falls within the provisions of the Article relating to commercial paper, rather than Article 8 dealing with investment securities. *Rago v. Cosmopolitan Nat'l Bank*, 89 Ill. App. 2d 12, 232 N.E.2d 88 (1st Dist. 1967).

Negotiable instruments are now governed by Article 3 of the UCC. *First Trust & Sav. Bank v. Fidelity-Philadelphia Trust Co.*, 214 F.2d 320, 50 A.L.R.2d 1218 (3d Cir. Pa. 1954), cert denied, 348 U.S. 856, 75 S. Ct. 81, 99 L. Ed. 674 (1954).

12. Installment contracts.

Under provisions of consumer credit act prohibiting use of negotiable instruments in consumer credit transactions, instrument entitled "Retail Installment Agreement (Security Interest)," although it contained necessary elements of negotiable instrument set out in UCC § 3-104, was not negotiable instrument, but was retail installment contract and security agreement subject to provisions of Article 9 of UCC, where instrument was drawn by creditor regulated by consumer credit act and contained matters required by consumer credit act, and where bulk of its

terms provided for retention of title and preservation of purchase money security interest as prescribed by Article 9. *Jefferson v. Mitchell Select Furn. Co.*, 56 Ala. App. 259, 321 So. 2d 216 (Civ. App. 1975).

13. Holders in due course.

Payees of drafts issued by title company were holders in due course of drafts and were entitled to enforce them against title company, notwithstanding drafts were issued through escrow to payees as creditors of person who funded escrow with forged certified check, where there was no evidence to indicate that payees were not bona fide creditors or that they ought to have been suspicious of title company draft; nor were payees subject to personal defenses under UCC § 3-305(2) on grounds that payees dealt with title company since payees did not participate in immediate transaction by which title company gave out its draft, that is, exchange of forged cashier's check for draft. *Chicago Title & Trust Co. v. Walsh*, 34 Ill. App. 3d 458, 340 N.E.2d 106 (1st Dist. 1975).

RESEARCH REFERENCES

Law Reviews. Lawrence, *Misconceptions About Article 3 of the Uniform Commercial Code: A Suggested Methodology*

and Proposed Revisions. 62 N.C. L. Rev. 115, October, 1983.

§ 75-3-102. Subject matter.

(a) This chapter applies to negotiable instruments. It does not apply to money, to payment orders governed by Chapter 4A, or to securities governed by Chapter 8.

(b) If there is conflict between this chapter and Chapter 4 or 9, Chapters 4 and 9 govern.

(c) Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of this chapter to the extent of the inconsistency.

SOURCES: Former § 75-3-102: Codes, 1942, § 41A:3-102; Laws, 1966, ch. 316, § 3-102; Laws, 1992, ch. 420, § 2, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Applicability.
- 2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-103.

11. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Applicability.

The present version of Article 3 does not apply to a non-negotiable instrument. *Addington v. Estate of Temple*, — So. 2d —, 2000 Miss. App. LEXIS 138 (Miss. Ct. App. Mar. 28, 2000), reversed on other grounds, *In re Estate of Temple*, 780 So. 2d 639 (Miss. 2001).

- 2.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-103.

11. In general.

In action arising when vice-president of defendant bank who was authorized to sign bank's serially numbered certificate of deposit forms acquired blank certificate of deposit, inserted his name as payee, signed instrument on behalf of defendant bank with name of another employee authorized to sign certificates of deposit, and then obtained \$20,000 loan from plaintiff bank with certificate of deposit given as security for loan, certificate of deposit was investment security governed by UCC

§ 8-102 even though it also met requirements of UCC § 3-103, where certificate was issued in registered form, was one of series, and evidenced obligation of issuer by acknowledging obligation to pay depositor specified sum of money upon presentment at maturity; under UCC §§ 1-201 and 8-205, plaintiff bank was purchaser for value without notice of certificate of deposit and unauthorized signature was effective in its favor where vice-president was employee of issuer entrusted with responsible handling of security who placed unauthorized signature on security in course of its issue. *Victory Nat'l Bank v. Oklahoma State Bank*, 520 P.2d 675 (Okla. 1973).

Because provisions of Article 4 govern inconsistent provisions of Article 3 to the extent that corresponding provisions cannot be reconciled, bank taking check for deposit by customer without indorsement by customer succeeds to rights of customer as "holder". To same effect, see affirming opinion of Circuit Court of Appeals in 425 F.2d 81. *Bowling Green, Inc. v. State St. Bank & Trust Co.*, 307 F. Supp. 648 (D. Mass. 1969), *aff'd*, 425 F.2d 81 (1st Cir. Mass. 1970), but see, *Maine Family Fed. Credit Union v. Sun Life Assurance Co.*, 727 A.2d 335 (Me. 1999).

Article 3 does not, by virtue of subsection (1) of the instant section apply to "money" as defined by § 1-201(24), and hence it does not apply to Federal Reserve notes which constitute "money" within the Code definition. *Commonwealth v. Saville*, 353 Mass. 458, 233 N.E.2d 9 (1968).

§ 75-3-103. Definitions.

- (a) In this chapter:

- (1) "Acceptor" means a drawee who has accepted a draft.
- (2) "Drawee" means a person ordered in a draft to make payment.
- (3) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.
- (4) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.
- (5) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.

(6) “Order” means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay.

(7) “Ordinary care” in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank’s prescribed procedures and the bank’s procedures do not vary unreasonably from general banking usage not disapproved by this chapter or Chapter 4.

(8) “Party” means a party to an instrument.

(9) “Promise” means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(10) “Prove” with respect to a fact means to meet the burden of establishing the fact (Section 75-1-201(8), Mississippi Code of 1972).

(11) “Remitter” means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(b) Other definitions applying to this chapter and the sections in which they appear are:

“Acceptance”	Section 75-3-409
“Accommodated party”	Section 75-3-419
“Accommodation party”	Section 75-3-419
“Alteration”	Section 75-3-407
“Anomalous indorsement”	Section 75-3-205
“Blank indorsement”	Section 75-3-205
“Cashier’s check”	Section 75-3-104
“Certificate of deposit”	Section 75-3-104
“Certified check”	Section 75-3-409
“Check”	Section 75-3-104
“Consideration”	Section 75-3-303
“Draft”	Section 75-3-104
“Holder in due course”	Section 75-3-302
“Incomplete instrument”	Section 75-3-115
“Indorsement”	Section 75-3-204
“Indorser”	Section 75-3-204
“Instrument”	Section 75-3-104
“Issue”	Section 75-3-105
“Issuer”	Section 75-3-105
“Negotiable instrument”	Section 75-3-104

"Negotiation"	Section 75-3-201
"Note"	Section 75-3-104
"Payable at a definite time"	Section 75-3-108
"Payable on demand"	Section 75-3-108
"Payable to bearer"	Section 75-3-109
"Payable to order"	Section 75-3-109
"Payment"	Section 75-3-602
"Person entitled to enforce"	Section 75-3-301
"Presentment"	Section 75-3-501
"Reacquisition"	Section 75-3-207
"Special indorsement"	Section 75-3-205
"Teller's check"	Section 75-3-104
"Transfer of instrument"	Section 75-3-203
"Traveler's check"	Section 75-3-104
"Value"	Section 75-3-303

(c) The following definitions in other chapters apply to this chapter:

"Bank"	Section 75-4-105
"Banking day"	Section 75-4-104
"Clearinghouse"	Section 75-4-104
"Collecting bank"	Section 75-4-105
"Depository bank"	Section 75-4-105
"Documentary draft"	Section 75-4-104
"Intermediary bank"	Section 75-4-105
"Item"	Section 75-4-104
"Payor bank"	Section 75-4-105
"Suspends payments"	Section 75-4-104

(d) In addition, Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

SOURCES: Former § 75-3-103; Codes, 1942, § 41A:3-103; Laws, 1966, ch. 316, § 3-103; Laws, 1992, ch. 420, § 3, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-102.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-102.

11. In general.

Indorser is secondary party under UCC § 3-102(1)(d), and his liability is subject to preconditions of (1) presentment under UCC § 3-501(1)(b) and (2) proper notice of dishonor under UCC § 3-501(2)(a). Thus

if, without excuse, any necessary presentment or notice of dishonor is delayed beyond time it is due, indorser is discharged from liability under UCC § 3-502(1)(a). *Nevada State Bank v. Fischer*, 93 Nev. 317, 565 P.2d 332 (1977).

Where contract for sale of cotton provided that risk of loss remained with seller until warehouse receipts "are issued" or "have been issued" and where cotton was burned after delivery to buyer, but one day prior to completion and issuance of warehouse receipts, words in contract relating to "issue", pursuant to definition in UCC § 3-102, meant that warehouse receipts not only must have been complete in form and signed as required by UCC § 7-202, but must have been delivered to seller; thus, seller was entitled to entire proceeds of insurance settlement since loss occurred prior to time warehouse receipts were issued. *Livingston v. Hohenberg Bros. Co.*, 341 So. 2d 104 (Miss. 1976).

Execution of guarantee was not Code transaction; guarantee was not "transaction...which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts," under UCC § 9-102(1)(a); neither did guarantee of accounts receivable fall within coverage of Article 3 of UCC, §§ 3-102 to 3-805, formalities of which apply only to guarantees of commercial paper. *EAC Credit Corp. v. King*, 507 F.2d 1232 (5th Cir. 1975).

Trial court erred in granting directed verdict upon check in favor of payee where drawers testified that parties orally agreed that check was not to be effective and should not be presented for payment until drawees received insurance money from destruction of hay crops by fire. Parol evidence was admissible to show that check was not to be operative as binding obligation until occurrence of some condition precedent. Although insurance proceeds had been received by time of trial and, therefore, check was payable at that time, judgment in favor of payee could not be sustained since present action was on check, not on underlying debt, proper presentment to bank was conditioned precedent to drawers' liability and there was no

evidence of any presentment subsequent to receipt by drawers of proceeds of insurance. *Engelcke v. Stoehsler*, 273 Or. 937, 544 P.2d 582 (1975).

Although a federal reserve note is money and is therefore commercial paper under Article 3 of the Code, the delivery of such a note to one of the twelve Federal Reserve Banks is the first delivery to a holder or a remitter, the sense in which issue is used in the Code, and is therefore an issuance for the purpose of a criminal statute, where counterfeit notes are involved. *Commonwealth v. Saville*, 353 Mass. 458, 233 N.E.2d 9 (1968).

Contracts guaranteeing the payment of the purchase price by a purchaser are not negotiable instruments, and are therefore not governed by any of the provisions of Article 3. *Associates Dist. Corp. v. Elgin Organ Ctr., Inc.*, 375 F.2d 97 (7th Cir. Ill. 1967).

The instant section was referred to in a case in which the drawer of a check sought to hold in conversion a bank, other than the drawee, which had cashed the check upon a forged indorsement, in connection with the proposition that the provision of § 3-419, that an instrument is converted when paid on a forged indorsement was not applicable to the paying bank which was not a payor bank as defined in § 4-105(b). *Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

The word "holder" in the law of Bills and Notes includes the payee or indorsee of a bill or note who is in possession of it; and, accordingly, a bank, while it retained the ownership and possession of notes secured by a deed of trust, was the holder thereof. *Federal Land Bank v. Miller*, 199 Miss. 615, 25 So. 2d 11 (1946).

Assignee of deed of trust, owning all of unpaid notes secured thereby except two which were in possession of assignor merely for collection, was legal holder of the unpaid notes within purview of provision in the deed authorizing legal holders of a majority of the unpaid indebtedness secured thereby to appoint a substituted

trustee upon death of original one. *Baker v. Connecticut Gen. Life Ins. Co.*, 196 Miss. 701, 18 So. 2d 438 (1944).

otherwise put into circulation. *Love v. Mayor & Bd. of Aldermen*, 166 Miss. 322, 148 So. 382 (1933).

Ordinarily, a bond, bill or note is not "issued" until delivered to purchaser or

§ 75-3-104. Negotiable instrument.

(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

(b) "Instrument" means a negotiable instrument.

(c) An order that meets all of the requirements of subsection (a), except paragraph (1), and otherwise falls within the definition of "check" in subsection (f) is a negotiable instrument and a check.

(d) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this chapter.

(e) An instrument is a "note" if it is a promise and is a "draft" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.

(f) "Check" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order."

(g) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(h) "Teller's check" means a draft drawn by a bank (i) on another bank, or (ii) payable at or through a bank.

(i) "Traveler's check" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term "traveler's check" or by a substantially similar term, and (iv) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(j) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a

promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank.

SOURCES: Former § 75-3-104: Codes, 1942, § 41A:3-104; Laws, 1966, ch. 316, § 3-104; Laws, 1992, ch. 420, § 4, eff from and after January 1, 1993.

Cross References — Declaration that state general obligation bonds issued for the support of the Institute for Technology Development are negotiable instruments, see § 31-29-7.

General obligation bonds issued for the purpose of renovating or repairing facilities at various institutions of higher learning, the Education and Research Center, and the Gulf Coast Research Laboratory being negotiable instruments, see § 37-101-311.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-104.

11. In general.
12. Comparison with former law.
13. Draft or bill of exchange.
14. Check.
15. —Conditions or restrictions.
16. —Instruments missing signature, amount or other elements.
17. —Payable to order or bearer.
18. —Other matters.
19. Certificate of deposit.
20. Note.
21. —Additional powers or provisions.
22. —Relationship with contracts or other documents.
23. —Requirement that note be unconditional.
24. —Time for payment.
25. Bonds, warrants and other government obligations.
26. Money order.
27. Retail installment contract.
28. Traveler's check.
29. Withdrawal order.
30. "Draft", "Check" or other terms applied to non-negotiable instruments.
31. Confession of judgment.
32. Miscellaneous instruments.

III. DECISIONS UNDER FORMER STATUTES.

33. Decisions under Code 1942 § 42.
34. Decisions under Code 1942 § 51.

35. Decisions Under Code 1942 § 167.
36. Decisions under Code 1942 § 225.
37. Decisions under Code 1942 § 226.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-104.

11. In general.

Provisions of UCC §§ 3-104 and 3-109 as to form of instruments and definite time for payment could in no way alter meaning of "definite" and "indefinite" as used in Internal Revenue Code for purpose of valuation of notes in determining tax liability. *Caruth v. United States*, 566 F.2d 901 (5th Cir. Tex. 1978).

Whether particular instrument is negotiable within meaning of UCC Art 3 can be determined only by reading UCC §§ 3-104 through 3-112 as a unit. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

In order to be a negotiable instrument under UCC Art 3, instrument must precisely meet definition of "negotiable instrument" contained in UCC § 3-104(1). Moreover, in determining whether an instrument meets such definition, only the instrument itself and not any other documents may be looked to, even though the instrument may refer to other documents that allegedly cure defects in instrument's negotiability. *First State Bank v. Clark*, 91 N.M. 117, 570 P.2d 1144 (1977).

Execution of guarantee was not Code transaction; guarantee was not

"transaction... which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts," under UCC § 9-102(1)(a); neither did guarantee of accounts receivable fall within coverage of Article 3 of UCC, §§ 3-102 to 3-805, formalities of which apply only to guarantees of commercial paper. *EAC Credit Corp. v. King*, 507 F.2d 1232 (5th Cir. 1975).

Any writing to be a negotiable instrument must be signed by the maker or drawer. *Jenkins v. Evans*, 31 A.D.2d 597 (3d Dep't 1968).

The negotiability of an instrument is not affected by the presence of a seal. *Pitts v. Pitchford*, 201 So. 2d 563 (Fla. App. 1967), cert. denied, 207 So. 2d 452 (Fla. 1967).

Where a promissory note authorizes confession of judgment as of any time it is not "an instrument otherwise negotiable," and being non-negotiable its execution under seal imports consideration. *Smith v. Lenchner*, 204 Pa. Super. 500, 205 A.2d 626 (Super. 1964).

12. Comparison with former law.

Under Code, as formerly, one may bring action upon debt evidenced by commercial paper in form of suing directly on instrument which imports its own consideration without setting forth facts creating obligation evidenced by paper; obligee, however, still has only one cause of action for amount owing him, and filing of action based directly on check will not inhibit him from pleading and proving facts, including consideration for which check was given, and addition of such facts to declaration will not constitute new cause of action. *Minner v. Childs*, 116 Ga. App. 272, 157 S.E.2d 50 (1967).

The requirement of the NIL of an unconditional order or promise to pay a sum certain of money is continued in the Code. *United States v. Farrington*, 172 F. Supp. 797 (D. Mass. 1959).

13. Draft or bill of exchange.

"Envelope draft" presented by beneficiary of letter of credit to issuer was not validly drawn in accordance with letter's terms where (1) it did not contain statement, "Drawn Under National Bank of

Austin Letter of Credit No. 8274," as required by such letter, and (2) instrument was not a draft under UCC § 3-104(1)(a), since drawer's alleged signature was on back of instrument and not on line in right-hand corner of face of instrument that was provided for drawer's signature (applying Illinois law, and holding that signature on back of instrument was actually indorsement under UCC § 3-402). *North Valley Bank v. National Bank*, 437 F. Supp. 70 (N.D. Ill. 1977).

Document entitled "collection letter" which made allusion to accompanying draft did not constitute sight draft where it was not unconditional order to pay money and was burdened with additional instructions, and where bank's typed name only signature thereon. *Bounty Trading Corp. v. S.E.K. Sportswear, Ltd.*, 48 A.D.2d 811 (1st Dep't 1975).

Where the defendant unexplainedly came into possession of a stolen and forged check and signed his name as payee and then indorsed it, the check became a bill of exchange, payable upon demand at the drawee bank. *People v. White*, 55 Misc. 2d 298 (1967).

A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand a sum certain to order or to bearer. *Garden Check Cashing Serv., Inc. v. First Nat'l City Bank*, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

A bill of exchange becomes a check when drawn on a bank payable on demand. *Garden Check Cashing Serv., Inc. v. First Nat'l City Bank*, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

The negotiability of a trade acceptance which otherwise conforms to the statutory requirements is unaffected by a mere reference on the face of the instrument to the transaction from which it arose. *Federal Factors, Inc. v. Wellbanke*, 241 Ark. 44, 406 S.W.2d 712 (1966).

14. Check.

Where bank customer could withdraw money by inserting card into computer terminal and foundation of relationship

between bank and customer was bank's agreement to pay out customer's money according to customer's order, card constituted "check" within meaning of UCC § 3-104, notwithstanding card was non-negotiable. *Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co.*, 536 F.2d 176 (7th Cir. Ill. 1976), cert. denied, 429 U.S. 871, 97 S. Ct. 184, 50 L. Ed. 2d 151 (1976).

The ordinary form of personal check is a negotiable instrument. *Middlemas v. Wright*, 493 S.W.2d 282 (Tex. Civ. App. 1973).

Under Code provision defining check as draft drawn on bank and payable on demand, negotiable instrument drawn on bank payable to defendants was check. *Russ Togs, Inc. v. Gordon*, 127 Ga. App. 520, 194 S.E.2d 280 (1972).

Signed letter and telegram satisfied Code § 3-104 (2)(b) requirements for "check", so that bank, required by resolution to transfer funds pursuant to "check", was not negligent in acting pursuant to signed letter and telegram. *United Milk Prods. Co. v. Lawndale Nat'l Bank*, 392 F.2d 876 (7th Cir. Ill. 1968).

A check is a draft on a bank, payable on demand but revocable until paid or accepted for payment. *Mott v. Sewickley Sav. & Loan Ass'n*, 211 Pa. Super. 357, 236 A.2d 541 (1967).

That at the time the successful bidder at a public auction issued the city his personal check for the required deposit against his bid there were insufficient funds in his account to pay it did not invalidate the bid when the check was duly paid on presentation to the drawee bank, for the check was not payment at the time of sale but merely a promise of future payment at the time of its presentation. *Kensil v. Ocean City*, 89 N.J. Super. 342, 215 A.2d 43 (App. Div. 1965).

A check can be a negotiable instrument without constituting immediate payment, and unless the parties agree otherwise, a check is not payment until presented and paid. *Kensil v. Ocean City*, 89 N.J. Super. 342, 215 A.2d 43 (App. Div. 1965).

15. —Conditions or restrictions.

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of

son for \$20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that \$20,000 should be taken from his estate at death for his son: (1) Under UCC § 3-104, instrument in question was negotiable instrument and, under UCC § 3-114(1) and (2), its negotiability was not affected by fact that it was post dated 15 years, and time when it was payable was determined by stated date. *Smith v. Gentilotti*, 371 Mass. 839, 359 N.E.2d 953 (1977).

Written instructions on reverse side of checks which were properly dated (i.e., dated as of time of issue), limiting time for deposit to future date, did not preclude instruments from being payable on demand as required by UCC § 3-104(2)(b); instructions on checks could not be regarded as qualified or restrictive endorsements since drawer was not holder of checks and, since instructions were not endorsements, they were not binding on payee or on subsequent holders. *Silver Creations, Ltd. v. UPS*, 133 N.J. Super. 543, 337 A.2d 641, 88 A.L.R.3d 1093 (L. Div. 1975).

The requirement that a check contained an unconditional promise to pay applies only to the matter of the form of a negotiable instrument, and as between the original parties payment by check is conditional. *Mansion Carpets, Inc. v. Marinoff*, 24 A.D.2d 947 (1st Dep't 1965).

16. —Instruments missing signature, amount or other elements.

In action by materials supplier against subcontractor to recover entire proceeds of four checks drawn by general contractor and made jointly payable to both supplier and subcontractor, where subcontractor surrendered all four checks to supplier without indorsement and general contractor's bank, at supplier's request, exchanged such checks for two cashier's checks made payable to supplier and subcontractor, (1) bank by exchanging checks originally issued for cashier's checks did not alter rights of parties named in originally issued checks; (2) drawer of original checks (general contractor) was not placed at disadvantage because drawer's account was immediately chargeable on presentation and acceptance of original checks; (3)

payees of original checks (supplier and subcontractor) were also not placed at disadvantage because funds in same amount were available to them from the cashier's checks; (4) validity of drawer's order to bank to make payment to payees named in original checks was not in question; and (5) making of cashier's checks payable to payees named therein (supplier and subcontractor) did not circumvent purpose of requirement of indorsements, since indorsements would still be routinely required under UCC § 3-104(2)(b) and UCC §§ 3-201 et seq. to negotiate the cashier's checks. In such case, bank was not negligent in performing customer's orders under rule that bank will be protected if it pays without indorsement as long as payee actually receives money ordered by drawer to be paid. *Swan Air Conditioning Co. v. Crest Constr. Corp.*, 568 P.2d 1330 (Okla. Ct. App. 1977).

Where drawee bank paid checks imprinted with false unauthorized signature stamps, drawer was entitled to recover on bond covering forgery and alteration, despite fact that claim of loss referred to "counterfeit" as opposed to "forged" checks. *MBTA Emp. Credit Union v. Employers Mut. Liab. Ins. Co.*, 374 F. Supp. 1299 (D. Mass. 1974).

Check which was signed by maker but was blank as to payee and amount was not legally a check within meaning of UCC. *State v. Kleen*, 491 S.W.2d 244 (Mo. 1973).

17. —Payable to order or bearer.

Check executed and delivered is contract in writing by which drawer contracts with payee that bank will pay to latter or his order amount designated on presentation. *Mason v. Blayton*, 119 Ga. App. 203, 166 S.E.2d 601 (1969).

Instruments not payable to order of bearer were non-negotiable in sense that there could be no holder in due course thereof; however, under Code § 3-805 and official comment thereto, such instruments are treated as negotiable in other respects and are referred to as checks; being checks within Code, such instruments can be subject of crime of larceny by check. *Faulkner v. State*, 445 P.2d 815 (Alaska 1968).

A person would be a holder in due course of a negotiable instrument if he acquired it for value and without notice where it was payable to bearer. *Hartford Accident & Indem. Co. v. Walston & Co.*, 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

18. —Other matters.

A conservator of an estate had the authority to endorse and negotiate checks made payable to the estate's conservatorship. *Great S. Nat'l Bank v. Minter*, 590 So. 2d 129 (Miss. 1991).

Negotiable orders of withdrawal ("NOW drafts") requiring savings bank to pay specified sum to named third party which (1) are "payable-through" drafts that designate a commercial bank at which they can be presented for payment, (2) clear through banking system in manner similar to traditional checks, and (3) bear legend that gives bank option to require 14 days' notice before making payment, are not checks within meaning of UCC § 3-104(2)(b), since such drafts are not payable on demand. *Pennsylvania Bankers Ass'n v. Secretary of Banking*, 481 Pa. 332, 392 A.2d 1319 (1978).

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for \$20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that \$20,000 should be taken from his estate at death for his son: (1) Under UCC § 3-104, instrument in question was negotiable instrument and, under UCC § 3-114(1), and (2), its negotiability was not affected by fact that it was post dated 15 years, and time when it was payable was determined by stated date. *Smith v. Gentilotti*, 371 Mass. 839, 359 N.E.2d 953 (1977).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where bank's refusal to sign was because

it had no ownership interest in corporation but only security interest in corporation's assets; (3) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (4) where bank indorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, buyer's contention that when bank accepted and cashed cashier's checks it became obligated by terms of sale agreement could not be sustained because (1) clear import of Uniform Commercial Code is that negotiable instruments may not be used by parties to express obligations other than obligation stated in UCC § 3-104(1)(b), namely, unconditional promise to pay sum certain; and (2) since terms of sale agreement with respect to such cashier's checks required only that they be made out for specified amounts and be payable to specified copayees, such checks were not affected or modified under UCC § 3-119(1) by terms of sale agreement, but were completely independent of such agreement. In such case, cashier's checks stood on their express terms, bank's acceptance of such checks did not constitute acceptance of terms of separate sale agreement which bank did not sign, and causes of action arising out of such sale agreement were not available against bank. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

Negotiability of check is not affected by fact it is drawn in return for creation of debt obligation from payee to drawer which is secured by collateral, nor is such negotiability affected by promise to maintain or protect collateral, and borrower who accepts check representing proceeds of his loan may freely negotiate check as his own property notwithstanding security agreement which secures his obligation to repay. *Johnson v. State*, 158 Ind. App. 611, 304 N.E.2d 555 (1973).

Use of waiver of defense clause (often, as here, in fine print and couched in technical language which is difficult for

the ordinary consumer to appreciate) cannot impart attributes of negotiability to otherwise negotiable instrument. *Fairfield Credit Corp. v. Donnelly*, 158 Conn. 543, 264 A.2d 547, 39 A.L.R.3d 509 (1969).

The appellant's printed name and address at the top of the check established that he was named in the instrument and that he clothed his agent with authority to possess, issue, and assign checks drawn upon his account, and respondent took the checks, as a holder in due course free from any and all defenses on the part of the appellant. *Jenkins v. Evans*, 31 A.D.2d 597 (3d Dep't 1968).

Where an employer signs his name to a blank check the improper completion of the check by an employee and his conversion of the proceeds of the check constitutes the crime of embezzling money, as against the argument that the blank check was not a negotiable instrument as it did not contain any order or promise to pay money and was not payable to order or bearer. *State v. Moreno*, 156 Conn. 233, 240 A.2d 871 (1968).

A so-called "Personal Money Order-Register Check" (an instrument issued by a bank for the amount of the sum of money deposited with it by the check's purchaser, and showing the name of the bank as drawee but with the names of the drawer and payee left blank) creates the same debtor-creditor relationship between the bank and its customer which any ordinary deposit of funds would create; and the purchaser of the check who, under his contract with the bank, is the sole person who may draw on the fund deposited, and he has a clear right to stop payment prior to the check's acceptance by the bank. *Garden Check Cashing Serv., Inc. v. First Nat'l City Bank*, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

19. Certificate of deposit.

Section 81-5-63 and § 81-12-137, which deal, respectively, with joint deposits in a bank checking account and in a savings account in a savings association, create a presumption of joint tenancy ownership with the right of survivorship. On the other hand, such presumption does not apply to bank issued certificates of deposit

held in the names of 2 or more persons, in the absence of express intent on the certificate to create such joint tenancy. *Delta Fertilizer, Inc. v. Weaver*, 547 So. 2d 800 (Miss. 1989).

Where (1) first bank, which had loaned debtor \$20,000 and accepted as collateral nonnegotiable certificate of deposit that first bank had previously issued to debtor, inadvertently delivered renewal certificate to debtor, (2) debtor, instead of returning renewal certificate to first bank, used it as collateral for loan from second bank and gave second bank security interest in renewal certificate that second bank perfected by possession under UCC § 9-304(1), and (3) on debtor's default on both loans, second bank presented renewal certificate to first bank, which dishonored it, court held (1) that second bank was not holder in due course under UCC §§ 3-302(1) and 3-805 because renewal certificate was nonnegotiable under UCC § 3-104(1)(d), (2) that as a result, second bank was mere assignee of renewal certificate and certificate under assignments statute was subject to first bank's right of setoff, (3) that exclusion of right of setoff from Article 9 protection means that claimant of right of setoff (first bank) against collateral (renewal certificate) is not barred from enforcing such right merely because another creditor (second bank) has perfected security interest in collateral by taking possession thereof, since right of setoff is separate from priority provisions of Article 9, and (4) that as a result, second bank held debtor's renewal certificate subject to any defenses of first bank, which "defenses" included first bank's right of setoff. *Bank of Crystal Springs v. First Nat'l Bank*, 427 So. 2d 968 (Miss. 1983).

In action to determine whether two certificates of deposit should be included in estate of decedent, certificates of deposit were not negotiable under UCC § 3-104 where there were neither payable to order nor to bearer on their face; certificates of deposit were governed by UCC pursuant to UCC § 3-805 where they satisfied all attributes of negotiable instrument except words of negotiability; cousin of decedent was entitled to one of certificates of deposit where decedent had indorsed it in blank and physically delivered it to him,

thereby creating presumption of valid and intentional delivery under UCC § 3-201 of inter vivos gift, and where this presumption was not overcome by evidence that periodic interests payments which accrued on certificate continued to be deposited into separate savings account belonging to decedent. *Rand v. Moore*, 414 So. 2d 885 (Miss. 1981).

Certificate of deposit issued by bank which (1) represented deposit of specified sum by decedent, (2) was payable in the alternative to decedent or to plaintiff-claimant of certificate's proceeds, (3) had not been negotiated to plaintiff in accordance with UCC § 3-116(a), but was still in decedent's possession at time of her death, and (4) contained no reference to survivorship rights, was in decedent's possession as holder in due course and thus was part of her estate when she died (holding that Uniform Commercial Code controls certificates of deposit which comply with UCC § 3-104(2)(c)). *Thomas v. Estate of Eubanks*, 358 So. 2d 709 (Miss. 1978).

Certificate of deposit which was not payable to order or to bearer, but was payable only on return of instrument properly indorsed, was not negotiable instrument under UCC § 3-104(1)(d) and § 3-110(2). *Kaw Valley State Bank & Trust v. Commercial Bank of Liberty*, 567 S.W.2d 710 (App. 1978).

Where statutory requirements are met, certificate of deposit becomes negotiable instrument carrying with it obligation on part of depository bank to repay receipt of money given to it by its depositor; thus, where depositor transferred certificates of deposit to lending bank as collateral for loan, security interest of lending bank in certificates of deposit included and extended to unidentified funds on deposit by depositor at depository bank which would pay certificates when due, and depository bank was precluded from setting off against certificates depositor's obligations to depository bank. *First Wisconsin Nat'l Bank v. Midland Nat'l Bank*, 76 Wis. 2d 662, 251 N.W.2d 829 (1977).

Savings certificates, issued by savings and loan association, which were not payable to order or to bearer were not negotiable instruments under UCC § 3-104;

since they were not negotiable, under UCC § 3-805, purchasers of such certificates were not holders in due course and, thus, under UCC § 3-306 such purchasers took certificates subject to defense of failure or want of consideration. *Jones v. United Sav. & Loan Ass'n*, 515 S.W.2d 869 (Mo. Ct. App. 1974).

Certificate of deposit, which contained unconditional promise to pay certain sum of money absolutely, had all essential elements of promissory note and should be governed by same rules as promissory note with reference to creation of joint-tenancy rights therein. In re *Estate of Baxter*, 56 Ill. 2d 223, 306 N.E.2d 304 (1973).

20. Note.

Where promissory note was not negotiable under UCC § 3-104(1), liability of signer of such note was not controlled by Uniform Commercial Code provisions governing personal liability of agent who signs on behalf of principal or corporation (see UCC § 3-403). *Central States, S.E. & S.W. Areas, Health & Welfare Fund v. Pitman*, 66 Ill. App. 3d 300, 383 N.E.2d 793 (3d Dist. 1978).

Note was negotiable notwithstanding it contained acceleration clause and clause confessing judgment on instrument if not paid when due, since UCC §§ 3-109 and 3-112(d), respectively, authorize such clauses. *Broadway Mgt. Corp. v. Briggs*, 30 Ill. App. 3d 403, 332 N.E.2d 131 (4th Dist. 1975).

Promissory notes which stated "Buyer agrees to pay to Seller..." were not negotiable instruments, assignee of such notes was not holder in due course thereof, and, thus, trial court erred in refusing to consider evidence in support of maker's affirmative defenses. *Locke v. Aetna Acceptance Corp.*, 309 So. 2d 43 (Fla. App. 1975).

Assignee of promissory note qualified as "holder" under UCC § 1-201(20), but provision that judgment could be confessed "at any time hereafter" rendered note non-negotiable under UCC § 3-112(d) and outside scope of Code. *Shatz v. Dunn*, 18 Ill. App. 3d 390, 309 N.E.2d 702 (5th Dist. 1974).

UCC does not require that negotiable note be payable "to order or to bearer" in

haec verba; these are alternative requirements and it is necessary to comply with only one of them. *First Nat'l City Bank v. Valentine*, 62 Misc. 2d 719 (1970).

A note is an irrevocable promise to pay made by the maker. *Mott v. Sewickley Sav. & Loan Ass'n*, 211 Pa. Super. 357, 236 A.2d 541 (1967).

21. —Additional powers or provisions.

The provision in a note for "interest after maturity at the highest lawful" rate does not render the note non-negotiable for failure to state a sum certain as required by § 3-104(1)(b) because, there being no agreement in writing for any other rate after default, the interest rate after maturity would be that indicated in c 107, § 3 which would make the note equivalent to one payable "with interest," which latter type of note would clearly be negotiable under c 106. § 3-118(d). *Universal C.I.T. Credit Corp. v. Ingel*, 347 Mass. 119, 196 N.E.2d 847 (1964).

Evidence that a note and a contract completion certificate were "together" at one stage of a transaction does not justify an inference that the note and completion certificate were "part of the same instrument" and that an additional obligation in the completion certificate rendered the note non-negotiable under subsection (1)(b) of the instant section. *Universal C.I.T. Credit Corp. v. Ingel*, 347 Mass. 119, 196 N.E.2d 847 (1964).

A clause in a note which makes credit life insurance available to the maker does not affect negotiability of the note under subsection (1)(b) because it is clear that the "no other promise" provision therein refers only to promises by maker. *Universal C.I.T. Credit Corp. v. Ingel*, 347 Mass. 119, 196 N.E.2d 847 (1964).

The addition of the power to confess judgment at any time destroyed the negotiability of a note. *Atlas Credit Corp. v. Leonard*, 15 Pa. D. & C.2d 292 (1957).

22. —Relationship with contracts or other documents.

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that

trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). *Northwestern Bank v. Neal*, 271 S.C. 544, 248 S.E.2d 585 (1978).

Two notes which were issued subject to separate agreement between makers and payee were not negotiable instruments within meaning of Article 3 of Uniform Commercial Code. *TMA Fund, Inc. v. Bieber*, 380 F. Supp. 1248 (E.D. Pa. 1974), appeal dismissed, 520 F.2d 639 (3d Cir. Pa. 1975), *aff'd*, 532 F.2d 747 (3d Cir. Pa. 1976).

Where note bears legend "as per contract," this fact does not prevent it from containing unconditional promise within provision of § 3-104, subd b, since § 3-105, subd 1(c) provides that promise is not made conditional by fact that instrument refers to or states that it arises out of separate agreement. Such legend does not affect the negotiability of the instrument as would statement that instrument is subject to or governed by any other agreement as is provided by § 105, subd 2(a). *D'Andrea v. Feinberg*, 45 Misc. 2d 270 (1965).

The negotiability of a note is not affected by the fact that it was originally physically attached to a conditional sales contract. *Congress Fin. Corp. v. J-K Coin Op Equip. Co.*, 353 F.2d 683 (7th Cir. Ind. 1965).

The negotiability of a note is not affected by a variance between it and a written contract where there is nothing in the note to indicate that it is subject to the terms of the contract. *Universal C.I.T. Credit Corp. v. Ingel*, 347 Mass. 119, 196 N.E.2d 847 (1964).

23. —Requirement that note be unconditional.

Note was not negotiable instrument under UCC § 3-104(1) where promise to pay

contained in instrument was conditional and instrument also contained express restriction that it could not be transferred, pledged, or assigned by payee without written consent of maker. *First State Bank v. Clark*, 91 N.M. 117, 570 P.2d 1144 (1977).

Writings on reverse side of paid note and on accompanying envelope, signed by decedent, stating that decedent's son and another loaned decedent money to pay note, that decedent wanted this paid out of his estate, and that he owed his son and the other person a certain sum of money, did not fall within classification of promissory note in statute of limitations since writings failed to provide for payment absolutely and unconditionally. *Estate of Garrett v. Garrett*, 24 Ill. App. 3d 895, 322 N.E.2d 213 (2d Dist. 1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. *Hall v. Security Planning Serv., Inc.*, 371 F. Supp. 7 (D. Ariz. 1974).

The requirement that the instrument contain an unconditional order or promise to pay a sum certain in money is not retroactive. *United States v. Farrington*, 172 F. Supp. 797 (D. Mass. 1959).

24. —Time for payment.

"Promissory note" which was payable "upon evidence of an acceptable permanent loan...and upon acceptance of the [loan] commitment," was not payable on demand or at a definite time under UCC §§ 3-108 and 3-109(2), it was therefore not negotiable under UCC § 3-104(1)(c), and thus holder was not entitled to recover against signers of note under UCC § 3-307(2) merely upon production of note and admission of its execution. *Barton v. Scott Hudgens Realty & Mtg., Inc.*, 136 Ga. App. 565, 222 S.E.2d 126 (1975).

Instrument made payable "at the earliest possible time" was not payable at definite time, nor was phrase "at the earliest possible time" equivalent to no time for payment being stated in instrument; hence, it was not negotiable demand note. *Williams v. Cooper*, 504 S.W.2d 564 (Tex. Civ. App. 1973).

Notes payable to bank which were silent as to time when confession of judgment could occur were non-negotiable and were not governed by UCC. *von Frank v. Hershey Nat'l Bank*, 269 Md. 138, 306 A.2d 207 (1973).

Instruments payable on demand include those in which no time for payment is stated. *Erickson v. Newell*, 183 Neb. 641, 163 N.W.2d 286 (1968).

25. Bonds, warrants and other government obligations.

Under UCC § 3-104(1)(b) and (d), bond which was not payable in sum certain, and which also was not expressly payable to order or to bearer, was not negotiable instrument. *Cobb Bank & Trust Co. v. American Mfrs. Mut. Ins. Co.*, 459 F. Supp. 328 (N.D. Ga. 1978), *aff'd*, 624 F.2d 722 (5th Cir. Ga. 1980).

Warrant issued by governmental levee district directing state comptroller to pay construction company sum certain was "negotiable instrument" under UCC § 3-104(1), and under UCC § 3-105(1)(g), dealing with instruments issued by governmental agencies, unconditional promise to pay contained in warrant was not made conditional by fact that instrument was limited to payment of particular fund or proceeds of particular source. *St. James Bank & Trust Co. v. Board of Comm'rs*, 354 So. 2d 233 (La. App. 1978).

In action by bank to recover funds paid by it in exchange for warrant issued by governmental levee district, district's contention that even if warrant should qualify as negotiable instrument under UCC § 3-104(1) and § 3-105(1)(g), it was still collection item and bank should not have advanced its funds until warrant cleared state comptroller and funds were paid by state treasurer could not be sustained, since warrant either was or was not a negotiable instrument, and the law does not recognize a particular category of negotiable instruments that are somehow

less negotiable because they are bank collection items. *St. James Bank & Trust Co. v. Board of Comm'rs*, 354 So. 2d 233 (La. App. 1978).

Revenue bonds and coupons with indefinite interest rate provisions are not negotiable instruments because of failure to meet "sum certain" requirement. *Brazos River Auth. v. Carr*, 405 S.W.2d 689 (Tex. 1966).

Bonds and their coupons issued by public authority which provide for the payment of an indefinite rate of interest are not negotiable, and neither statute authorizing authority to issue negotiable bonds nor a resolution of the authority declaring the bonds to be negotiable alters the fact. *Brazos River Auth. v. Carr*, 405 S.W.2d 689 (Tex. 1966).

26. Money order.

Money order which was signed by alleged drawer, contained unconditional order to pay sum certain in money, was payable on demand and to order of specified person and was not drawn on bank, was draft or bill of exchange. *People v. Peace*, 48 Mich. App. 79, 210 N.W.2d 116 (1973).

A bank money order which does not require the signature of the issuer is subject to a stop payment order. *Krom v. Chemical Bank N.Y. Trust Co.*, 38 A.D.2d 871 (3d Dep't 1972).

Money orders which were not "payable to order or to bearer" but made "payable to" named payee were not negotiable. *Nation-Wide Check Corp. v. Banks*, 260 A.2d 367 (D.C. 1969).

Postal money order resembles negotiable instrument in many but not all respects. See *United States v. First Nat'l Bank*, 263 F. Supp. 298 (D. Mass. 1967).

Unlike a cashier's check or a traveller's check, both of which are signed by the issuer prior to their issuance, a so-called "Personal Money Order-Register Check" at no time bears the signature of the drawee, who enters into no contract relations with the holder unless and until the instrument is accepted; and a bank issuing such a check is under no obligation to accept or pay the same to a holder, innocent or otherwise, after receipt of a stop-payment order from the purchaser of the check. *Garden Check Cashing Serv., Inc. v.*

First Nat'l City Bank, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

A so-called "Personal Money Order-Register Check", which bears no signature whatsoever at the time of its purchase from the drawee bank, does not become a negotiable instrument until the purchaser fills in the name of a payee and signs it himself as the drawer. *Garden Check Cashing Serv., Inc. v. First Nat'l City Bank*, 25 A.D.2d 137 (1st Dep't 1966), aff'd, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

Bogus money orders, although meeting the other requirements of this section and simulating negotiable instruments in form, are not negotiable when not payable to order or bearer. *Strauss v. State*, 113 Ga. App. 90, 147 S.E.2d 367 (1966).

27. Retail installment contract.

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). *Northwestern Bank v. Neal*, 271 S.C. 544, 248 S.E.2d 585 (1978).

Retail installment contract for sale of mobile home and security agreement which were combined into one instrument, and which involved promises, obligations, and powers in addition to those declared by UCC § 3-104(1) to be essential for negotiability of a writing, was not a negotiable instrument. *Wickware v. National Mtg. Corp. of Am.*, 570 P.2d 330 (Okla. 1977).

In action by assignee of retail installment contracts, waiver of defenses clause in contract signed by purchasers was ef-

factive where assignee purchased contract for value, in good faith, and without notice of any claim or defense. Although retail installment contracts are not negotiable instruments within meaning of UCC § 3-104, standards set forth in UCC § 9-206(1) relating to such instruments are equally applicable in determining whether assignee is entitled to protection of waiver of defense clause. *Personal Fin. Co. v. Meredith*, 39 Ill. App. 3d 695, 350 N.E.2d 781 (5th Dist. 1976).

There was sufficient doubt that instrument designated as "Retail Installment Contract & Security Agreement" was negotiable instrument, so as to preclude granting summary judgment in face of allegations of lawful defenses, where there was no clear indication that amount of obligation was payable to order or to bearer, where document provided for repossession of collateral by seller without judicial process contrary to requirements of UCC § 3-104(1)(b), and where seller retained purchase money security interest. *Pacific Fin. Loans v. Goodwin*, 41 Ohio App. 2d 141, 324 N.E.2d 578 (1974).

Instrument denominated "Retail Installment Contract" which showed "seller" to be business college and described articles sold or services rendered as "Med. Secretary Course," with cash price of \$490, and which contained provision waiving defenses against assignee thereof, was not negotiable instrument as defined by UCC §§ 3-104 through 3-112, but came within Retail Installment and Home Solicitation Sales Act. *Grimes v. Community Loan & Inv. Corp.*, 130 Ga. App. 8, 202 S.E.2d 265 (1973).

By c. 255, § 12C, inserted by St. 1961, c. 595, certain notes given in connection with the sale of consumer goods are made non-negotiable. *Universal C.I.T. Credit Corp. v. Ingel*, 347 Mass. 119, 196 N.E.2d 847 (1964).

28. Traveler's check.

Traveller's check is negotiable instrument within meaning of UCC Article 3 (see UCC § 3-104(1) and Official Comment 4). *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

American Express Travellers checks, which party to whom such checks were given as payment for merchandise saw

holder sign and countersign, but which holder did not date or make payable to plaintiff and which plaintiff never completed although he had authority to do so, were incomplete and unenforceable as matter of law, since omission of payee's name rendered checks nonnegotiable under UCC § 3-104(1)(d), which requires that any writing to be negotiable instrument must be payable "to order" or "to bearer." (holding, however, that failure to date checks did not affect their negotiability since UCC § 3-114 expressly permits instruments otherwise negotiable to be undated). *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

29. Withdrawal order.

Negotiable orders of withdrawal ("NOW drafts") requiring savings bank to pay specified sum to named third party which (1) are "payable-through" drafts that designate a commercial bank at which they can be presented for payment, (2) clear through banking system in manner similar to traditional checks, and (3) bear legend that gives bank option to require 14 days' notice before making payment, are not checks within meaning of UCC § 3-104(2)(b), since such drafts are not payable on demand. *Pennsylvania Bankers Ass'n v. Secretary of Banking*, 481 Pa. 332, 392 A.2d 1319 (1978).

A withdrawal order possesses the attributes of negotiability required by UCC § 3-104(1) since it is an unconditional order to the bank signed by the drawer and depositor to pay a specified sum, and it is payable to order and on demand. *Consumers Sav. Bank v. Commissioner of Banks*, 361 Mass. 717, 282 N.E.2d 416, 64 A.L.R.3d 1310 (1972).

30. "Draft", "Check" or other terms applied to non-negotiable instruments.

Under UCC § 3-104(1)(b) and (d), bond which was not payable in sum certain, and which also was not expressly payable to order or to bearer, was not negotiable instrument. *Cobb Bank & Trust Co. v. American Mfrs. Mut. Ins. Co.*, 459 F. Supp. 328 (N.D. Ga. 1978), *aff'd*, 624 F.2d 722 (5th Cir. Ga. 1980).

Where promissory note was not negotiable under UCC § 3-104(1), liability of

signer of such note was not controlled by Uniform Commercial Code provisions governing personal liability of agent who signs on behalf of principal or corporation (see UCC § 3-403). *Central States, S.E. & S.W. Areas, Health & Welfare Fund v. Pitman*, 66 Ill. App. 3d 300, 383 N.E.2d 793 (3d Dist. 1978).

Where defendant contended in prosecution for passing bad checks (1) that statute under which he was being prosecuted applied only to negotiable instruments, (2) that sales drafts in case at bar were not negotiable, and (3) that Uniform Commercial Code supported defendant's view that such drafts were not negotiable, court would conclude that even if Uniform Commercial Code could be resorted to for interpretation of criminal statutes, it did not support defendant's contention, since UCC § 3-104(3) specifically states that terms "draft" and "check" may refer to both negotiable and nonnegotiable instruments. *Commonwealth v. Schwartz*, 250 Pa. Super. 455, 378 A.2d 1237 (1977).

Draft payable to two named payees without addition of words "or order" or any similar words of negotiability was not negotiable instrument within meaning of UCC. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

31. Confession of judgment.

Demand note with clause authorizing confession of judgment "at any time," whether or not default had occurred (i. e., without demand for payment), was nonnegotiable under UCC § 3-112(1)(d). *Cheltenham Nat'l Bank v. Snelling*, 230 Pa. Super. 498, 326 A.2d 557 (1974), *cert. denied*, 421 U.S. 965, 95 S. Ct. 1955, 44 L. Ed. 2d 453 (1975).

Notes payable to bank which were silent as to time when confession of judgment could occur were non-negotiable and were not governed by UCC. *von Frank v. Hershey Nat'l Bank*, 269 Md. 138, 306 A.2d 207 (1973).

Obligation permitting confession of judgment at any time, as distinguished from "upon default", is not negotiable within UCC § 3-112(1)(d). *Blake-Cadillac Oldsmobile, Inc. v. Cackovic*, 54 Pa. D. & C.2d 160 (1971).

The presence of a confession of judgment clause does not affect negotiability where it is so limited that judgment may not be entered before default. *Vain v. Gordon*, 249 Md. 134, 238 A.2d 872 (1968).

Despite the provisions of subsection (1)(d) judgment notes in use in Pennsylvania are not negotiable when they provide that judgment may be entered before the amount is due, and this subsection is construed to mean that a confession of judgment may be authorized only if the instrument is not paid when due. *Smith v. Lenchner*, 204 Pa. Super. 500, 205 A.2d 626 (Super. 1964).

A note containing a warrant to confess judgment at any time is a non-negotiable instrument, and hence a note authorizing a confession of judgment "as of any term" was not negotiable. *Bittner v. McGrath*, 186 Pa. Super. 477, 142 A.2d 323 (Super. 1958).

The addition of the power to confess judgment at any time destroyed the negotiability of a note. *Atlas Credit Corp. v. Leonard*, 15 Pa. D. & C.2d 292 (1957).

Although the type of authority to confess judgments which will not affect negotiability is stated slightly different in this section, the rule is the same as it was under the Negotiable Instruments Law. *Atlas Credit Corp. v. Leonard*, 15 Pa. D. & C.2d 292 (1957).

32. Miscellaneous instruments.

Since letters of credit are not negotiable instruments as defined by UCC § 3-104(1), bank did not become holder in due course merely by accepting them as security for loans; bank, as assignee of letters of credit which were not expressly transferable, only had right to receive drafts properly drawn by beneficiary pursuant to UCC § 5-116. *Shaffer v. Brooklyn Park Garden Apts.*, 311 Minn. 452, 250 N.W.2d 172 (1977).

The promise of the maker of an instrument to pay a sum certain is not rendered condition by the grant of authority to the payee or assignee to cancel an insurance policy in the event of default, and apply the return premiums against the unpaid balance. *Standard Premium Plan Corp. v. Hirschorn*, 56 Misc. 2d 687 (1968).

III. DECISIONS UNDER FORMER STATUTES.

33. Decisions under Code 1942 § 42.

The statute applies to negotiable instruments only, to the exclusion of non-negotiable. *Fish Meal Co. v. Brondum*, 242 Miss. 573, 135 So. 2d 825 (1961).

A check is a negotiable instrument. *Presley v. American Guarantee & Liab. Ins. Co.*, 237 Miss. 807, 116 So. 2d 410 (1959).

Where it was shown that the bank had no actual notice of a warranty and agreement and the breach thereof, the fact that there was stapled to the note, given for the purchase of farm equipment, at the time it was indorsed to the bank a purchase order signed by the maker-purchaser in favor of the seller-payee, on the reverse side of which there was a "warranty and agreement," did not put the bank upon notice as to such warranty and agreement or put it upon inquiry as to whether the warranty and agreement had been breached at the time of purchase, so that the bank as a holder in due course for value, and without notice, was entitled to recover against the maker even though the warranty had actually been breached. *Misso v. National Bank of Commerce*, 231 Miss. 249, 95 So. 2d 124 (1957).

Where note and mortgage are transferred without recourse, indorser is mere assignor subject to no liability except as an implied guarantor that instruments are genuine, that he has good title to them, and that he is not aware of any illegality. *Home Ins. Co. v. Citizens Bank*, 181 Miss. 181, 178 So. 589 (1938).

Where insurer purchased from mortgagee a mortgage on insured premises and mortgage note after fire loss, and mortgagee indorsed instruments "without recourse," insurer could not recover from mortgagee as a guarantor on ground that premises were mortgagor's homestead, contrary to recital in mortgage, and that mortgagor's wife had not joined in execution of mortgage, in absence of showing that mortgagee had made any false representations to insurer in regard to those matters. *Home Ins. Co. v. Citizens Bank*, 181 Miss. 181, 178 So. 589 (1938).

Where first indorser on note payable to bank paid bank receiver certain sum and

receiver gave receipt releasing indorser from further liability on note and the compromise settlement was made by authority of chancery court, decree authorizing discharge of first indorser and holding of second indorser was unauthorized where made without second indorser's consent. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

As between the indorsers on a note, the indorser whose name appeared first on back of note was liable first for payment of note and his discharge by receiver of payee bank by authority of chancery court discharged indorser whose name appeared second on back of note. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

Maker, by executing trade acceptances, admitted existence of corporate payee, and its capacity to indorse paper, and could not defeat liability on ground that amended charter changing name of corporation to that used in trade acceptances was not filed until four days after execution of acceptances. *Betlyn Sec. Corp. v. Bates*, 177 Miss. 41, 170 So. 301 (1936).

Purchaser of trade acceptances for cash consideration before due dates without notice of infirmities or defects in instruments held "holder for value, without notice," notwithstanding certificates were executed in favor of corporation after it had resolved to change its name to that used as payee in certificates, but before corporation had filed its amended charter. *Betlyn Sec. Corp. v. Bates*, 177 Miss. 41, 170 So. 301 (1936).

Where note was otherwise in form of negotiable instrument, recital on face of note that it was subject to and part of contract of sale, referring to incomplete, unexecuted, conditional sales contract in printed form on back of note, held not to render note non-negotiable. *Jones v. First Nat'l Bank*, 170 Miss. 857, 155 So. 173 (1934).

In suit on negotiable note, maker's defense based on oral agreement that note was payable in merchandise from maker's store, held not available as against holder in due course, for value and without notice of oral agreement. *Jones v. First Nat'l Bank*, 170 Miss. 857, 155 So. 173 (1934).

Notes must be payable to order or bearer, and, when payable to order, payee

must be named. *Moore v. Vaughn*, 167 Miss. 758, 150 So. 372 (1933).

Automobile sales contract not payable to order or bearer is not negotiable instrument. *J.W. McNees Motor Co. v. Brumfield*, 157 Miss. 132, 126 So. 898 (1930).

Maker of automobile purchase contract may defend against it for fraud in procurement against purchaser for value without notice, or contract may be cancelled in equity. *J.W. McNees Motor Co. v. Brumfield*, 157 Miss. 132, 126 So. 898 (1930).

A statute authorizing discharge of surety or accommodation indorser on creditor's failure to commence proceedings after giving him notice in writing was not repealed by the Negotiable Instruments Act. *First Nat'l Bank v. Rau*, 146 Miss. 520, 112 So. 688 (1927).

One acquiring demand note for value without notice in reasonable time after execution held "holder in due course." *Wilson v. Stark*, 146 Miss. 498, 112 So. 390 (1927).

Failure to place federal revenue stamp on instrument does not affect negotiability. *Currie-McGraw Co. v. Friedman*, 135 Miss. 701, 100 So. 273 (1924).

Negotiable instruments law held not to repeal law declaring void notes given for intoxicating liquors. *Elkin Henson Grain Co. v. White*, 134 Miss. 203, 98 So. 531 (1924).

Breach of maker's contemporary agreement no defense against bona fide holder. *Despres, Bridges & Noel v. Hough Drug Co.*, 123 Miss. 598, 86 So. 359 (1920).

Failure of consideration no defense against bona fide purchaser. *Despres, Bridges & Noel v. Hough Drug Co.*, 123 Miss. 598, 86 So. 359 (1920).

Failure of corporation payee to file charter as condition to doing business no defense against bona fide holder. *Despres, Bridges & Noel v. Hough Drug Co.*, 123 Miss. 598, 86 So. 359 (1920).

34. Decisions under Code 1942 § 51.

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." *Moore v. Vaughn*, 167 Miss. 758, 150 So. 372 (1933).

35. Decisions Under Code 1942 § 167.

A check is a bill of exchange under this section. *Presley v. American Guarantee & Liab. Ins. Co.*, 237 Miss. 807, 116 So. 2d 410 (1959).

Check payable to attorney or bearer, indorsed by attorney and delivered to plaintiff, was a "bill of exchange," on which drawer was primarily liable and attorney secondarily liable. *Parrish v. Feldman*, 182 Miss. 77, 180 So. 610 (1938), error overruled, 182 Miss. 81, 181 So. 336 (1938).

A bank properly declined to honor a check (defined in § 226, Code 1942, as a "bill of exchange drawn on a bank payable on demand"), intended as a gift of the amount of money called for, where it was not presented for payment until after the death of the maker. *Smythe v. Sanders*, 136 Miss. 382, 101 So. 435 (1924).

36. Decisions under Code 1942 § 225.

Generally rights and obligations of parties are governed by laws of state wherein note is payable. *M. Levy & Sons v. Jeffords*, 141 Miss. 818, 105 So. 1 (1925).

Where declaration does not allege or admit note signed by a certain person such fact cannot be raised by demurrer though the note is filed as an exhibit. *Hodges v. Mills*, 139 Miss. 347, 104 So. 165 (1925).

37. Decisions under Code 1942 § 226.

A check is a bill of exchange under this section. *Presley v. American Guarantee & Liab. Ins. Co.*, 237 Miss. 807, 116 So. 2d 410 (1959).

A novation is good consideration for a bill or note. *Greenwood Leflore Hosp. Comm'n v. Turner*, 213 Miss. 200, 56 So. 2d 496 (1952).

Check payable to attorney or bearer, indorsed by attorney and delivered to plaintiff was a "bill of exchange" on which drawer was primarily liable and attorney secondarily liable. *Parrish v. Feldman*, 182 Miss. 77, 180 So. 610 (1938), error overruled, 182 Miss. 81, 181 So. 336 (1938).

Payee could not sue drawee paying check on unauthorized indorsement without notice of defect. *Federal Land Bank v. Collins*, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

Indorsee of check is presumed prima facie to be privy to indorser's fraud in obtaining it. *Mississippi Valley Trust Co. v. Brewer*, 151 Miss. 170, 117 So. 540 (1928).

"Check" is bill of exchange drawn on bank payable on demand. *Smythe v. Sanders*, 136 Miss. 382, 101 So. 435 (1924).

Attempted gift of money by check not cashed during lifetime of drawer is revoked by his death. *Smythe v. Sanders*, 136 Miss. 382, 101 So. 435 (1924).

No delivery of gift by bank check, unless cashed in lifetime of donor. *Smythe v. Sanders*, 136 Miss. 382, 101 So. 435 (1924).

Cashier's check is bill of exchange. *Anderson v. Bank of Tupelo*, 135 Miss. 351, 100 So. 179 (1924).

Check is a negotiable instrument. *Bank of Gulfport v. Smith*, 132 Miss. 63, 95 So. 785 (1923).

ATTORNEY GENERAL OPINIONS

A submitted document did not contain an unconditional promise to pay a sum certain in money on demand or at a definite time and, therefore, appeared to be a

simple contract, but not a promissory note. *Gunn*, Feb. 11, 2000, A.G. Op. #2000-0053.

RESEARCH REFERENCES

ALR. What constitutes "money" within meaning of Uniform Commercial Code. 40 A.L.R.4th 346.

Effect on negotiability of instrument, under terms of UCC § 3-104(1), of state-

ments expressly limiting negotiability or transferability. 58 A.L.R.4th 632.

When is instrument "payable on demand or at a definite time" as required to constitute negotiable instrument under

§§ 3-104(a)(2), 3-108(a,b) of Uniform Commercial Code. 71 A.L.R.5th 443.

What constitutes undertaking or instruction to do any act in addition to payment of money as limitation on definition of negotiable instrument under UCC § 3-104. 75 A.L.R.5th 559.

What constitutes "fixed amount of money" for purposes of § 3-104 of Uniform Commercial Code providing that negotiable instrument must contain unconditional promise to pay fixed amount of money. 76 A.L.R.5th 289.

When is instrument "payable to bearer or to order" as required to constitute negotiable instrument under Article 3 of the Uniform Commercial Code §§ 3-10(a)(1) and 3-109. 77 A.L.R.5th 523.

Certificate of deposit as "security" under federal securities laws. 82 A.L.R. Fed. 553.

Am Jur. 29 Am. Jur. Proof of Facts 2d 83, Sufficiency of Debtor's Direction as to Application of Payment.

§ 75-3-105. Issue of instrument.

(a) "Issue" means the first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person.

(b) An unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker or drawer, but nonissuance is a defense. An instrument that is conditionally issued or is issued for a special purpose is binding on the maker or drawer, but failure of the condition or special purpose to be fulfilled is a defense.

(c) "Issuer" applies to issued and unissued instruments and means a maker or drawer of an instrument.

SOURCES: Former § 75-3-105: Codes, 1942, § 41A:3-105; Laws, 1966, ch. 316, § 3-105; Laws, 1992, ch. 420, § 5, eff from and after January 1, 1993.

§ 75-3-106. Unconditional promise or order.

(a) Except as provided in this section, for the purposes of Section 75-3-104(a), a promise or order is unconditional unless it states (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, or (iii) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional.

(b) A promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

(c) If a promise or order requires, as a condition to payment, a counter-signature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of Section 75-3-104(a). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

(d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of Section 75-3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

SOURCES: Former § 75-3-106: Codes, 1942, § 41A:3-106; Laws, 1966, ch. 316, § 3-106; Laws, 1988, ch. 333; Laws, 1992, ch. 420, § 6, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-105.

11. In general.
12. Unconditional promises.
13. —Statement of consideration or “as per” contract.
14. —Obligation secured by mortgage.
15. —Government obligation limited to particular fund for payment.
16. Conditional promises.
17. —Subject to another agreement.
18. —Payment limited to particular source.

III. DECISIONS UNDER FORMER STATUTES.

19. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-105.

11. In general.

In action by bank to recover funds paid by it in exchange for warrant issued by governmental levee district, district's contention that even if warrant should qualify as negotiable instrument under UCC § 3-104(1) and § 3-105(1)(g), it was still collection item and bank should not have advanced its funds until warrant

cleared state comptroller and funds were paid by state treasurer could not be sustained, since warrant either was or was not a negotiable instrument, and the law does not recognize a particular category of negotiable instruments that are somehow less negotiable because they are bank collection items. *St. James Bank & Trust Co. v. Board of Comm'rs*, 354 So. 2d 233 (La. App. 1978).

Under UCC § 3-105 and Official Comment thereto, as far as negotiability is concerned, the conditional or unconditional character of the promise or order is to be determined by what is expressed in the instrument itself. When the instrument itself makes express reference to an outside agreement, transaction, or document, the effect on the instrument's negotiability will depend on the nature of the reference. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Where buy-sell agreement for purchase of dress shop stated that balance was to be financed through SBA participation loan, where buyer did not have loan at time of closing and seller agreed to take note in lieu of cash, and where written act of sale executed at same time stated that sale was made pursuant to agreement executed previously by vendors and vendee, parol testimony of parties concerning their intention was admissible pursuant to UCC § 3-119(1), but buyer-maker did not sustain burden of proof that payment of note was conditioned on his obtaining SBA loan. *Demaio v. Theriot*, 343 So. 2d 1143 (La. App. 1977), writ denied, 346 So. 2d 218 (La. 1977).

12. Unconditional promises.

An instrument is not made nonnegotiable because it states the obligation in payment of which it is made. *Anderson v. Consolidated Auto Wholesalers, Inc.*, 4 U.C.C. Rep. Serv. 205 (1967, NY Sup.).

13. —Statement of consideration or “as per” contract.

The recital in a promissory note “as per contract” does not affect its negotiability. *New York Plumbers Specialties Co. v. Valco Homes, Inc.*, 4 U.C.C. Rep. Serv. 587 (1967, NY Sup.).

Where note bears legend “as per contract,” this fact does not prevent it from containing an unconditional promise within provision of § 3-104, subd b, since § 3-105, subd 1(c) provides that promise is not made conditional by fact that instrument refers to or states that it arises out of separate agreement. Such legend does not affect negotiability of instrument as would statement that instrument is subject to or governed by any other agreement as is provided by § 105, subd 2(a). *D’Andrea v. Feinberg*, 45 Misc. 2d 270 (1965).

14. —Obligation secured by mortgage.

Where note and mortgage were executed simultaneously, note provided that all terms of mortgage were thereby made part of note, and terms of mortgage made it patent that mortgagees could look only to mortgage property to recover debt, assignees of portion of mortgage note were not holders in due course and were subject to limitation in mortgage precluding deficiency judgment. *Stern v. Itkin Bros.*, 87 Misc. 2d 538 (1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller’s reorganization trustee, notes met definition of “note” as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser’s contract. *Hall v. Security Plan-*

ning Serv., Inc., 371 F. Supp. 7 (D. Ariz. 1974).

15. —Government obligation limited to particular fund for payment.

Warrant issued by governmental levee district directing state comptroller to pay construction company sum certain was “negotiable instrument” under UCC § 3-104(1), and under UCC § 3-105(1)(g), dealing with instruments issued by governmental agencies, unconditional promise to pay contained in warrant was not made conditional by fact that instrument was limited to payment of particular fund or proceeds of particular source. *St. James Bank & Trust Co. v. Board of Comm’rs*, 354 So. 2d 233 (La. App. 1978).

Promise to pay by governmental agency or unit is unconditional even though limited to particular fund. *Brazos River Auth. v. Carr*, 405 S.W.2d 689 (Tex. 1966).

16. Conditional promises.

The fact that the payee of an instrument assigns the instrument to another “subject to their acceptance” does not render it conditional, for that is not a condition of payment, but merely a condition precedent before the instrument comes into being—a credit approval—which gives rise to the instrument. *Standard Premium Plan Corp. v. Hirschorn*, 56 Misc. 2d 687 (1968).

17. —Subject to another agreement.

Promissory note that stated that it was in lieu of property settlement supplementing prior deed of separation and property settlement, and that such prior deed and property settlement were incorporated into note by reference, was not negotiable, since parties by incorporating prior deed and property settlement into instrument made it subject to all conditions that might possibly be contained in incorporated documents, so as to render sum certain agreed to be paid in note “conditional” within meaning of UCC § 3-105(2)(a) (stating that whether documents incorporated into note in suit actually contained any conditions that might affect maker’s promise to pay was immaterial, and that basic point involved is that when a note incorporates other documents by reference into its provisions,

essential terms of note cannot be ascertained from face of instrument itself). *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Two notes which were issued subject to separate agreement between makers and payee were not negotiable instruments within meaning of Article 3 of Uniform Commercial Code. *TMA Fund, Inc. v. Biever*, 380 F. Supp. 1248 (E.D. Pa. 1974), appeal dismissed, 520 F.2d 639 (3d Cir. Pa. 1975), *aff'd*, 532 F.2d 747 (3d Cir. Pa. 1976).

Subd 1(c) is intended to resolve conflict and to reject cases in which a reference to separate agreement has been held to mean that payment of instrument must be limited in accordance with terms of such agreement and hence was conditioned by it. *D'Andrea v. Feinberg*, 45 Misc. 2d 270 (1965).

It has been said that the probable meaning of subparagraph (2)(a) is that a reference to any other agreement destroys negotiability even though the agreement referred to does not, in fact, impose any condition or contingency upon the promise to pay. Subparagraph (2)(a) however, is to be compared with subparagraph (1)(e) of the instant section. *United States v. Farrington*, 172 F. Supp. 797 (D. Mass. 1959).

18. —Payment limited to particular source.

In action against endorser of promissory note which was to be repaid from cigarette vending machine sales, summary judgment for payee was reversed

where there was factual dispute as to whether parties intended instrument to be paid only out of specific fund, in which case note would be rendered "not unconditional" under UCC § 3-105(2)(b). *Rothenberg v. Mellow Music, Inc.*, 291 So. 2d 234 (Fla. App. 1974).

Agreement to pay "within the next 60 days the sum of \$5,000 from the jobs now under construction" did not contain an unconditional promise to pay and therefore was not a negotiable instrument and the language was ambiguous as to whether payment was to be made from gross receipts or solely if profits existed and evidence as to such question would clearly be admissible particularly since the additional terms sought to be developed were not inconsistent with the existing agreement. *Webb & Sons v. Hamilton*, 30 A.D.2d 597 (3d Dep't 1968).

III. DECISIONS UNDER FORMER STATUTES.

19. In general.

Where note and mortgage are transferred without recourse, indorser is mere assignor subject to no liability except implied guaranty that instruments are genuine, he has good title to them, and he is not aware of any illegality. *Home Ins. Co. v. Citizens Bank*, 181 Miss. 181, 178 So. 589 (1938).

Discharge of indorser whose name appears first on back of note, by receiver of bank on authority of chancery court discharged indorser whose name appeared second on note. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

RESEARCH REFERENCES

ALR. Provision in draft or note directing payment "on acceptance" as affecting negotiability. 19 A.L.R.4th 1268.

§ 75-3-107. Instrument payable in foreign money.

Unless the instrument otherwise provides, an instrument that states the amount payable in foreign money may be paid in the foreign money or in an equivalent amount in dollars calculated by using the current bank-offered spot rate at the place of payment for the purchase of dollars on the day on which the instrument is paid.

SOURCES: Former § 75-3-107: Codes, 1942, § 41A:3-107; Laws, 1966, ch. 316, § 3-107; Laws, 1992, ch. 420, § 7, eff from and after January 1, 1993.

RESEARCH REFERENCES

ALR. What constitutes “money” within meaning of Uniform Commercial Code. 40 A.L.R.4th 346.

§ 75-3-108. Payable on demand or at definite time.

(a) A promise or order is “payable on demand” if it (i) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (ii) does not state any time of payment.

(b) A promise or order is “payable at a definite time” if it is payable on elapse of a definite period of time after sight or acceptance or at a fixed date or dates or at a time or times readily ascertainable at the time the promise or order is issued, subject to rights of (i) prepayment, (ii) acceleration, (iii) extension at the option of the holder, or (iv) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(c) If an instrument, payable at a fixed date, is also payable upon demand made before the fixed date, the instrument is payable on demand until the fixed date and, if demand for payment is not made before that date, becomes payable at a definite time on the fixed date.

SOURCES: Former § 75-3-108: Codes, 1942, § 41A:3-108; Laws, 1966, ch. 316, § 3-108; Laws, 1992, ch. 420, § 8, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-108, 75-3-109.

11. In general.
12. Payable at sight.
13. No time stated.
14. Instrument not payable on demand.
15. Payable on demand.
16. Acceleration clause.
17. Posted dated check.

III. DECISIONS UNDER CURRENT LAW.

18. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-108, 75-3-109.

11. In general.

Provisions of UCC § 3-109 as to definite time for payment could in no way alter meaning of “definite” or “indefinite” as used in Internal Revenue Code for purpose of valuation of notes in determining tax liability. *Caruth v. United States*, 566 F.2d 901 (5th Cir. Tex. 1978).

Where instrument for payment of money was written on personalized check form, individual defendants’ names were printed at top of form and their signatures appeared at bottom right-hand corner,

where name of bank and account number were crossed out, but remainder of form was filled in as check would be and was payable to plaintiff's order in amount of \$12,000 and where it was dated December 31, 1972, and notation "Note-6% Int." appeared at lower left-hand corner, instrument was negotiable demand instrument under UCC § 3-108, individual defendants were personally liable thereon under UCC § 3-403(2), and parol evidence was inadmissible to disestablish such obligation; however, under UCC § 3-401, corporate defendant, whose signature did not appear on instrument, was not liable on it. *Kaminsky v. Van Dusen*, 88 Misc. 2d 833 (1976).

Statute of limitations on note payable "30 days after demand" began running on making of note, and suit to enforce note was therefore time barred when brought more than six years after note was executed. *Enviro-nics, Inc. v. Pratt*, 50 A.D.2d 552 (1st Dep't 1975).

Demand note is payable immediately on date of its execution; thus, bank had right to offset unpaid balance of loan evidenced by demand notes against maker's checking account deposits in bank without prior notice, notwithstanding facts that maker's obligations were secured by collateral pursuant to security agreements, that money had been loaned over period of years, and that bank notified debtors of maker's accounts receivable to pay directly to bank. *Allied Sheet Metal Fabricators, Inc. v. Peoples Nat'l Bank*, 10 Wash. App. 530, 518 P.2d 734 (1974), review denied, 83 Wash. 2d 1013 (1974), cert. denied, 419 U.S. 967, 95 S. Ct. 231, 42 L. Ed. 2d 183 (1974).

A note payable on demand is due immediately after delivery, without further notice or demand. *Flintkote Co. v. Grimes*, 281 Ala. 707, 208 So. 2d 87 (1968).

When a note is payable on demand, parol evidence is not admissible to change the maturity of the note. *Flintkote Co. v. Grimes*, 281 Ala. 707, 208 So. 2d 87 (1968).

A note payable "within ten (10) years after date" is payable at a fixed or determinable future time within the meaning of subd. (1) of this section, for the quoted phrase is the equivalent of "on or before ten (10) years after date," payment could

not be demanded until expiration of the ten-year period, and an earlier maturity date could not be established by parol evidence. *Ferri v. Sylvia*, 100 R.I. 270, 214 A.2d 470 (1965).

12. Payable at sight.

A sight draft is forwarded in commercial transactions in order to insure that payment will occur on or before the delivery of goods. A sight draft is a document written by the seller to be paid to the order of the seller, with the buyer as the drawee; it is not, therefore, an ordinary draft which is drawn and tendered by the drawee. *McCullum Aviation, Inc. v. CIM Assocs.*, 446 F. Supp. 511 (S.D. Fla. 1978).

In action against drawer to recover on draft which provided, before space for payee's name, "at sight when approved pay to order of," "at sight" was equivalent to being payable on demand under UCC § 3-108 and where draft, which was payable through bank, did not authorize bank to make payment under UCC § 3-120, approval referred to in quoted phrase was interpreted to require approval by drawer by insertion of authorized signature rather than approval of bank through which draft was made payable. *Oneida Nat'l Bank & Trust Co. v. Allstate Ins. Co.*, 76 Misc. 2d 1062 (1974).

13. No time stated.

Where buyer of cattle paid for them with defendant bank's "customer draft" which (1) stated in main body of instrument "upon acceptance, pay to order of (plaintiff seller) \$_____", and (2) stated in lower left corner of instrument, "To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi," court held (1) that such draft was "demand item" under UCC § 4-302(a), which deals with liability for late return of "demand item" since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of "item" in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be "demand item," (3) that draft's "order to pay" was not affected by words, "on acceptance," (4) that defendant bank was draft's drawee and thus was

“payor bank” under UCC §§ 4-105(b) and 4-302(a) because authorized agent of defendant’s customer (seller-drawer) prepared and signed draft, (5) that UCC § 3-121, which deals with instruments payable “at bank,” was inapplicable because draft in suit did not contain words “payable at,” (6) that draft’s payee (plaintiff seller) did not waive defendant’s compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as “payor bank” under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant’s midnight deadline. *Horney v. Covington County Bank*, 716 F.2d 335 (5th Cir. 1983), reh’g denied, 725 F.2d 1006 (5th Cir. 1984).

Where (1) two drafts, drawn by buyer on September 15, 1973 and October 15, 1973, were presented when due by seller-payee to first bank, (2) first bank, after crediting seller’s account with amount of drafts, forwarded them to second bank, which received them on September 21, 1973 and October 8, 1973, (3) second bank thereafter notified first bank on January 3, 1974 of drafts’ dishonor and returned them to first bank, (4) first bank, in turn, notified seller and charged back amount of drafts to seller’s account, and (5) seller sought judgment in the alternative for amount of drafts from either second bank or first bank because drawer was in financial distress and drafts were virtually uncollectible, court held (1) that under UCC § 4-105(b) and (d), second bank was payer bank and not collecting bank by virtue of express language in order sentence of drafts, and fact that collection letter accompanying drafts indicated that they were to be paid “through” second bank, instead of “by” it as drawee, was not controlling, (2) since drafts were sight drafts, they matured under UCC § 3-108 when presented to second bank (payor bank), and thus second bank should have returned drafts immediately after learning that drawer would not honor them, (3) under UCC § 4-302(a), second bank was liable for full amount of drafts, which were effectively presented, because of either its failure to settle for them before midnight of banking day on which they were received or its failure to pay or

return drafts before bank’s midnight deadline, (4) second (payor) bank was also liable for interest on drafts, since it had held them for unreasonable period of time (two and a half months) after date on which it should have returned them, and (5) first bank (collecting bank) was not liable under UCC § 4-202(1) for any failure to exercise due care in presenting drafts for payment and returning them to payee. *Engine Parts, Inc. v. Citizens Bank*, 92 N.M. 37, 582 P.2d 809 (1978).

Under UCC § 3-108, undated promissory notes are not invalid but are payable on demand. *Nuri Farhadi, Inc. v. Anavian*, 58 A.D.2d 546 (1st Dep’t 1977).

Check was demand instrument under UCC § 3-108 where no date for payment was indicated. *Turner v. State*, 508 S.W.2d 861 (Tex. Civ. App. 1974).

In action by holder of note against makers who signed it as accommodation for payee: (1) fact that due date of first monthly installment was omitted did not make instrument incomplete in any “necessary respect” under UCC § 3-115(1) and instrument in which no time for payment was stated was payable on demand under UCC § 3-108; (2) holder’s taking of note dated June 30, 1972, on July 14, 1972, was within “a reasonable length of time after its issue” under UCC § 3-304(3)(c); and (3) since note was not overdue when holder took it, lack of consideration was no defense under UCC §§ 3-304(4)(c) and 3-415(2). *Gill v. Commonwealth Nat’l Bank*, 504 S.W.2d 521 (Tex. Civ. App. 1973), writ ref’d n.r.e., (Apr. 3, 1974).

Note which does not state time for payment is demand note; language “interest payable biweekly” does not make note payable at fixed time. *Davis v. Dennis*, 448 S.W.2d 495 (Tex. Civ. App. 1969).

Note stating no time for payment is payable on demand; allegedly unauthorized addition of words “on demand” held immaterial, since such addition did not alter rights or obligations as between payee and maker. *Holliday v. Anderson*, 428 S.W.2d 479 (Tex. Civ. App. 1968).

Instruments payable on demand include those in which no time for payment is stated. *Erickson v. Newell*, 183 Neb. 641, 163 N.W.2d 286 (1968).

An instalment form note in which the spaces for the times and amounts of

instalments were left blank is a demand note, due and payable immediately, and this is true irrespective of whether the note is negotiable. *Master Homecraft Co. v. Zimmerman*, 208 Pa. Super. 401, 222 A.2d 440 (1966).

The absence of a specific maturity date is not a fatal defect. *Master Homecraft Co. v. Zimmerman*, 208 Pa. Super. 401, 222 A.2d 440 (1966).

The fact that a note set out no date of maturity did not constitute grounds for striking a judgment entered thereon, because under this section a note in which no time for payment is stated is payable on demand. *Liberty Aluminum Prods. Co. v. Cortis*, 14 Pa. D. & C.2d 624 (1958).

14. Instrument not payable on demand.

"Promissory note" which was payable "upon evidence of an acceptable permanent loan...and upon acceptance of the [loan] commitment," was not payable on demand or at a definite time under UCC §§ 3-108 and 3-109(2), it was therefore not negotiable under UCC § 3-104(1)(c), and thus holder was not entitled to recover against signers of note under UCC § 3-307(2) merely upon production of note and admission of its execution. *Barton v. Scott Hudgens Realty & Mtg., Inc.*, 136 Ga. App. 565, 222 S.E.2d 126 (1975).

Instrument made payable "at the earliest possible time" was not payable at definite time, nor was phrase "at the earliest possible time" equivalent to no time for payment being stated in instrument; hence, it was not negotiable demand note. *Williams v. Cooper*, 504 S.W.2d 564 (Tex. Civ. App. 1973).

15. Payable on demand.

"Promissory note" which was payable "upon evidence of an acceptable permanent loan...and upon acceptance of the [loan] commitment," was not payable on demand or at a definite time under UCC §§ 3-108 and 3-109(2), it was therefore not negotiable under UCC § 3-104(1)(c), and thus holder was not entitled to recover against signers of note under UCC § 3-307(2) merely upon production of note and admission of its execution. *Barton v. Scott Hudgens Realty & Mtg., Inc.*, 136 Ga. App. 565, 222 S.E.2d 126 (1975).

16. Acceleration clause.

Acceleration clauses premised on default in payment are enforceable under UCC § 3-109(1)(c). Accordingly, where a suit is based only on a note and the creditor does not bring an action to foreclose on the security for the note, such as a deed of trust, the acceleration clause in the note is enforceable, and the debtor has no statutory or equitable right to cure the money default in order to prevent his equitable interest in the collateral (the land) from being jeopardized. *Smith v. Certified Realty Corp.*, 41 Colo. App. 170, 585 P.2d 293 (1978), *aff'd*, 198 Colo. 222, 597 P.2d 1043 (1979).

Note was negotiable notwithstanding it contained acceleration clause and clause confessing judgment on instrument if not paid when due, since UCC §§ 3-109 and 3-112(d), respectively, authorize such clauses. *Broadway Mgt. Corp. v. Briggs*, 30 Ill. App. 3d 403, 332 N.E.2d 131 (4th Dist. 1975).

17. Posted dated check.

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for \$20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that \$20,000 should be taken from his estate at death for his son, endorsement modified check by providing for acceleration of time of payment, as authorized by UCC § 3-109(1)(c), and for direct payment by drawer's estate. *Smith v. Gentilotti*, 371 Mass. 839, 359 N.E.2d 953 (1977).

III. DECISIONS UNDER CURRENT LAW.

18. In general.

Holder in due course of note, materially altered by blank date of payment being filled in, can recover on it according to original tenor. *Wilson v. Stark*, 146 Miss. 498, 112 So. 390 (1927).

Demand note providing for interest held not to mature and set statute running till demand. *Shapleigh Hdwe. Co. v. Spiro*, 141 Miss. 38, 106 So. 209, 44 A.L.R. 393 (1925).

Note endorsed and delivered when overdue is, as regards person issuing or en-

dorsing it, payable on demand and subject to the laws governing such paper. *Carter*

v. *Jennings*, 134 Miss. 263, 98 So. 687 (1924).

RESEARCH REFERENCES

ALR. When is instrument “payable on demand or at a definite time” as required to constitute negotiable instrument under §§ 3-104(a)(2), 3-108(a,b) of Uniform Commercial Code. 71 A.L.R.5th 443.

Am Jur. 29 Am. Jur. Proof of Facts 2d

83, Sufficiency of Debtor’s Direction as to Application of Payment.

Law Reviews. Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 75-3-109. Payable to bearer or to order.

(a) A promise or order is payable to bearer if it:

(1) States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

(2) Does not state a payee; or

(3) States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

(b) A promise or order that is not payable to bearer is payable to order if it is payable (i) to the order of an identified person or (ii) to an identified person or order. A promise or order that is payable to order is payable to the identified person.

(c) An instrument payable to bearer may become payable to an identified person if it is specially indorsed pursuant to Section 75-3-205(a). An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to Section 75-3-205(b).

SOURCES: Former § 75-3-109: Codes, 1942, § 41A:3-109; Laws, 1966, ch. 316, § 3-109; Laws, 1992, ch. 420, § 9, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-110.

11. In general.

III. DECISIONS UNDER FORMER UCC § 75-3-111.

12. In general.

IV. DECISIONS UNDER FORMER UCC § 75-3-805.

13. In general.

V. DECISIONS UNDER FORMER STATUTES.

14. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-110.

11. In general.

A conservator of an estate had the authority to endorse and negotiate checks made payable to the estate’s conservatorship. *Great S. Nat’l Bank v. Minter*, 590 So. 2d 129 (Miss. 1991).

Certificate of deposit which was not payable to order or to bearer, but was payable only on return of instrument properly indorsed, was not negotiable instrument under UCC § 3-104(1)(d) and § 3-110(2). *Kaw Valley State Bank & Trust v. Commercial Bank of Liberty*, 567 S.W.2d 710 (App. 1978).

Bank was payee of checks made payable to "Pittsburgh National Bank Carpenters Contribution Account" under UCC § 3-117(c), and trustees of money in account named were not payees under UCC § 3-110(1)(e), where, *inter alia*, agreement which established account clearly created creditor-debtor relationship between trustees of account funds and bank, as depository of trust funds. *West Penn Admin., Inc. v. Union Nat'l Bank*, 233 Pa. Super. 311, 335 A.2d 725 (1975).

Draft payable to two named payees without addition of words "or order" or any similar words of negotiability was not negotiable instrument within meaning of UCC. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

Postal money order resembles negotiable instrument in many but not all respects. See *United States v. First Nat'l Bank*, 263 F. Supp. 298 (D. Mass. 1967).

III. DECISIONS UNDER FORMER UCC § 75-3-111.

12. In general.

Judgment by confession entered pursuant to clause in negotiable instrument payable "to the order of Three Thousand Four Hundred Ninety Eight and ⁴⁵/₁₀₀ Dollars" was improper; note was not bearer paper within meaning of UCC § 3-111, and holder could not be determined on face of instrument. *Broadway Mgt. Corp. v. Briggs*, 30 Ill. App. 3d 403, 332 N.E.2d 131 (4th Dist. 1975).

If an instrument is made payable to an existing person not intended to have any interest in it, and such fact was known to the person making it so payable or known to his employee, the Legislature intended to make such an instrument bearer paper, thereby relieving a drawee or any endorser from the resulting loss and impos-

ing the loss resulting from actions of a dishonest employee on the drawer-employer. *Phoenix Die Casting Co. v. Manufacturers & Traders Trust Co.*, 50 Misc. 2d 152 (1966).

IV. DECISIONS UNDER FORMER UCC § 75-3-805.

13. In general.

Execution of guarantee was not Code transaction; guarantee was not "transaction ... which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts," under UCC § 9-102(1)(a); neither did guarantee of accounts receivable fall within coverage of Article 3 of UCC, §§ 3-102 to 3-805, formalities of which apply only to guarantees of commercial paper. *EAC Credit Corp. v. King*, 507 F.2d 1232 (5th Cir. 1975).

Savings certificates, issued by savings and loan association, which were not payable to order or to bearer were not negotiable instruments under UCC § 3-104; since they were not negotiable, under UCC § 3-805, purchasers of such certificates were not holders in due course and, thus, under UCC § 3-306 such purchasers took certificates subject to defense of failure or want of consideration. *Jones v. United Sav. & Loan Ass'n*, 515 S.W.2d 869 (Mo. Ct. App. 1974).

Instruments not payable to order or bearer were non-negotiable in sense that there could be no holder in due course thereof; however, under Code § 3-805 and official comment thereto, such instruments are treated as negotiable in other respects and are referred to as checks; being checks within Code, such instruments can be subject of crime of larceny by check. *Faulkner v. State*, 445 P.2d 815 (Alaska 1968).

V. DECISIONS UNDER FORMER STATUTES.

14. In general.

Purchaser of trade acceptances for cash consideration before due dates without notice of infirmities or defects in instruments held "holder for value without no-

tice," notwithstanding certificates were executed in favor of corporation after it had resolved to change its name to that used as payee in certificates, but before corporation had filed its amended charter. *Betlyn Sec. Corp. v. Bates*, 177 Miss. 41, 170 So. 301 (1936).

Maker, by executing trade acceptances, admitted existence of corporate payee, and its capacity to indorse paper, and could not defeat liability on ground that amended charter changing name of corporation to that used in trade acceptances was not filed until four days after execu-

tion of acceptances. *Betlyn Sec. Corp. v. Bates*, 177 Miss. 41, 170 So. 301 (1936).

Notes must be payable to order or bearer, and, when payable to order, payee must be named. *Moore v. Vaughn*, 167 Miss. 758, 150 So. 372 (1933).

Payment of negotiable instrument to person not in possession is at payer's risk. *Sivley v. Williamson*, 112 Miss. 276, 72 So. 1008 (1916).

Note payable to bearer is negotiable instrument. *Sivley v. Williamson*, 112 Miss. 276, 72 So. 1008 (1916).

RESEARCH REFERENCES

ALR. When is instrument "payable to bearer or to order" as required to constitute negotiable instrument under Article 3 of the Uniform Commercial Code §§ 3-104(a)(1) and 3-109. 77 A.L.R.5th 523.

Law Reviews. 1978 Mississippi Supreme Court Review: Commercial Law. 50 Miss. L. J. 41, March 1979.

§ 75-3-110. Identification of person to whom instrument is payable.

(a) The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized, signing as, or in the name or behalf of, the issuer of the instrument. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by a name or other identification that is not that of the intended person. If more than one (1) person signs in the name or behalf of the issuer of an instrument and all the signers do not intend the same person as payee, the instrument is payable to any person intended by one or more of the signers.

(b) If the signature of the issuer of an instrument is made by automated means, such as a check-writing machine, the payee of the instrument is determined by the intent of the person who supplied the name or identification of the payee, whether or not authorized to do so.

(c) A person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number. For the purpose of determining the holder of an instrument, the following rules apply:

(1) If an instrument is payable to an account and the account is identified only by number, the instrument is payable to the person to whom the account is payable. If an instrument is payable to an account identified by number and by the name of a person, the instrument is payable to the named person, whether or not that person is the owner of the account identified by number.

(2) If an instrument is payable to:

(i) A trust, an estate, or a person described as trustee or representative of a trust or estate, the instrument is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named;

(ii) A person described as agent or similar representative of a named or identified person, the instrument is payable to the represented person, the representative, or a successor of the representative;

(iii) A fund or organization that is not a legal entity, the instrument is payable to a representative of the members of the fund or organization; or

(iv) An office or to a person described as holding an office, the instrument is payable to the named person, the incumbent of the office, or a successor to the incumbent.

(d) If an instrument is payable to two (2) or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two (2) or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two (2) or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.

SOURCES: Former § 75-3-110: Codes, 1942, § 41A:3-110; Laws, 1966, ch. 316, § 3-110; Laws, 1992, ch. 420, § 10, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-117.

11. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-117.

11. In general.

A conservator of an estate had the authority to endorse and negotiate checks made payable to the estate's conservatorship. *Great S. Nat'l Bank v. Minter*, 590 So. 2d 129 (Miss. 1991).

Under UCC § 3-117(3), providing that instrument made payable to named per-

son with additional words describing him is payable to payee unconditionally and additional words have no effect on subsequent parties, check payable to "Shores Corporation of Miami Escrow Acct. for Unit 401D Building C B/O Pablo Goldszmidt," which was indorsed "For deposit only, Shores Corporation of Miami," followed by deposit account number, was validly negotiated instrument, and any subsequent party dealing with it could disregard payee's description and treat instrument as payable unconditionally to payee. *Pan Am. Bank v. Goldszmidt*, 364 So. 2d 505 (Fla. App. 1978), cert. denied, 373 So. 2d 458 (Fla. 1979).

Cashier's check payable to "Shores Corporation of Miami, Escrow Acct. for Unit 301D Building C B/O Ernesto Yanco," which was indorsed "For Deposit Only, Shores Corporation of Miami," followed by deposit account number, was valid and effective under UCC § 3-117(3), which

provides that an instrument made payable to named person with additional words describing him is payable to payee unconditionally and additional words are without effect on subsequent parties. *Pan Am. Bank v. Yanco*, 364 So. 2d 508 (Fla. Dist. Ct. App. 3d Dist. 1978).

In action against bank for alleged negligence in cashing cashier's check issued against account in another bank into which plaintiff's funds had wrongfully been deposited, where evidence showed that such check was made payable to "Emil Haliewicz, Swiss Baco Skyline Logging, Inc."; that "Emil Haliewicz" was name of alleged converter of plaintiff's funds and "Swiss Baco Skyline Logging, Inc." was plaintiff's corporate designation; and that such check had been indorsed by Haliewicz by printing "Swiss Baco Skyline Logg. Inc." on back of instrument and signing his name below such printed words, summary judgment in favor of defendant bank would be affirmed because (1) designation of payee as "Emil Haliewicz, Swiss Baco Skyline Logging, Inc." did not constitute joint-payee lan-

guage under UCC § 3-116; (2) under facts of case, check was payable under UCC § 3-117(c) to "Emil Haliewicz" conditionally; and (3) plaintiff "Swiss Baco Skyline Logging, Inc.," not being a named payee of such check, had no protectable interest therein. *Swiss Baco Skyline Logging, Inc. v. Haliewicz*, 18 Wash. App. 21, 567 P.2d 1141 (1977).

Bank was payee of checks made payable to "Pittsburgh National Bank Carpenters Contribution Account" under UCC § 3-117(c), and trustees of money in account named were not payees under UCC § 3-110(1)(e), where, *inter alia*, agreement which established account clearly created creditor-debtor relationship between trustees of account funds and bank, as depository of trust funds. *West Penn Admin., Inc. v. Union Nat'l Bank*, 233 Pa. Super. 311, 335 A.2d 725 (1975).

Where a promissory note is made payable to one named therein as attorney for plaintiffs but not endorsed to them by the attorney, plaintiffs may enforce payment as holders of the note. *Bennett v. Cannon*, 114 Ga. App. 479, 151 S.E.2d 828 (1966).

§ 75-3-111. Place of payment.

Except as otherwise provided for items in Chapter 4, an instrument is payable at the place of payment stated in the instrument. If no place of payment is stated, an instrument is payable at the address of the drawee or maker stated in the instrument. If no address is stated, the place of payment is the place of business of the drawee or maker. If a drawee or maker has more than one (1) place of business, the place of payment is any place of business of the drawee or maker chosen by the person entitled to enforce the instrument. If the drawee or maker has no place of business, the place of payment is the residence of the drawee or maker.

SOURCES: Former § 75-3-111: Codes, 1942, § 41A:3-111; Laws, 1966, ch. 316, § 3-111; Laws, 1992, ch. 420, § 11, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-120, 75-3-121.

11. Instruments "payable through" bank.

12. Instruments payable at bank.

III. DECISIONS UNDER FORMER STATUTES.

13. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-120, 75-3-121.

11. Instruments "payable through" bank.

An award of summary judgment in favor of plaintiff is affirmed where defendant insurer delivered to its insured a draft drawn on itself and payable through its bank in an attempt to honor its apparent obligation under an automobile theft policy, which draft was payable also to plaintiff due to plaintiff's security interest in the insured vehicle, and plaintiff deposited the draft in its bank account after the insured indorsed the check over to plaintiff thereby extinguishing plaintiff's security interest in the vehicle, following which defendant stopped payment on the draft upon learning that its insured's claim was fraudulent, at which time plaintiff's account was debited with the amount of the dishonored draft and plaintiff demanded of the defendant payment of the draft. Since the check was drawn by the drawer on itself as drawee, payable through its bank, the bank was not authorized to pay the draft, but was merely designated as a collecting bank to present the draft to the drawer-drawee for payment (Uniform Commercial Code, § 3-120), and because the draft was not drawn without recourse, and there was no drawee other than defendant itself who accepted responsibility for it, defendant remained liable thereon (Uniform Commercial Code, § 3-413, subd [2]); although the draft was principally issued to the insured, plaintiff's name was added as payee only to protect its duly filed security interest in the insured vehicle, and upon issuance of the draft defendant acknowledged its insured's claim that the vehicle had been stolen, thus entitling plaintiff to rely upon that representation and to accept the draft as a holder in due course in

payment and release of its lien on the vehicle, constituting the giving of value for the draft (Uniform Commercial Code, § 3-302, subd [1]; § 3-303, subds [b], [c]); after defendant stopped payment on the draft it remained liable on it to plaintiff as a holder in due course. *GMAC v. General Accident Fire & Life Assurance Corp.*, 67 A.D.2d 316 (4th Dep't 1979).

Under New Mexico UCC § 3-120 and § 3-121, to make a draft payable "through" or "at" a bank, and thus designate the bank as a mere conduit for payment and not a "payor" bank directly ordered to pay, the drawer of the draft must expressly write the words "through," "pay through," "at," "payable at," or similar words before the name of the bank on the instrument itself. A party who is not the drawer cannot, without authority from the drawer, add these words to the instrument, as by saying "payable through" on some attached document, such as a collection letter, that accompanies presentment of the draft. *Engine Parts, Inc. v. Citizens Bank*, 92 N.M. 37, 582 P.2d 809 (1978).

Drawee of draft made "payable through" specified bank was "other payor," as that term is used in UCC § 4-207(1), notwithstanding special arrangement between drawee and bank for handling of such drafts, and drawee was, thus, entitled to benefit of collecting bank's warranty of good title to draft in action by drawee against collecting bank on draft on which endorsement of one of draft's payees was forged. *Aetna Cas. & Sur. Co. v. Traders Nat'l Bank & Trust Co.*, 514 S.W.2d 860 (Mo. Ct. App. 1974).

In action against drawer to recover on draft which provided, before space for payee's name, "at sight when approved pay to order of," "at sight" was equivalent to being payable on demand under UCC § 3-108 and where draft, which was payable through bank, did not authorize bank to make payment under UCC § 3-120, approval referred to in quoted phrase was interpreted to require approval by drawer by insertion of authorized signature rather than approval of bank through which draft was made payable. *Oneida Nat'l Bank & Trust Co. v. Allstate Ins. Co.*, 76 Misc. 2d 1062 (1974).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts: (1) since negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees and, thus, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, (2) second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plaintiff its transferee. *Phoenix Assurance Co. v. Davis*, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

Conviction for possession of blank check with intent to defraud was reversed where blank instrument possessed by defendant, stating that it was "payable through" designated bank, did not authorize bank to pay instrument out of drawer's account under UCC § 3-120; instruments possessed by defendant were therefore not checks as defined by UCC § 3-104(2)(b). *People v. Burke*, 38 Cal. App. 3d 708 (1st Dist. 1974).

Bank which failed to inquire as to legality of copayee's signature on draft, treated draft as though it was negotiable bank check, and paid instrument although draft stated on its face "payable through" particular branch bank, failed to deal with this draft in accordance with reasonable commercial standards practiced in banking business and, therefore, had failed to establish defense to conversion under UCC § 3-419(3). *Montgomery v. First*

Nat'l Bank, 265 Or. 55, 508 P.2d 428 (1973).

Where check was "payable through" bank, payee could not recover from bank on unauthorized endorsement, since bank was collecting bank within UCC § 3-120, and since UCC § 3-419(3) makes it clear that collecting banks bear no liability to the true owner of a draft or check, except for those proceeds which may remain in possession of said bank. *Messeroff v. Kantor*, 261 So. 2d 553 (Fla. App. 1972).

The fact that a draft is made payable through a bank does not affect the obligation of the drawee to make payment to the payee or other proper holder. *Gast v. American Cas. Co.*, 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

When an item is payable through a bank, or under the law, and "at" item is deemed so payable, the bank is merely a collecting bank and not a payor bank. *Phelan v. University Nat'l Bank*, 85 Ill. App. 2d 56, 229 N.E.2d 374 (1st Dist. 1967).

12. Instruments payable at bank.

Where buyer of cattle paid for them with defendant bank's "customer draft" which (1) stated in main body of instrument "upon acceptance, pay to order of (plaintiff seller) \$_____, and (2) stated in lower left corner of instrument, "To: Cattle Company, 610-627-7, Covington County Bank, Collins, Mississippi," court held (1) that such draft was "demand item" under UCC § 4-302(a), which deals with liability for late return of "demand item" since (a) it was instrument for payment of money under UCC § 4-104(1)(g), and (b) it was payable on demand under UCC § 3-108 because it specified no time for payment, (2) that under definition of "item" in UCC § 4-104(1)(g), draft in suit did not have to be negotiable to be "demand item," (3) that draft's "order to pay" was not affected by words, "on acceptance," (4) that defendant bank was draft's drawee-and thus was "payor bank" under UCC §§ 4-105(b) and 4-302(a)-because authorized agent of defendant's customer (seller-drawer) prepared and signed draft, (5) that UCC § 3-121, which deals with instruments payable "at bank," was inapplicable because draft in suit did not contain words

"payable at," (6) that draft's payee (plaintiff seller) did not waive defendant's compliance with liability provisions of UCC § 4-302(a), and (7) that defendant was liable as "payor bank" under UCC § 4-302(a) because it returned draft, which was dishonored for insufficient funds, after defendant's midnight deadline. *Horney v. Covington County Bank*, 716 F.2d 335 (5th Cir. 1983), reh'g denied, 725 F.2d 1006 (5th Cir. 1984).

Under New Mexico UCC § 3-120 and § 3-121, to make a draft payable "through" or "at" a bank, and thus designate the bank as a mere conduit for payment and not a "payor" bank directly ordered to pay, the drawer of the draft must expressly write the words "through," "pay through," "at," "payable at," or similar words before the name of the bank on the instrument itself. A party who is not the drawer cannot, without authority from the drawer, add these words to the instrument, as by saying "payable through" on some attached document, such as a collection letter, that accompanies presentment of the draft. *Engine Parts, Inc. v. Citizens Bank*, 92 N.M. 37, 582 P.2d 809 (1978).

Bank was not "payor bank," as defined in UCC § 4-105(b), with respect to sight drafts which were drawn on buyer of meat and which were sent to bank by seller accompanied by invoices for meat, although drafts stated they were payable at bank, where there were no funds of buyer

specifically deposited to seller's credit out of which seller had right to direct bank to make payment. *Whitehall Packing Co. v. First Nat'l City Bank*, 55 A.D.2d 675 (2d Dep't 1976), appeal dismissed, 41 N.Y.2d 804 (1977), appeal dismissed, 41 N.Y.2d 1009 (1977).

Pointing out it was not necessary to allege presentment and dishonor in the complaint, the court held the failure to give notice of the dishonor of a note discharged the drawer only if the failure to present the note caused a loss because of the insolvency of the bank at which it was payable, and in that event the loss became a matter of defense to be pleaded in the answer with a tender of assignment of the defendant's rights against the bank. *County Restaurant & Bar Equip. Co. v. Shaw Mechanical Contractors*, 56 Misc. 2d 832 (1968).

A note stated to be payable at a bank is the equivalent of a draft drawn on the bank, and the bank is not only authorized but ordered to make payment. *Goldman v. Goldman*, 48 Misc. 2d 985 (1966).

III. DECISIONS UNDER FORMER STATUTES.

13. In general.

Presentment of note elsewhere than at bank, where payable, is insufficient to hold accommodation indorser. *Brewer v. Automobile Sales Co.*, 147 Miss. 603, 111 So. 578 (1927).

§ 75-3-112. Interest.

(a) Unless otherwise provided in the instrument, (i) an instrument is not payable with interest, and (ii) interest on an interest-bearing instrument is payable from the date of the instrument.

(b) Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues.

SOURCES: Former § 75-3-112: Codes, 1942, § 41A:3-112; Laws, 1966, ch. 316, § 3-112; Laws, 1992, ch. 420, § 12, eff from and after January 1, 1993.

JUDICIAL DECISIONS**I. DECISIONS UNDER UNIFORM
COMMERCIAL CODE.**

1.-10. [Reserved for future use].

**II. DECISIONS UNDER FORMER UCC
§ 75-3-106.**

11. In general.

**III. DECISIONS UNDER FORMER
UCC § 75-3-106.**

12. Unconditional promises.

**I. DECISIONS UNDER UNIFORM
COMMERCIAL CODE.**

1.-10. [Reserved for future use].

**II. DECISIONS UNDER FORMER
UCC § 75-3-106.**

11. In general.

In action to recover on unpaid promissory notes secured by mortgage on realty, provision in both notes and mortgage that debtor agreed to pay reasonable attorney's fees arising from default was unenforceable on public policy grounds under well-established rule of Kentucky case law; and such rule was not changed by Kentucky version of UCC § 3-106(1)(e), under which sum payable is "sum certain," even though it is to be paid with costs of collection, or attorney's fee not exceeding 15 percent of amount owing, or \$500, whichever is smaller, since such statute means only that attorney's fee greater than that allowed by the statute would render instrument indefinite, and therefore nonnegotiable, for failure to contain sum certain. Nor was such provision in notes and mortgage rendered enforceable by UCC § 9-504(1)(a), dealing with secured party's right to dispose of collateral and apply proceeds to, among other things, "reasonable attorney's fees" incurred by secured party, since UCC § 9-504(1)(a) applies only to personalty that is used as collateral, and in present case collateral consisted of realty. (where court expressly declined to determine what phrase "not prohibited by law" in UCC § 9-504(1)(a) might mean in light of Kentucky case law) *Mammoth Cave Prod. Credit Ass'n v. Gerald's*, 551 S.W.2d 5 (Ky. Ct. App. 1977).

In Vermont, it is accepted practice that negotiable instruments may provide for charging the maker with the costs of collection, including attorney's fees. *Young v. Northern Terms., Inc.*, 130 Vt. 258, 290 A.2d 186 (1972).

Provision for a reasonable attorney's fee contained in a promissory note is enforceable. Section 402 of the Personal Property Law as amended July 1, 1967, by the addition of ¶ 6-a (Laws of 1967, Ch 731, §§ 1, 2) is limited to instalment sales contracts. *National Bank of N. Am. v. Around the Clock Truck Serv., Inc.*, 58 Misc. 2d 660 (1968).

A provision in commercial paper for the payment of costs and expenses if "legal proceedings be instituted" is to be interpreted according to general contract law principles as nothing in the Code displaces such principles, and is to be interpreted as requiring that a court action be commenced. *Bryant v. Bowles*, 108 N.H. 315, 234 A.2d 534 (1967).

The Uniform Commercial Code effects no change in local law with respect to the validity of the provisions of an instrument for attorneys' fees. *First Sav. & Loan Ass'n v. Heldman*, 79 N.J. Super. 65, 190 A.2d 400 (1963).

Subsection (e) of the instant section was referred to as to notes delivered beginning Oct. 1, 1958, the effective date of the Massachusetts Uniform Commercial Code, in *Gramatan Nat. Bank & Trust Co. v. Montgomery* (1961) 343 Mass 129, 177 NE2d 577, in connection with the proposition that a reasonable attorney's fee may be recovered on an overdue note where the note so provides. *Gramatan Nat'l Bank & Trust Co. v. Montgomery*, 343 Mass. 129, 177 N.E.2d 577 (1961).

**III. DECISIONS UNDER FORMER
UCC § 75-3-106.**

12. Unconditional promises.

In suit by holder of note given for purchase of realty against surety, who was original purchaser of such realty and original maker of note sued on prior to its assumption by third party under novation, court held (1) that note was negotiable under UCC § 3-112(1)(b), even

though it was secured by mortgage; (2) that even though defendant surety was original maker of note, fact that he had no right, title, or interest in collateral for note entitled him to protection of UCC § 3-606(1) concerning harmful impairment of note's collateral; (2) that holder of note unreasonably impaired value of its collateral by executing subordination agreement and releasing over 700 acres of land, which was part of collateral, without defendant surety's knowledge; and (4) that under UCC § 3-606(1)(b), defendant was discharged by such impairment from liability on note. *Hughes v. Tyler*, 485 So. 2d 1026 (Miss. 1986).

Where note and mortgage are transferred without recourse, indorser is mere assignor subject to no liability except im-

plied guaranty that instruments are genuine, he has good title to them, and he is not aware of any illegality. *Home Ins. Co. v. Citizens Bank*, 181 Miss. 181, 178 So. 589 (1938).

Discharge of indorser whose name appears first on back of note, by receiver of bank on authority of chancery court discharged indorser whose name appeared second on note. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

Where chancery court authorized receiver of bank to release first indorser on note, upon payment of certain sum, decree discharging first indorser and holding second indorser, held unauthorized where without second indorser's consent. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

RESEARCH REFERENCES

ALR. Negotiability of instrument providing for variable rate of interest under UCC § 3-106. 69 A.L.R.4th 1127.

Am Jur. 45 Am. Jur. 2d, Interest and Usury §§ 49, 51, 70.

§ 75-3-113. Date of instrument.

(a) An instrument may be antedated or postdated. The date stated determines the time of payment if the instrument is payable at a fixed period after date. Except as provided in Section 75-4-401(c), an instrument payable on demand is not payable before the date of the instrument.

(b) If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder.

SOURCES: Former § 75-3-113: Codes, 1942, § 41A:3-113; Laws, 1966, ch. 316, § 3-113; Laws, 1992, ch. 420, § 13, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-114.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-114.

11. In general.

Under UCC § 3-122(1)(b), a cause of action on a demand instrument accrues on the date of the instrument, even though no demand is made by the payee (holding that under UCC § 3-114(2), the stated

date of demand notes that were antedated determined when notes were payable). *Cantonwine v. Fehling*, 582 P.2d 592 (Wyo. 1978).

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for \$20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that \$20,000 should be taken from his estate at death for his son Under UCC § 3-104, instrument in question was negotiable instrument and, under UCC § 3-114(1) and (2), its negotiability was not affected by fact that it was post dated 15 years, and time when it was payable was determined by stated date. *Smith v. Gentilotti*, 371 Mass. 839, 359 N.E.2d 953 (1977).

American Express Travellers checks, which party to whom such checks were given as payment for merchandise saw holder sign and countersign, but which holder did not date or make payable to plaintiff and which plaintiff never completed although he had authority to do so, were incomplete and unenforceable as matter of law, since omission of payee's name rendered checks nonnegotiable under UCC § 3-104(1)(d), which requires that any writing to be negotiable instrument must be payable "to order" or "to bearer." (holding, however, that failure to date checks did not affect their negotiability since UCC § 3-114 expressly permits instruments otherwise negotiable to be undated). *Gray v. American Express Co.*, 34 N.C. App. 714, 239 S.E.2d 621 (1977).

In action for breach of implied warranty of merchantability; brought against in-

staller of home heating and air conditioning system for damages resulting from failure of condensate removal pump to function properly, jury question was presented on issue whether installer was "merchant" within meaning of UCC § 1-104 and UCC § 2-314; fact that installer testified knowledgeably about workings and installation of condensate pumps and that he had recommended that a particular pump be installed in system, supported inference that he had installed and sold other pumps during his years in heating and air conditioning business, but also supported inference that condensate pump sale in question was only one that he had ever made. *Storey v. Day Heating & Air Conditioning Co.*, 56 Ala. App. 81, 319 So. 2d 279 (Civ. App. 1975).

Where purchasers of trailer park gave vendors' agent check in acceptance of vendors' offer to sell, fact that check was postdated for one week did not make purchaser's acceptance a qualified acceptance. *How v. Fulkerson*, 22 Ariz. App. 467, 528 P.2d 853 (1974).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

A post-dated check is not invalid because, at time of its issuance, the payee knew that the drawer had insufficient funds in the bank to pay it. *Presley v. American Guarantee & Liab. Ins. Co.*, 237 Miss. 807, 116 So. 2d 410 (1959).

Post-dated instrument is negotiable. *Currie-McGraw Co. v. Friedman*, 135 Miss. 701, 100 So. 273 (1924).

§ 75-3-114. Contradictory terms of instrument.

If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.

SOURCES: Former § 75-3-114: Codes, 1942, § 41A:3-114; Laws, 1966, ch. 316, § 3-114; Laws, 1992, ch. 420, § 14, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-118.

11. In general.
12. Handwritten, typed and printed terms.
13. Words and figures.
14. Interest provisions.
15. —Date.
16. —Rate.
17. Two or more signers.
18. Extensions.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-118.

11. In general.

In action by payee against guarantors of promissory note, where guaranties sued on expressly provided that each guaranty applied to renewals of note, that payee could change or renew the original credit, and that payee could release any one or more of the guarantors without notice or demand and without affecting guarantors' liability, guarantors were not released or discharged from liability by UCC § 3-118(f) and UCC § 3-606(1)(a), since these sections of the Uniform Commercial Code apply only to negotiable instruments and do not apply to guaranty contracts, which are not negotiable. *First Nat'l Bank v. Energy Equities Inc.*, 91 N.M. 11, 569 P.2d 421 (Ct. App. 1977).

Code § 3-118 simply establishes certain rules of construction which cannot be altered by parol evidence except in action for reformation, but this section in no way attempts to establish comprehensive parol evidence rule for commercial paper. *American Underwriting Corp. v. Rhode Island Hosp. Trust Co.*, 111 R.I. 415, 303 A.2d 121 (1973).

12. Handwritten, typed and printed terms.

Under Code provision that handwritten terms control typewritten and printed

terms, handwritten amendment on face of note which provided that note could be renewed once but would be paid at or before second maturity controlled printed provision of note authorizing extensions without notice to or consent of indorsers. *Watson v. First Nat'l Bank*, 213 Va. 687, 194 S.E.2d 749 (1973).

Rule that handwritten terms control typewritten terms applies only to terms of instrument itself and not to extraneous matter appearing on document; and it was error to instruct jury that handwritten words "stamped in error" appearing next to bank stamp, "Renewed," across face of note were controlling, in absence of evidence as to who made handwritten entry or when it was done. *Pueblo Bank & Trust Co. v. McMartin*, 31 Colo. App. 546, 506 P.2d 759 (1972).

13. Words and figures.

In action on note, codefendants who signed instrument as comakers were jointly and severally liable thereon under UCC § 3-118(e), which provides that two or more persons who sign as maker and as part of same transaction are jointly and severally liable, even though instrument contains such words as "I promise to pay." *Hubert v. Lawson*, 146 Ga. App. 698, 247 S.E.2d 223 (1978).

In action on note whose figures indicated amount payable was \$19,896.01, but whose words stated amount due was "Nineteen hundred eight hundred ninety-six _____ and 01/100 Dollars", under UCC § 3-118, words were ambiguous and were therefore controlled by figures. *Wall v. East Tex. Teachers Credit Union*, 526 S.W.2d 148 (Tex. Civ. App. 1975), rev'd, 533 S.W.2d 918 (Tex. 1976).

14. Interest provisions.

Prior chattel mortgagee, after chattel mortgagor's default on loans and mortgagor's sale of collateral at public auction, was not entitled to deduct from sale proceeds amounts denominated "bonus" and "charges," so as to deprive subsequent chattel mortgagee of its rightful share, under UCC § 9-504(1)(c) and (2), of sale's proceeds because (1) such "bonus" and "charges" were actually "interest" on prior

mortgagee's loan to debtor within meaning of UCC § 3-118(d), and (2) under New York law, lender was not entitled to collect unearned interest on money loaned in absence of subsequent agreement between lender and debtor. *Bostwick-Westbury Corp. v. Commercial Trading Co.*, 94 Misc.2d 401 (1978).

Circumstances surrounding execution of note supported conclusion that parties did not intend to create interest-bearing instrument, although note on its face recited that interest was to be paid at rate of 6 percent; trial court was not required to award interest at rate of 5 percent as specified in statute on judgments, pursuant to UCC § 3-118(d), since payees' conduct was inconsistent with contention that there was ambiguity with respect to rate of interest intended by parties at time instrument was created. *Mendelson v. Flaxman*, 32 Ill. App. 3d 644, 336 N.E.2d 316 (1st Dist. 1975).

Money loaned bears interest without any express agreement. In *re Nicolazzo Estate*, 414 Pa. 186, 199 A.2d 455 (1964).

15. —Date.

Under (1) UCC § 3-118(d), providing that provision for payment of interest means interest at judgment rate at place of payment from date of instrument, and (2) non-UCC statute providing for allowance of interest on money due under judgment from date of judgment's rendition until satisfaction of judgment by payment, notes which contained provision that in event of default of more than 30 days on any one payment, they should bear interest at six per cent for the year of the delinquency provided for penalty interest at six per cent only for the four-month period of delinquency in making payment and not for one full year from date of default. *Willis v. Community Developers, Inc.*, 563 S.W.2d 104 (Mo. Ct. App. 1978).

Although there was no demand made on maker, interest on note must run from date of instrument, where note provided "with interest". In *re Carr Estate*, 436 Pa. 47, 258 A.2d 628 (1969).

The code reiterates the prior law that where an instrument does not specify the date of which interest runs, it will run from the date of the instrument. *Taylor v.*

Hamden Hall Sch., Inc., 149 Conn. 545, 182 A.2d 615 (1962).

Subsection (d) of this section has a similar provision to that of § 17(2) of the (Pa.) Negotiable Instruments Law of 1901, which stated that where an instrument provided for the payment of interest, without specifying the date from which the interest was to run, the interest ran from the date of the instrument, and if the instrument was undated, from the issue thereof. *Roller v. Jaffe*, 387 Pa. 501, 128 A.2d 355 (1957).

16. —Rate.

Where maker of promissory note, on which blank space for amount of interest had been filled in by payee by inserting the number "8," claimed that he had not agreed to pay any interest but did not protest statements showing both principal and interest due on note, trial court's award of interest at legal rate of six per cent was not error in light of (1) failure of parties to agree on specific rate of interest, and (2) trial court's power under UCC § 3-118(d) to charge interest at statutory rate if space in instrument for interest has been left blank. *Roberts v. Southern Wood Piedmont Co.*, 571 F.2d 276 (5th Cir. 1978).

Where a note is stated to be payable "with interest" the rate is the judgment rate. *Epstein v. Paskow & Epstein*, 4 U.C.C. Rep. Serv. 1066 (1968, NY Sup).

17. Two or more signers.

Cosigners of a note are usually divided into two categories, principals and sureties. If one is principal, he is commonly designated "maker." Under UCC § 3-118(e), a comaker's liability to the payee is joint and several. As between one another, comakers are presumed to be liable in equal amounts. If one comaker pays the entire judgment entered against all comakers, he is entitled to contribution from each comaker in the amount of his aliquot share of the debt. *Caldwell v. Stevenson*, 567 S.W.2d 278 (Tex. Civ. App. 1978).

In action on note, codefendants who signed instrument as comakers were jointly and severally liable thereon under UCC § 3-118(e), which provides that two or more persons who sign as maker and as

part of same transaction are jointly and severally liable, even though instrument contains such words as "I promise to pay." *Hubert v. Lawson*, 146 Ga. App. 698, 247 S.E.2d 223 (1978).

Although each signer of note is liable to payee for entire amount under UCC § 3-118(e), generally as between two signers, each is liable for one-half of amount of instrument. However, if co-obligors shared unequally in consideration received from note, contribution may be prorated according to benefits each co-obligor received (holding that cosigners of note who benefited from consideration from note in proportions of 64% and 36%, respectively, were liable on instrument in similar proportions). *Dittberner v. Bell*, 558 S.W.2d 527 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Apr. 5, 1978).

Since accommodation party under UCC § 3-415(2) is liable in capacity in which he signed instrument, note executed by two persons as comakers, which contained nothing to show that one of them actually signed only as accommodation maker, subjected both under UCC § 3-118(e) to joint and several liability on such obligation. *Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Sept. 27, 1977).

Notwithstanding accommodation party who signed note as maker would otherwise have been jointly and severally liable on note as co-maker under UCC § 3-118 and § 3-415, accommodation party was totally discharged under UCC §§ 3-606 and 9-306 by secured creditor's impairment of collateral where collateral, which was not in possession of secured creditor, was sold by principal debtor with express authority of secured creditor and value of collateral exceeded value of debt. *Beneficial Fin. Co. v. Marshall*, 551 P.2d 315 (Okla. Ct. App. 1976).

Where bank made loan on condition that debtor-corporation's officers personally endorse notes and that creditor-corporations guarantee payments, and where endorsements of creditor-corporation preceded endorsements of officers of debtor-corporation, endorsees were not liable in order in which they endorsed under presumption raised by UCC § 3-414(2), but were jointly and severally liable under

UCC § 3-118(e) in that creditor-corporations signed in same capacity as accommodation parties and as a part of same transaction. *Zapp Nat'l Bank v. Metropolitan Planning & Redevelopment Corp.*, 308 Minn. 309, 242 N.W.2d 96 (1976).

Under UCC § 3-414, second endorser of note was not liable to first endorser and presumption that endorsers were liable in order in which their signatures appeared on note was not overcome even if both endorsers signed note "as a part of the same transaction" under UCC § 3-118, where there was no agreement by second endorser to be jointly liable with first endorser. *Wilson v. Turner*, 29 N.C. App. 101, 223 S.E.2d 539 (1976), review denied, 290 N.C. 311, 225 S.E.2d 832 (1976).

One who received benefits from proceeds of note was co-signer; she would have been accommodation signer, even though she did receive money or other benefits for use of her name, if she had received no benefits from proceeds of note. *Riegler v. Riegler*, 244 Ark. 483, 426 S.W.2d 789 (1968).

An obligation signed by husband and wife imposes upon them joint and several liability. *Garner v. Tomcavage*, 34 Northumb. Legal J. 18 (Pa. 1962).

When two or more persons execute a promissory note, they are jointly and severally liable, under the general rule. *Roller v. Jaffe*, 387 Pa. 501, 128 A.2d 355 (1957).

18. Extensions.

Two extensions of note, each for same period as note itself, were authorized by UCC § 3-118(f) and were binding on estate of deceased accommodation indorser where note expressly provided that it could be extended from time to time after maturity without notice to any indorsers or sureties. In such case, deceased accommodation indorser is deemed to have consented in advance to such extensions without notice. *Bay Nat'l Bank & Trust Co. v. Mason*, 349 So. 2d 810 (Fla. App. 1977).

An agreement by the holder of a note to suspend the right to enforce for 113 days, 21 days longer than the period of the original note, was an extension beyond that authorized by UCC § 3-118(f) and when made without the consent of the

endorser discharges the endorser under Beermann Bros. Dehy, 188 Neb. 597, 198 UCC § 3-606(1)(a). Citizens State Bank v. N.W.2d 458 (1972).

§ 75-3-115. Incomplete instrument.

(a) "Incomplete instrument" means a signed writing, whether or not issued by the signer, the contents of which show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers.

(b) Subject to subsection (c), if an incomplete instrument is an instrument under Section 75-3-104, it may be enforced according to its terms if it is not completed, or according to its terms as augmented by completion. If an incomplete instrument is not an instrument under Section 75-3-104, but, after completion, the requirements of Section 75-3-104 are met, the instrument may be enforced according to its terms as augmented by completion.

(c) If words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument under Section 75-3-407.

(d) The burden of establishing that words or numbers were added to an incomplete instrument without authority of the signer is on the person asserting the lack of authority.

SOURCES: Former § 75-3-115: Codes, 1942, § 41A:3-115; Laws, 1966, ch. 316, § 3-115; Laws, 1992, ch. 420, § 15, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-115.

11. In general.
12. Date of execution.
13. Blanks which do not render instrument incomplete.
14. Authorized or ratified completion.
15. Unauthorized completion, generally.
16. —Particular applications.

III. DECISIONS UNDER FORMER STATUTES.

17. In general.

II. DECISIONS UNDER FORMER UCC § 75-3-115.

11. In general.

In *Smith v. Franklin Life Ins. Co.* (Pa) 29 Lehigh 235, the court quoted § 3-115, in a case involving a receipt and release, in connection with an insurance policy, which had been filled out to accomplish the purpose of the insured. *Smith v. Franklin Life Ins. Co.*, 29 Lehigh 235 (Pa).

12. Date of execution.

Parol evidence is not admissible to show that a note was not executed on the date shown thereon but on a later date and allegedly backdated to the date of the original transaction. *Epstein v. Paskow & Epstein*, 4 U.C.C. Rep. Serv. 1066 (1968, NY Sup).

Where, after check was signed, printed date of "195" was completed and altered by handwritten "1964", bank properly cashed check, relying on presumption of

Code § 3-114(3) that date is correct and on presumption of Code § 3-118(b) that handwritten terms control printed terms. *Newman v. Manufacturers Nat'l Bank*, 7 Mich. App. 580, 152 N.W.2d 564 (1967).

13. Blanks which do not render instrument incomplete.

In action by holder of note fact that due date of first monthly installment was omitted did not make instrument incomplete in any "necessary respect" under UCC § 3-115(1) and instrument in which no time for payment was stated was payable on demand under UCC § 3-108. *Gill v. Commonwealth Nat'l Bank*, 504 S.W.2d 521 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Apr. 3, 1974).

14. Authorized or ratified completion.

Where makers signed printed note form, leaving blank spaces for date, amount of interest, and duration of note, and where payee later filled in blank spaces, testimony by makers that they did not expressly give payee authority to fill in blanks did not overcome presumption that payee had authority to complete blanks with respect to date and prematurity interest; UCC § 3-115 provides that burden of establishing that any completion is unauthorized is on the party asserting lack of authorization, effect of which is to imply that transferee has authority to complete blanks in instrument. *Antrim v. McMurrey*, 549 S.W.2d 463 (Tex. Civ. App. 1977).

In action against guarantor of 11 notes for balance due thereon, even if guarantor signed notes when they were incomplete, under UCC § 3-115(1), they could be subsequently completed if authority to do so had been given. Such authority was implicit where proceeds of note were accepted by obligor without objection. *First Nat'l City Bank v. Cooper*, 50 A.D.2d 518 (1st Dep't 1975).

Where decedent signed printed blank check containing words necessary to show that it was intended to become negotiable instrument, i.e., "Pay to the order of _____", and check was completed for \$3,300 with no material omissions and no ambiguities, under UCC § 3-115(2), burden of showing that amount inserted in proper blanks was not what decedent in-

tended and was beyond amount he authorized was upon his estate; since only evidence offered to show amount intended by decedent was four numerals, "3,300," in handwriting of deceased in blank following printed word "For" in lower left hand corner of check and since there was approximately \$6,600 in decedent's checking account at time check was written, there was no evidence sufficient to overcome presumption established by UCC § 3-115(2) and check was, therefore, completed as authorized. *Calhoun v. Norris* (In re Estate of Norris), 532 P.2d 981 (Colo. Ct. App. 1974).

In action by payee-finance company to recover on note signed in blank by comakers and completed by finance company, note was legally executed and valid under UCC § 3-115 where there was evidence that comakers knew that blank instrument they signed was in fact note and where comakers failed to show that they had not authorized finance company to complete blank note. *Charter Fin. Co. v. Henderson*, 15 Ill. App. 3d 1065, 305 N.E.2d 338 (5th Dist. 1973), aff'd, 60 Ill. 2d 323, 326 N.E.2d 372 (1975).

Where parties to security agreement indicated their intent that paragraph covering debtor's inventory was to be applicable by including under this printed paragraph typewritten statement, "all petroleum products, tires and other motor vehicle supplies, now owned or after-acquired," secured party's alteration of instrument by insertion of "x" in box prefacing paragraph showing coverage of debtor's inventory was authorized. *First Nat'l Bank v. Hull*, 189 Neb. 581, 204 N.W.2d 90 (1973).

When a note is delivered to a person with the intention, evidenced by clear circumstances or expression, that he fill in any blanks therein, he becomes an agent for that purpose and binds the principal accordingly. *Manufacturers Hanover Trust Co. v. Eisenstadt*, 64 Misc. 2d 397 (1970).

The holder of negotiable instruments had the right to complete the blanks in the instrument if it so desired. The indorsement of a guarantee signed with obvious blanks can be enforced in the absence of fraud or lack of authority. *Flushing Nat'l*

Bank v. Brightside Mfg., Inc., 59 Misc. 2d 108 (1969).

Holder has right to complete blanks in negotiable instrument. Flushing Nat'l Bank v. Brightside Mfg., Inc., 59 Misc. 2d 108 (1969).

One signing instrument containing blanks is said to have conferred upon transferee of instrument implied authority to complete instrument in accordance with understanding of parties; incompleteness of instrument is no defense in absence of any allegation that transferee acted in excess of implied authority in completing instrument. Davtian v. Barsamian, 106 R.I. 185, 256 A.2d 510 (1969).

Alteration and completion of note by plaintiff-indorsee were assented to, ratified and confirmed by defendant-indorser so that latter was disqualified from attacking validity of note, where there was credible testimony that, at meeting at which note was signed and indorsed, blanks were deliberately left open, subject to being filled in on terms approved by indorsee, and maker and indorser were informed of those terms and accepted them. Fairfield County Trust Co. v. Steinbrecher, 5 Conn. Cir. Ct. 405, 255 A.2d 144 (1968).

The legal effect of giving an incomplete promissory note to another with the authorization to fill in the blanks is the same as delivering a complete instrument. Davis v. Commonwealth, 399 S.W.2d 711 (Ky. 1965), cert. denied, 385 U.S. 831, 87 S. Ct. 67, 17 L. Ed. 2d 66 (1966).

It is no defense that the negotiable instrument had been signed in blank where it was admitted that as completed, the instrument conformed to the agreement made by the parties, as the Code authorizes the completion of incomplete instruments. Chester Valley Refrigeration Co. v. Altieri, 41 Pa. D. & C.2d 90 (1965).

15. Unauthorized completion, generally.

Where an employer signs his name to a blank check the improper completion of the check by an employee and his conversion of the proceeds of the check constitutes the crime of embezzling money, as against the argument that the blank check was not a negotiable instrument as

it did not contain any order or promise to pay money and was not payable to order or bearer. State v. Moreno, 156 Conn. 233, 240 A.2d 871 (1968).

Under the Code an unauthorized completion is treated as an alteration of the instrument and governed by the alteration rule stated in UCC § 3-107. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

16. —Particular applications.

In action by cashing bank to recover from drawer and indorser of two checks drawn on insufficient funds, where defendant indorser stole, completed, and cashed at plaintiff bank (where indorser was customer) two checks which had been signed in blank by defendant drawer and delivered by drawer to her husband, and where plaintiff bank had no notice of any defenses against, or claims to, such checks by any person, plaintiff under UCC § 3-302 was holder in due course of such checks and could, under UCC § 3-407 and UCC § 3-115, enforce them as completed. Central State Bank v. Kilroy, 57 A.D.2d 940 (2d Dep't 1977).

Claim in suit to cancel combination note, security agreement, and disclosure statement, which alleged that amount not agreed on was fraudulently inserted in note signed in blank, raised issue that was primarily controlled by UCC § 3-115, which deals with incomplete instruments, and UCC § 3-407, which deals with alteration of instruments. First Am. Bank v. Bishop, 239 Ga. 809, 239 S.E.2d 19 (1977).

Obligor was not shown to have authorized alteration of place of performance of retail instalment contract, where change was not in connection with authority given in contract to complete blanks, and correction authority was given by contract to plaintiff assignee, who did not make alterations, and not to unidentified person who altered provisions. Commercial Credit Corp. v. Bryant, 490 S.W.2d 644 (Tex. Civ. App. 1973).

Where written contract for sale which provided authority for completion of note set term of note at 2 years and made no mention of periodic instalment payments, and president of payee bank added provisions for 7 instalment payments over approximately 16 months, president's

completion of note in terms varying authorized time and manner of payment was unauthorized and constituted material alteration; and suit on note filed 10 months prior to maturity date "as authorized" was premature. *Bank of New Effington v. Thompson*, 502 P.2d 978 (Colo. Ct. App. 1972).

Where the makers of a note, who were inexperienced in even ordinary business affairs, were induced by a salesman to enter into a home improvement contract supposedly with one business concern but without notice to, or consent of, the makers, and after the signing thereof, the name of the concern with whom makers intended to deal was clipped from one copy of the contract and the name of another concern stamped thereon, and makers innocently signed a property loan application in blank, the makers were entitled to the benefit of the rules govern-

ing incomplete instruments and alteration of instruments. *Fidelity Trust Co. v. Gardiner*, 191 Pa. Super. 17, 155 A.2d 405 (1959).

III. DECISIONS UNDER FORMER STATUTES.

17. In general.

Where buyer of automobile signed conditional sale contract with blank spaces, expecting seller's salesman to fill in the blanks, he thereby made seller his agent so that balance stated in the contract was binding on buyer. *Universal Credit Co. v. Moore*, 173 Miss. 740, 163 So. 142 (1935).

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." *Moore v. Vaughn*, 167 Miss. 758, 150 So. 372 (1933).

§ 75-3-116. Joint and several liability; contribution.

(a) Except as otherwise provided in the instrument, two (2) or more persons who have the same liability on an instrument as makers, drawers, acceptors, indorsers who indorse as joint payees, or anomalous indorsers are jointly and severally liable in the capacity in which they sign.

(b) Except as provided in Section 75-3-419(e) or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law.

(c) Discharge of one (1) party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection (b) of a party having the same joint and several liability to receive contribution from the party discharged.

SOURCES: Former § 75-3-116: Codes, 1942, § 41A:3-116; Laws, 1966, ch. 316, § 3-116; Laws, 1992, ch. 420, § 16, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-116.

11. In general; instruments payable in the alternative.

12. Instruments payable jointly.

13. —Parties necessary for suit on instrument.

14. —Liability of bank for payment on single indorsement.

III. DECISIONS UNDER FORMER STATUTES.

15. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-116.

11. In general; instruments payable in the alternative.

Certificate of deposit issued by bank which (1) represented deposit of specified sum by decedent, (2) was payable in the alternative to decedent or to plaintiff-claimant of certificate's proceeds, (3) had not been negotiated to plaintiff in accordance with UCC § 3-116(a), but was still in decedent's possession at time of her death, and (4) contained no reference to survivorship rights, was in decedent's possession as holder in due course and thus was part of her estate when she died (holding that Uniform Commercial Code controls certificates of deposit which comply with UCC § 3-104(2)(c)). *Thomas v. Estate of Eubanks*, 358 So. 2d 709 (Miss. 1978).

12. Instruments payable jointly.

UCC § 3-605(1)(b) allows the holder of an instrument to discharge a party thereto to the extent of the holder's interest in the instrument. However, under UCC § 3-116(b), the holder cannot discharge all interests under an instrument that is payable, but not in the alternative, to both himself and another party (holding that UCC § 3-605(1)(b) does not prohibit person from discharging his interest in an instrument by a renunciation contained in a properly executed will). *Cantonwine v. Fehling*, 582 P.2d 592 (Wyo. 1978).

Husband and wife held notes as tenants in common where notes were payable to husband and wife and where nothing appeared in instruments evidencing intention to create survivorship. *Fehling v. Cantonwine*, 522 F.2d 604 (10th Cir. Wyo. 1975).

Note payable to two persons could not be cancelled by one of those persons without authority given by the other. *May v. Triangle Oil Co.*, 96 Idaho 289, 527 P.2d 781 (1974).

Questions of fact precluding summary judgment existed as to whether check proceeds went where intended under UCC

§ 3-116 where negotiable instrument payable to two payees was cashed bearing the forged endorsement of one of the payees. *Sullivan v. Wilton Manors Nat'l Bank*, 259 So. 2d 194 (Fla. App. 1972).

Both co-payees must endorse a negotiable instrument payable to both. *Sullivan v. Wilton Manors Nat'l Bank*, 259 So. 2d 194 (Fla. App. 1972).

Instrument payable to joint payees must be endorsed by all of them. *Insurance Co. of N. Am. v. Atlas Supply Co.*, 121 Ga. App. 1, 172 S.E.2d 632 (1970).

All joint payees must join not only for negotiation but also for discharge. *Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank*, 253 Cal. App. 2d 368 (2d Dist. 1967).

Under the Uniform Negotiable Instruments Law, requiring the indorsement of all where there are two or more payees or indorsees, and supplemented by the instant section, it was held that where a check was payable to two persons, the indorsement of both persons was necessary to cash the check or otherwise to transfer it. *Gill Equip. Co. v. Freedman*, 339 Mass. 303, 158 N.E.2d 863 (1959).

Where a check is made payable to two persons and is turned over to one of the payees upon an understanding that the proceeds were to be used for a particular purpose, the payee who received and indorsed the check is responsible for the proper application of the proceeds, and he may not defend on the ground that he gave the check to the other payee, and that he, the first payee, received no benefit from the check. *Gill Equip. Co. v. Freedman*, 339 Mass. 303, 158 N.E.2d 863 (1959).

13. —Parties necessary for suit on instrument.

Under UCC § 3-116(a), one of joint payees could enforce payment of note without joining other payee. *McDonald v. McDonald*, 232 Ga. 190, 205 S.E.2d 850 (1974).

Two payees named in note are each indispensable party in suit by one of them on note, if note does not provide that it is payable to them in the alternative. *Hinojosa v. Love*, 496 S.W.2d 224 (Tex. Civ. App. 1973).

Individual payee was not indispensable party to action on note made payable to individual and/or company. *Lohf v. Warner*, 495 P.2d 241 (Colo. Ct. App. 1972).

14. —Liability of bank for payment on single indorsement.

A check made payable to copayees requires the indorsement of both for negotiation (Uniform Commercial Code, § 3-116) and an indorsement by only one of the payees is so obviously inadequate that payment by a drawee bank is a departure from reasonable commercial standards. A drawee bank that makes improper payment of a check may plead the equitable defense of unjust enrichment when sued by the drawer if the proceeds actually reached all the payees designated by the drawer. If one of the payees has received none of the proceeds of the check, the drawee bank is answerable to the drawer for the entire amount of the check as the bank has failed to shield itself from its mistake in paying the amount of the check without a proper indorsement. The fact that a copayee who did not receive payment asserts no interest in the check will not benefit the drawee bank as the intent of the drawer is controlling, even if such intent resulted from mistake induced by some third party, not an agent or employee of the drawer. *Middle States Leasing Corp. v. Manufacturers Hanover Trust Co.*, 62 A.D.2d 273 (1st Dep't 1978).

Where drawee bank, in violation of UCC § 3-116(b), paid check made out to two payees on indorsement of one payee only and nonindorsing copayee received none of check's proceeds, (1) drawee bank was liable to drawer for entire amount of check, and (2) drawee bank could not successfully assert defense of unjust enrichment of drawer without showing that check's proceeds had been received by both payees (also holding that in drawee bank's third-party action against federal reserve bank, additional time for discovery should have been allowed respecting issue as to whether drawee bank's claim for breach of warranty was made within reasonable time under UCC § 4-207(4)). *Middle States Leasing Corp. v. Manufacturers Hanover Trust Co.*, 62 A.D.2d 273 (1st Dep't 1978).

Where check was payable not in the alternative to two payees, bank which paid check on indorsement of one payee only, and which credited entire proceeds of check to account of indorsing payee without other payee's knowledge, was liable in conversion for face amount of check because (1) under UCC § 3-116(b), check could only be negotiated by both payees, and (2) payment of a check on a missing indorsement is equivalent to payment on a forged indorsement, and under UCC § 3-419(1)(c), instrument is converted when it is paid on a forged indorsement (rejecting defense contention that since United States treasury eventually honored check in suit, which was drawn by government agency, such action was evidence of drawer's intent to pay "in the alternative" under UCC § 3-116(a)). *Peoples Nat'l Bank v. American Fid. Fire Ins. Co.*, 39 Md. App. 614, 386 A.2d 1254 (1978).

Under UCC § 3-116(b), unless a check payable to the order of two or more payees is in the alternative, a bank can accept and pay it only on the indorsement of all payees (case involving payment of check, jointly payable to both subcontractor and materialman, without obtaining materialman's indorsement, wherein court also stated that subrogation rights granted by UCC § 4-407(c) to payor bank could not be used to defeat materialman's claim, and that court of appeals correctly held that both collecting and drawee banks were liable to materialman as a matter of law). *Trust Co. v. Refrigeration Supplies, Inc.*, 241 Ga. 406, 246 S.E.2d 282 (1978), on remand, 146 Ga. App. 825, 247 S.E.2d 542 (1978).

In action against bank for alleged negligence in cashing cashier's check issued against account in another bank into which plaintiff's funds had wrongfully been deposited, where evidence showed that such check was made payable to "Emil Haliewicz, Swiss Baco Skyline Logging, Inc."; that "Emil Haliewicz" was name of alleged converter of plaintiff's funds and "Swiss Baco Skyline Logging, Inc." was plaintiff's corporate designation; and that such check had been indorsed by Haliewicz by printing "Swiss Baco Skyline Logg. Inc." on back of instrument and

signing his name below such printed words, summary judgment in favor of defendant bank would be affirmed because (1) designation of payee as "Emil Haliewicz, Swiss Baco Skyline Logging, Inc." did not constitute joint-payee language under UCC § 3-116; (2) under facts of case, check was payable under UCC § 3-117(c) to "Emil Haliewicz" unconditionally; and (3) plaintiff "Swiss Baco Skyline Logging, Inc.," not being a named payee of such check, had no protectable interest therein. *Swiss Baco Skyline Logging, Inc. v. Haliewicz*, 18 Wash. App. 21, 567 P.2d 1141 (1977).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. *Atlas Bldg. Supply Co. v. First Indep. Bank*, 15 Wash. App. 367, 550 P.2d 26 (1976).

Where draft, made payable to three parties, was paid over forged endorsement of one of the parties, under UCC § 3-116 drawer's debt was not discharged as to party whose endorsement was forged; payment of instrument by drawer-drawee constituted conversion of instrument for which drawer-drawee must respond in damages under UCC § 3-419. *Lee v. Skidmore*, 49 Ohio App. 2d 347, 361 N.E.2d 499 (1976).

Bank that issued cashiers' check which was purchased by corporation and made payable to it and plaintiff, a third party,

was liable to plaintiff where it allowed corporation to return cashiers' check without plaintiff's indorsement and issued two new cashiers' checks payable to corporation only; although bank would have been justified in relying on presumption of continued ownership of check by corporation, absent any unusual circumstances, there were unusual circumstances in present case sufficient to raise duty of inquiry where, inter alia, bank refused to issue original \$25,000 cashiers' check to corporation as drawer-purchaser until plaintiff's earnest money check for \$25,000, which was deposited in corporation's account, had cleared, corporation at that time had balance of only \$13,000 in its account, and, when plaintiff's \$25,000 check cleared, bank issued \$25,000 cashiers' check payable to plaintiff and corporation; where president of corporation returned cashiers' check for \$25,000 about one month later, notified bank that it had not been used for intended purpose, and requested two new cashiers' checks (one for \$15,000 and one for \$10,000) payable only to corporation, and, at bank's request, president wrote "not used for purpose issued" on reverse side of \$25,000 cashiers' check; where plaintiff, a joint payee, did not indorse cashiers' check for \$25,000; and where bank failed to make any inquiry and issued \$15,000 and \$10,000 cashiers' checks payable to corporation only, as requested, and thereby made possible conversion by corporation of \$25,000 of plaintiff's money. *Gillespie v. Riley Mgt. Corp.*, 59 Ill. 2d 211, 319 N.E.2d 753 (1974).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee

had not received proceeds, issued substitute drafts, since negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, second collecting bank became liable to plaintiff on warranty of good title, and when first collecting bank obtained payment from second collecting bank, and depositor received payment from first collecting bank, first collecting bank became liable to second collecting bank and depositor became liable to first collecting bank on similar warranties. *Phoenix Assurance Co. v. Davis*, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

III. DECISIONS UNDER FORMER STATUTES.

15. In general.

The collecting bank which honored, and the drawee bank which paid, a check

payable to two payees but only indorsed by one, were both liable in tort for conversion provided loss or injury resulted from such acts which violated this section. *Kaplan v. Deposit Guar. Nat'l Bank*, 192 So. 2d 391 (Miss. 1966).

Payee indorsers of notes held liable to purchaser, notwithstanding administrator of joint payee was not expressly authorized to indorse notes by foreign court which had jurisdiction of administration of estate, where purchaser paid payee's interest in proceeds of notes to payee's heirs who assigned to purchaser their interest in notes and sale of notes and disbursement of proceeds was approved by administration court, especially where neither such court nor payee's heirs had repudiated administrator's indorsement. *Weston v. Merchants' Bank & Trust Co.*, 173 Miss. 34, 161 So. 145 (1935).

RESEARCH REFERENCES

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§ 75-3-117. Other agreements affecting instrument.

Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.

SOURCES: Former § 75-3-117: Codes, 1942, § 41A:3-117; Laws, 1966, ch. 316, § 3-117; Laws, 1992, ch. 420, § 17, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-119.

11. In general.

12. Evidence; "same transaction".
13. Other writings read with instrument.
14. —Holder in due course.
15. Separate agreements.

III. DECISIONS UNDER FORMER UCC § 75-3-117.

16. In general; liability of guarantor or payment.
17. —Similarity to co-maker.
18. Liability for guarantee of collection.
19. Limited guaranty.
20. Words creating guaranty.
21. Practice and procedure.
22. —Defenses; usury.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-119.

11. In general.

UCC § 3-119(1) incorporates into the law of negotiable instruments the ordinary rule that writings contemporaneously executed as a part of the same transaction are to be read together as a single agreement. As between the immediate parties, a negotiable instrument is merely a contract or part of an overall contractual transaction, and any defense to the underlying obligation is also a defense to the negotiable instrument as long as the instrument remains in the hands of one who is not a holder in due course (holding that where indemnity agreement in bail bond case was legally unenforceable against party who signed it, promissory note signed by such party in conjunction with indemnity agreement also was unenforceable). *Perry v. Cain*, 581 P.2d 891 (Okla. 1978).

UCC § 3-119 applies to negotiable instruments the ordinary rule that writings executed as part of the same transaction are to read together as a single agreement. As between the immediate parties, a negotiable instrument is merely a contract and is no exception to the principle that courts will look to the entire contract in writing. Accordingly, a note may be affected by an acceleration clause, a clause providing for discharge under certain conditions, or any other relevant

term in the separate agreement. However, the phrase "may be modified or affected" in UCC § 3-119(1) does not mean that the separate agreement must necessarily be given effect; there is still room for construction of the separate agreement as not being intended to affect the negotiable instrument at all, or as being intended to affect it for a limited purpose only, such as foreclosure or other realization of collateral. And if there is outright contradiction between the two, as where a note is for \$1,000 but the accompanying mortgage recites that it is for \$2,000, the note may be held to stand on its own feet and not to be affected by the contradiction. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

12. Evidence; "same transaction".

Where buy-sell agreement for purchase of dress shop stated that balance was to be financed through SBA participation loan, where buyer did not have loan at time of closing and seller agreed to take note in lieu of cash, and where written act of sale executed at same time stated that sale was made pursuant to agreement executed previously by vendors and vendee, parol testimony of parties concerning their intention was admissible pursuant to UCC § 3-119(1), but buyer-maker did not sustain burden of proof that payment of note was conditioned on his obtaining SBA loan. *Demaio v. Theriot*, 343 So. 2d 1143 (La. App. 1977), writ denied, 346 So. 2d 218 (La. 1977).

Evidence may be offered by defendant under UCC § 3-119(1) to show that note sued on had been modified by prior written agreement between parties that was executed as part of same transaction, so as to cause note not to be due at time of suit. However, where such evidence does not demand finding that note was thus modified, trial court does not commit error in finding that note was overdue and unpaid. *Eason v. Berger & Co.*, 143 Ga. App. 482, 238 S.E.2d 593 (1977).

Various instruments pertaining to same transaction, i.e., obtaining permanent financing for land development, although executed at different times and not expressly referring to each other, would be read together as one contract, notwithstanding claim that such documents were inadmissible on ground that they contra-

dicted "no pre-payment" clause in note and thus violated parol evidence rule, where promissory note was not entire contract between parties. *Pendleton Green Assocs. v. Anchor Sav. Bank*, 520 S.W.2d 579 (Tex. Civ. App. 1975).

Pursuant to UCC § 3-119, defendant in action on cognovit note which he had executed could have presented evidence indicating that note had been modified by real estate contract between defendant and plaintiff; however, reference to "earnest money" on face of note did not itself modify instrument. *Robbins v. Avara*, 28 Ill. App. 3d 292, 328 N.E.2d 95 (1st Dist. 1975).

In action by bank on promissory note in which defendant showed he was accommodation maker under UCC § 3-415, all written agreements executed at same time as part of same transaction were admissible in action between original parties under UCC § 3-119. *Berger v. Mercantile Nat'l Bank*, 231 Ga. 680, 203 S.E.2d 479 (1974).

Code § 3-119 applies to negotiable instruments general rule that writings executed as part of same transaction are to be read together as single agreement; and standby agreement executed on August 3 by buyers, sellers, and Small Business Administration and promissory note executed on September 10 by buyers payable to sellers could be said to have arisen out of same transaction, since both were executed as part of plan for financing sale of children's clothing store and standby agreement was intended to limit right of sellers to assert claim for balance due on purchase price still owing after September 10, until written consent of SBA had been obtained or until SBA loan had been fully paid. *Sanden v. Hanson*, 201 N.W.2d 404 (N.D. 1972).

Renewal of original note was basis of suit by bank for sum due; earlier contract regarding creation of obligated corporate entity and covering letter pertaining to security agreement executed simultaneously with original note were both part of same transaction and were admissible under parol evidence rule. *Merchants Nat'l Bank & Trust Co. v. Professional Men's Ass'n*, 409 F.2d 600 (5th Cir. Tex. 1969), cert. denied, 396 U.S. 1009, 90 S. Ct. 567, 24 L. Ed. 2d 501 (1970).

13. Other writings read with instrument.

Check bearing unconditional language of release, accompanied by letter of transmittal which set forth basis of dispute between parties, along with appropriate cautionary language that deposit of check constituted acceptance of settlement offer, were to be read together under provisions of UCC § 3-119(1) so that deposit of check constituted accord and satisfaction between parties regardless of any alteration or disclaimer added to check by payee. *A.G. King Tree Surgeons v. Deeb*, 140 N.J. Super. 346, 356 A.2d 87 (1976).

Maker of promissory note was not liable to transferee of note where note was executed in conjunction with instrument providing that first payment was to be made out of sale of paint (which never materialized) and where transferee, who did not qualify as innocent purchaser for value without notice, was bound by terms of accompanying agreement under UCC § 3-119. *Texas State Bank v. Sharp*, 506 S.W.2d 761 (Tex. Civ. App. 1974), ref. n.r.e (July 10, 1974).

In determining whether a mortgage note provided for payment of a usurious rate of interest, it should be construed in conjunction with a building contract executed at the same time as the note and as a part of the same transaction. *Guaranty Fin. Corp. v. Harden*, 242 Ark. 779, 416 S.W.2d 287 (1967).

Where promissory note merely recites installments due but does not indicate how much is interest, it is proper to interpret the note together with the mortgage executed as part of the same transaction in order to determine what part was interest, where rights of a holder in due course were not involved. *Guaranty Fin. Corp. v. Harden*, 242 Ark. 779, 416 S.W.2d 287 (1967).

14. —Holder in due course.

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due

course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). *Northwestern Bank v. Neal*, 271 S.C. 544, 248 S.E.2d 585 (1978).

If assignee of lease concerning computers and computer equipment took assignment for value, in good faith and without notice of concurrent agreement that lease, would not be effective if certain acceptable and satisfactory equipment were not delivered, assignee could recover on lease notwithstanding lessor's alleged failure to deliver equipment where lease provided that lessee would not assert against assignee any defenses, counterclaims or offsets which it might have against lessor. *National Bank of N. Am. v. DeLuxe Poster Co.*, 51 A.D.2d 582 (2d Dep't 1976).

Where note and mortgage were executed simultaneously, note provided that all terms of mortgage were thereby made part of note, and terms of mortgage made it patent that mortgagees could look only to mortgage property to recover debt, assignees of portion of mortgage note were not holders in due course and were subject to limitation in mortgage precluding deficiency judgment. *Stern v. Itkin Bros.*, 87 Misc. 2d 538 (1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. *Hall v. Security Planning Serv., Inc.*, 371 F. Supp. 7 (D. Ariz. 1974).

15. Separate agreements.

UCC § 3-119(2) rejects decisions which have carried the rule about reading con-

temporaneous writings together to the point of holding that a clause in a mortgage affecting a note destroys the negotiability of the note. The negotiability of an instrument is always determined solely by what appears on the face of the instrument itself, and if it is negotiable by itself, a purchaser without notice of a separate writing is in no way affected by such writing. If the instrument itself states that it is subject to or governed by any other agreement, it is not negotiable under Article 3; but if it merely refers to a separate agreement or states that it arises out of such an agreement, it is negotiable. *Northwestern Bank v. Neal*, 271 S.C. 544, 248 S.E.2d 585 (1978).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where bank's refusal to sign was because it had no ownership interest in corporation but only security interest in corporation's assets; (3) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (4) where bank indorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, buyer's contention that when bank accepted and cashed cashier's checks it became obligated by terms of sale agreement could not be sustained because (1) clear import of Uniform Commercial Code is that negotiable instruments may not be used by parties to express obligations other than obligation stated in UCC § 3-104(1)(b), namely, unconditional promise to pay sum certain; and (2) since terms of sale agreement with respect to such cashier's checks required only that they be made out for specified amounts and be payable to specified copayees, such checks were not affected or modified under UCC

§ 3-119(1) by terms of sale agreement, but were completely independent of such agreement. In such case, cashier's checks stood on their express terms, bank's acceptance of such checks did not constitute acceptance of terms of separate sale agreement which bank did not sign, and causes of action arising out of such sale agreement were not available against bank. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

Official Comments to UCC § 3-119 make clear that negotiable instruments will not be affected by terms of separate contract in absence of some express term in such contract. And even then, contradictions between a negotiable instrument and such separate contract may be controlled by negotiable instrument itself. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

In action to recover on notes, under UCC §§ 3-119 and 3-601, question of fact existed as to whether parties entered into written contract which relieved defendants of personal liability on notes, or whether parties performed under oral contract to same effect. *DiLeo v. Werb*, 50 A.D.2d 570 (2d Dep't 1975).

Written agreement by parties to promissory note executed contemporaneously with note in question which merely recited that corporate maker was attempting to develop foreign source of crude oil for import into United States and, for services rendered to corporation, individuals who were payees of note would be entitled to receive fee of 1 per cent per barrel from expected sale of crude oil, standing alone, did not alter or modify promissory note. *Texas Export Dev. Corp. v. Schleder*, 519 S.W.2d 134 (Tex. Civ. App. 1974).

Negotiability of check is not affected by fact it is drawn in return for creation of debt obligation from payee to drawer which is secured by collateral, nor is such negotiability affected by promise to maintain or protect collateral, and borrower who accepts check representing proceeds of his loan may freely negotiate check as his own property notwithstanding security agreement which secures his obligation to repay. *Johnson v. State*, 158 Ind. App. 611, 304 N.E.2d 555 (1973).

III. DECISIONS UNDER FORMER UCC § 75-3-117.

16. In general; liability of guarantor or payment.

Liability of guarantor becomes indistinguishable from that of comaker since guarantor waives presentment, notice of dishonor, and protest and demand upon maker of promissory note. *West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n*, 506 So. 2d 241 (Miss. 1986).

Effect of assumption agreement is to make parties thereto liable on promissory note. *West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n*, 506 So. 2d 241 (Miss. 1986).

Parties who sign guaranty agreement are sureties on promissory note because of that agreement. *West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n*, 506 So. 2d 241 (Miss. 1986).

Cosigners of a note are usually divided into two categories, principals and sureties. If one is a surety, he is usually termed an "accommodation party" (see UCC § 3-415(1)) or a "guarantor" (see UCC § 3-416). A surety (accommodation party) is primarily liable with the principal (maker) to the payee of a note because he lends his name to the note as security (see UCC § 3-415(2)). However, the rights and obligations of a surety are different from those of a principal, one important difference being that if the surety pays the judgment, he stands in the shoes of the creditor and may sue on the judgment itself. In such a case, he has the burden of proving suretyship, and his burden is onerous, since it is presumed that one signs as a comaker unless the suretyship relation between the cosigners appears on the face of the note (holding that plaintiff, who alleged that he was merely surety on note, failed to rebut presumption that he had signed as comaker, since he did not make note part of his summary judgment proof and court thus could not ascertain whether surety relationship alleged actually appeared on face of note). *Caldwell v. Stevenson*, 567 S.W.2d 278 (Tex. Civ. App. 1978).

No notice of default must be given guarantor of unsecured demand note; guarantor became liable as original obligor pursuant to UCC § 3-416. *Knick v. Green*,

545 S.W.2d 269 (Tex. Civ. App. 1976), ref. n.r.e (June 29, 1977).

Under UCC § 3-416(1) payee of note guaranteed by defendant was not required to proceed against maker of note before bringing action against defendant. *Brown Univ. v. Laudati*, 113 R.I. 299, 320 A.2d 609 (1974).

Language of guarantee "to be responsible for payment of the sums owed pursuant to such loan," was clear and unambiguous in that, by its terms and as matter of law, guarantors were guarantors of payment and not collection; and holder of note could sue them without resort to any other party. *Cusick v. Ifshin*, 70 Misc. 2d 564 (1972), aff'd, 73 Misc. 2d 127, 341 N.Y.S.2d 280 (1973).

Under New Jersey UCC, guaranty contract indorsed on reverse side of notes obligated guarantor to pay for attorney's fees and to be bound by acceleration clause as provided for in note. *Warner-Lambert Pharmaceutical Co. v. Sylk*, 471 F.2d 1137 (3d Cir. Pa. 1972).

Note sued upon was signed by party as "guarantor"; held, such party must pay note according to its tenor without resort by holder to any other party as condition precedent. *Sadler v. Kay*, 120 Ga. App. 758, 172 S.E.2d 202 (1969).

Under the Code, a guaranty of payment is in effect the same as a suretyship undertaking and the guarantor may therefor be sued jointly with the primary party without at first making an attempt to recover from such party. *Decatur Coca-Cola Bottling Co. v. Variety Vending Corp.*, 277 F. Supp. 393 (N.D. Ga. 1967).

When corporate officers guarantee payment of a corporate note, they become primarily liable for the payment of the note to the same extent as the corporation. *Reynolds v. Service Loan & Fin. Co.*, 116 Ga. App. 740, 158 S.E.2d 309 (1967).

The Code makes no distinction with respect to a guarantee of payment in terms of whether the debtor is an individual or a corporation. *Reynolds v. Service Loan & Fin. Co.*, 116 Ga. App. 740, 158 S.E.2d 309 (1967).

17. —Similarity to co-maker.

A guarantor of a note, as an accommodation maker, was liable for the entire balance of the note to an accommodation

endorser who paid the note. *Comfort Eng'g Co. v. Kinsey*, 523 So. 2d 1019 (Miss. 1988).

Liability of guarantor of note was same as comaker, and payee had no duty after default by maker to resort either to collateral or to any other party before seeking payment from guarantors. *Rassette v. Jacobson*, 39 Mich. App. 172, 197 N.W.2d 330 (1972).

Guarantor's liability is the same as that of a comaker. *Rassette v. Jacobson*, 39 Mich. App. 172, 197 N.W.2d 330 (1972).

Liability of guarantors of "payment" of loan is indistinguishable from that of a comaker. *Etelson v. Suburban Trust Co.*, 263 Md. 376, 283 A.2d 408 (1971).

18. Liability for guarantee of collection.

Under UCC § 3-416, claim must be prosecuted to judgment and execution returned unsatisfied or maker of note found insolvent in order for there to be recovery on guarantee of collection and not of payment. *Floor v. Melvin*, 5 Ill. App. 3d 463, 283 N.E.2d 303 (3d Dist. 1972).

19. Limited guaranty.

Under guaranty to bank, guaranteeing only obligations on which debtor was primarily liable, guarantor was not liable, under UCC § 3-416 [3], for obligation to bank of third party, on which debtor was secondarily liable as guarantor. *Trego WaKeeney State Bank v. Maier*, 214 Kan. 169, 519 P.2d 743 (1974).

20. Words creating guaranty.

Where parent corporation formed wholly-owned subsidiary solely to acquire assets of defendant's business, purchase agreement provision that parent corporation agreed "to cause buyer to purchase and to accept transfer" did not create guaranty under UCC § 3-416. *Gladding Corp. v. Register*, 293 So. 2d 729 (Fla. App. 1974), cert. discharged, 322 So. 2d 911 (Fla. 1975).

21. Practice and procedure.

In action under UCC § 3-416(1) against guarantor of note because of maker's alleged failure to pay two interest installments on time, where plaintiff demands summary judgment and defendant contends that plaintiff's declaration of default and demand for full payment under acceleration clause is premature because

said plaintiff at time held \$100,000 fund belonging to debtor, the trial court, in its discretion, may deny said summary judgment where there is a reasonable possibility that recovery by plaintiff will be mitigated or offset by defendant's prevailing on counterclaim. *Mock v. Canterbury Realty Co.*, 152 Ga. App. 872, 264 S.E.2d 489 (1980).

Under both UCC § 3-416(1), dealing with payment by guarantor of instrument under contract of guaranty, and terms of actual contract under which guarantors of notes declared that their guaranty obligations were absolute and unconditional and that creditor could bring suit against any guarantor for payment of obligations of principal without regard to whether creditor had brought suit against principal or any other party primarily or secondarily liable on principal's obligations, trial court did not err in granting summary judgment in favor of creditor without joining principal as indispensable party defendant. *Johnson v. First Nat'l Bank*, 143 Ga. App. 384, 238 S.E.2d 747 (1977).

In action to enforce guarantor's liability on promissory note, trial court did not err in instructing jury that sole question was whether or not defendant had signed guarantee agreement where, *inter alia*, defendant did not raise issue of effectiveness of her signature, where jury was presented with guarantee agreement which contained what appeared to be de-

fendant's signature, raising presumption of genuineness under UCC § 3-307, and where, under UCC § 3-416, guarantee agreement obligated defendant to repay loan, interest, and attorneys' fees. *Wolfe v. Madison Nat'l Bank*, 30 Md. App. 525, 352 A.2d 914 (1976).

Where creditor-payee was urged by defendant indorser to forebear from carrying out replevin against goods of debtor-maker, and did so upon defendant's guarantee of payment and credit, creditor-payee was entitled to introduce parol evidence to establish intent of defendant in signing note, and to sue defendant directly and primarily on the notes not only as accommodation indorser-guarantor but also as *de facto* co-maker. *Jamaica Tobacco & Sales Corp. v. Ortner*, 70 Misc.2d 388 (1972).

22. —Defenses; usury.

Guarantor is not party to principal obligation and therefore defense of usury is not available to guarantors. *A.J. Armstrong Co. v. Lincoln Fin. & Thrift, Inc.*, 291 F. Supp. 1008 (E.D. Tenn. 1968).

Where the original corporate debtor may not raise the defense of usury, that defense may not be raised by secondary parties who have guaranteed payment of the corporate note and have thus become primarily liable for its payment. *Reynolds v. Service Loan & Fin. Co.*, 116 Ga. App. 740, 158 S.E.2d 309 (1967).

RESEARCH REFERENCES

ALR. Construction and effect of UCC § 3-416 governing guaranty contracts. 10 A.L.R.4th 897.

§ 75-3-118. Statute of limitations.

(a) Except as provided in subsection (e), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six (6) years after the due date or dates stated in the note or, if a due date is accelerated, within six (6) years after the accelerated due date.

(b) Except as provided in subsection (d) or (e), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six (6) years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten (10) years.

(c) Except as provided in subsection (d), an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within three (3) years after dishonor of the draft or ten (10) years after the date of the draft, whichever period expires first.

(d) An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three (3) years after demand for payment is made to the acceptor or issuer, as the case may be.

(e) An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six (6) years after demand for payment is made to the maker, but if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed.

(f) An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (i) within six (6) years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (ii) within six (6) years after the date of the acceptance if the obligation of the acceptor is payable on demand.

(g) Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty, or (iii) to enforce an obligation, duty, or right arising under this chapter and not governed by this section must be commenced within three (3) years after the cause of action accrues.

SOURCES: Former § 75-3-118: Codes, 1942, § 41A:3-118; Laws, 1966, ch. 316, § 3-118; Laws, 1992, ch. 420, § 18, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-122.

11. Accrual of cause of action, generally.
12. —Particular cases.

the date of the instrument, even though no demand is made by the payee (holding that under UCC § 3-114(2), the stated date of demand notes that were antedated determined when notes were payable). *Cantonwine v. Fehling*, 582 P.2d 592 (Wyo. 1978).

Rule that loan of money payable on demand creates present debt, and that statute of limitations begins to run against lender from date of loan, is in accord with UCC § 3-122(1)(b). *Hopper v. Hemphill*, 19 Wash. App. 334, 575 P.2d 746 (1978).

UCC § 3-122, which provides for accrual of interest from date of maturity of commercial paper, prevailed in action on negotiable promissory note over another statute which gave jury discretion to fix time when interest commenced in any action on contract, where other statute

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-122.

11. Accrual of cause of action, generally.

Under UCC § 3-122(1)(b), a cause of action on a demand instrument accrues on

stated that it applied "except as otherwise provided in § 3-122 of the Uniform Commercial Code." *Schwab v. Norris*, 217 Va. 582, 231 S.E.2d 222 (1977).

Statute of limitations on note payable "30 days after demand" began running on making of note, and suit to enforce note was therefore time barred when brought more than six years after note was executed. *Envionics, Inc. v. Pratt*, 50 A.D.2d 552 (1st Dep't 1975).

Demand note was mature and due when issued. *Paine-Erie Hosp. Supply, Inc. v. Lincoln First Bank*, 82 Misc. 2d 432 (1975).

Under UCC § 3-122, when read in light of § 1-201, all remedies on time instrument fall due at beginning of business day after maturity; thus, bank was not entitled to set off customer's checking accounts towards satisfaction of 30-day promissory note executed by customer and made payable to bank where judgment creditor of customer served writ of execution on bank as garnishee on date that note matured. *Bethlehem Acceptance Corp. v. Ed Newman Motor Co.*, 230 Pa. Super. 441, 331 A.2d 497 (1974).

Having found defendant and third party defendant in effect liable as drawers of unpaid settlement draft, district court could award interest and attorney's fees to plaintiff. *Farmers & Merchants Mut. Fire Ins. Co. v. Pulliam*, 481 F.2d 670 (10th Cir. Okla. 1973).

On an installment note, the statute of limitations begins to run against each installment on the day following its maturity date. *Oklahoma Brick Corp. v. McCall*, 497 P.2d 215 (Okla. 1972).

Cause of action ripens day after note matures without payment, since, in computing limitations period, day on which cause of action accrues is to be excluded. *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros.*, 452 F.2d 1346, 147 U.S. App. D.C. 14 (D.C. Cir. 1971), but see, *Steorts v. American Airlines*, 647 F.2d 194, 207 U.S. App. D.C. 369 (1981).

Cause of action against endorser of promissory note accrues to holders in due course following dishonor of instrument, and holders need not first recover judgment against maker before proceeding against the endorser. *D'Andrea v. Feinberg*, 45 Misc. 2d 270 (1965).

12. —Particular cases.

Under UCC § 3-122(1)(a), note for \$2500 dated October 29, 1952, which was executed on printed form and which contained in addition to printed clauses a separate paragraph stating that it was due on demand from maker's estate at maker's death, did not mature and was not payable until happening of such death and making of such demand, and non-UCC four-year statute of limitations did not begin to run until date of maker's death (where maker died on November 20, 1976, suit was instituted on March 2, 1977, and court stated that mere fact that note was 25 years old did not render it unenforceable). *Thigpen v. Thigpen*, 563 S.W.2d 868 (Tex. Civ. App. 1978), ref. n.r.e. (July 19, 1978).

Party who stipulated to having signed demand note as both "guarantor and endorser" on November 27, 1968, and against whom demand for payment was made on August 15, 1975, was liable on instrument because (1) nothing in New Jersey UCC precluded person from being liable as both an indorser and a guarantor; (2) New Jersey six-year statute of limitations did not bar suit against defendant, since under New Jersey UCC § 3-122(3) cause of action accrued against defendant, as indorser of note, not on date note was executed but on August 15, 1975, when demand for payment was made on defendant following maker's default; and (3) defendant could not escape liability by contending that since term "indorser" was spelled with an "i" in UCC § 3-122(3) and with an "e" ("endorser") in note sued on, provisions of UCC § 3-122(3) were inapplicable to case (also rejecting defendant's contention that since dishonor, or notice of dishonor, was not required as condition precedent to liability of guarantor, action against him in that capacity accrued on date note was executed). *Central Jersey Bank & Trust Co. v. Lady Van Indus., Inc.*, 154 N.J. Super. 459, 381 A.2d 831 (1977), disapproved, *Ligran, Inc. v. Medlawtel, Inc.*, 86 N.J. 583, 432 A.2d 502 (1981).

Where (1) bank's customer obtained loan from bank to buy car and later sold car and received check in payment, which was credited to customer's account, (2) customer then paid off loan by giving

personal check to bank, (3) check credited to customer's account was later dishonored, and (4) customer's checking account lacked sufficient funds to charge back amount of dishonored check, bank as holder in due course of dishonored check had cause of action under UCC § 3-122(3) against customer as indorser of such check, following receipt of notice of check's dishonor. *Serve v. First Nat'l Bank*, 143 Ga. App. 239, 237 S.E.2d 719 (1977).

Demand note was mature and due when issued. *Paine-Erie Hosp. Supply, Inc. v. Lincoln First Bank*, 82 Misc. 2d 432 (1975).

In action to recover alleged indebtedness evidenced by check, check was demand instrument under UCC § 3-108 since no date for payment was indicated and, as such, any cause of action on debt accrued on date of instrument under UCC § 3-122. *Turner v. State*, 508 S.W.2d 861 (Tex. Civ. App. 1974).

Although cause of action accrues in case of demand instrument on its date under UCC § 3-122 (1)(b), where demand note was given to payee with instructions that it was to be held for payment until maker and his wife had died, note was subject to condition precedent and cause of action did not accrue and statute of limitations did not begin to operate until condition was performed; parol evidence was admissible for purpose of showing that promis-

sory note, though absolute in form, delivered to manual possession of payee, was not intended to take effect as binding obligation until happening of stipulated contingency. *Washington v. Martin*, 503 S.W.2d 330 (Tex. Civ. App. 1973).

Instrument denominated "Retail Instalment Contract" which showed "seller" to be business college and described articles sold or services rendered as "Med. Secretary Course," with cash price of \$490, and which contained provision waiving defenses against assignee thereof, was not negotiable instrument as defined by UCC §§ 3-104 through 3-112, but came within Retail Instalment and Home Solicitation Sales Act. *Grimes v. Community Loan & Inv. Corp.*, 130 Ga. App. 8, 202 S.E.2d 265 (1973).

Where written contract for sale which provided authority for completion of note set term of note at 2 years and made no mention of periodic instalment payments, and president of payee bank added provisions for 7 instalment payments over approximately 16 months, president's completion of note in terms varying authorized time and manner of payment was unauthorized and constituted material alteration; and suit on note filed 10 months prior to maturity date "as authorized" was premature. *Bank of New Effington v. Thompson*, 502 P.2d 978 (Colo. Ct. App. 1972).

§ 75-3-119. Notice of right to defend action.

In an action for breach of an obligation for which a third person is answerable over pursuant to this chapter or Chapter 4, the defendant may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over. If the notice states (i) that the person notified may come in and defend and (ii) that failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the two (2) litigations, the person notified is so bound unless after seasonable receipt of the notice the person notified does come in and defend.

SOURCES: Former § 75-3-119: Codes, 1942, § 41A:3-119; Laws, 1966, ch. 316, § 3-119, eff March 31, 1968; Laws, 1992, ch. 420, § 19, eff from and after January 1, 1993.

§§ 75-3-120 through 75-3-122. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

§ 75-3-120. [Codes, 1942, § 41A:3-120; Laws, 1966, ch. 316, § 3-120]

§ 75-3-121. [Codes, 1942, § 41A:3-121; Laws, 1966, ch. 316, § 3-121]

§ 75-3-122. [Codes, 1942, § 41A:3-122; Laws, 1966, ch. 316, § 3-122]

Editor's Note — Former § 75-3-120 described the function of an instrument payable through a bank.

Former § 75-3-121 described the function of an instrument payable at a bank.

Former § 75-3-122 stated when a cause of action against a maker or an acceptor accrued.

PART 2.

NEGOTIATION, TRANSFER, AND INDORSEMENT.

SEC.

75-3-201. Negotiation.

75-3-202. Negotiation subject to rescission.

75-3-203. Transfer of instrument; rights acquired by transfer.

75-3-204. Indorsement.

75-3-205. Special indorsement; blank indorsement; anomalous indorsement.

75-3-206. Restrictive indorsement.

75-3-207. Reacquisition.

75-3-208. Repealed.

§ 75-3-201. Negotiation.

(a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

SOURCES: Former § 75-3-201: Codes, 1942, § 41A:3-201; Laws, 1966, ch. 316, § 3-201; Laws, 1992, ch. 420, § 20, eff from and after January 1, 1993.

Federal Aspects — Provisions of 20 USC §§ 1071 and 1078(b), see 20 USCS §§ 1071 and 1078(b).

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-202.

11. In general.
12. Indorsement.
13. —Forged or unauthorized indorsement.
14. —Separate writings as indorsements.
15. Partial or limited assignments.
16. Conditional or restrictive indorsement.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-202.

11. In general.

A money order may be either negotiable or nonnegotiable. If it is negotiable, the term "purchaser," with reference to the instrument, includes under UCC § 3-202(1) one who is a "holder" of the instrument. If a money order is not negotiable, the term "purchaser" will still include virtually all later transferees of the instrument, since such persons will have acquired their interest by some sort of voluntary transaction comprehended by UCC § 3-201. *Aetna Cas. & Sur. Co. v. Schmitt*, 441 F. Supp. 440 (N.D. Cal. 1977).

Document purporting to transfer and assign promissory note which was never attached to note did not serve as effective endorsement of note under UCC § 3-202(2); since note was not issued or endorsed to assignee, assignee was not holder of note as defined in UCC § 1-201(20) and, not being holder, assignee could not possibly be holder in due course and assignment of note was therefore subject to defense of failure of consideration. *Billas v. Dwyer*, 140 Ga. App. 774, 232 S.E.2d 102 (1976).

Where party to litigation admitted owing to opposing party specified sum of money which was paid into registry of

court by certified check, but lapse of nine days occurred before check was deposited by court clerk in court's registry account, opponent was not entitled to interest on amount of check during nine-day period; although first party, as drawer, was not discharged until certified check was paid, nevertheless, check was negotiated by delivery to clerk, the named payee, and this had effect of suspending underlying obligation of party pro tanto, until instrument was presented for payment, and, thus, interest claimed by other party would be owing only if check had been dishonored when presented for payment. *Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc.*, 388 F. Supp. 1362 (N.D. Miss. 1975).

Where owners of real property subject to vendor's lien entered into agreement with holder of vendor's lien note that bank would pay note upon presentation of necessary documents to enable bank to succeed to full rights of holder, where holder sent note and assignment of note and lien to bank but bank declined to complete transaction because no endorsement had been made upon note itself, and where, after papers were returned to holder, deed of trust on property was foreclosed, tender of payment by owners invoked provisions of UCC § 3-604(1), so as to relieve owners of liability subsequent to such tender to pay interest, costs and attorney's fees. *Penny v. Kelley*, 528 S.W.2d 330 (Civ. App. 1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. *Hall v. Security Planning Serv., Inc.*, 371 F. Supp. 7 (D. Ariz. 1974).

Plaintiff-assignee of facsimile copy of promissory note was entitled to maintain

action on note against defendant-maker, although plaintiff did not have possession of note, where bank that held note returned it to maker, though it had not been paid, and then subsequently prepared facsimile and assigned it to plaintiff. Plaintiff was not holder of note under UCC § 1-201(20), since he was never in possession of note, but he was transferee of note, though bank did not deliver it to him, and, as such, he could maintain action on note since maker had possession of note and note was in evidence. *Scheid v. Shields*, 269 Or. 236, 524 P.2d 1209 (1974).

12. Indorsement.

Where a bank, which under UCC § 3-202(1) was holder of note delivered to it with necessary endorsements of both copayees, took such note (1) "for value" under UCC §§ 3-302(1)(a) and 3-303(a) because it had taken it as collateral for loan to note's copayees, and (2) "in good faith" under UCC § 3-302(1)(b) and "without notice" under UCC § 3-302(1)(c) of any claims against note's copayees, court held (1) that bank was holder in due course of such note under UCC § 3-302(1), (2) that under UCC § 3-305(1), bank took note free from all claims to it by any person, and (3) that bank therefore was entitled to priority of payment over judgment creditor of note's copayees in situation where, prior to copayees' transfer of note to bank, judgment creditor of copayees had served writ of garnishment on maker of note. *Bricks Unlimited, Inc. v. Agee*, 672 F.2d 1255 (5th Cir. 1982).

Bank which took mortgage on assignment without indorsement of note supporting mortgage, and which did not notify maker of note about such assignment until interest payment was due, was not holder in due course under UCC § 3-202(1), providing that instrument payable to order is negotiated by delivery with any necessary endorsement. *Second Nat'l Bank v. G.M.T. Properties, Inc.*, 364 So. 2d 59 (Fla. App. 1978).

Where (1) debtor sold corporate stock on July 25, 1974 to defendants for \$180,000, and defendants executed promissory notes under pledge agreement securing payment of stock's purchase price and delivered notes to escrowee, which also received the purchased stock, (2) debtor

on March 19, 1975, with knowledge and consent of defendants and escrowee, assigned notes to creditor as collateral to secure payment of prior \$60,000 debt, indorsed them to creditor's order, and delivered them to creditor which retained possession of them until August 24, 1976, a date following date on which debtor had fully debt due creditor, (3) on November 5, 1975, when defendants still owed debtor \$135,000 on notes and notes were still in creditor's possession as collateral for payment of \$28,000 balance then owed by debtor to creditor, debtor entered into agreement with plaintiff law firm and its client under which payments on prior debt owed by debtor to such client were extended, prospective lawsuit was settled, sums thus due to client were collateralized by assignment of debtor's interest in stock-payment notes, and notes themselves and pledge agreement securing them were also assigned to plaintiff on behalf of its client, subject to prior collateral assignment in favor of debtor's first creditor, (4) first creditor on August 24, 1976 acknowledged to escrowee that debtor had fully discharged debt due it, delivered stock-payment notes in suit to plaintiff law firm, but never indorsed notes to plaintiff's order, (5) on August 25, 1976, plaintiff, defendants (purchasers of debtor's stock), debtor, and escrowee executed written acknowledgements of debtor's assignment of notes and pledge agreement to plaintiff, and plaintiff requested that it be paid next installment on notes, which was due on October 1, 1976, (5) on April 5, 1976, IRS assessed delinquent income-tax liability against debtor and filed notice of tax lien on August 4, 1976, (6) on October 1, 1976, escrowee paid installment payment due on notes to IRS, and (7) on October 5, 1976, plaintiff after due notice declared default on notes (because of failure to receive October 1, 1976 installment payment thereon) and under acceleration clause in notes demanded full payment thereof, court held (1) that plaintiff, as nominee for its client, acquired valid collateral assignment of proceeds of notes to extent that proceeds were not required to satisfy first creditor's prior security interest therein, (2) that under UCC § 3-202(3), debtor's indorsement

and negotiation of notes to first creditor merely created partial assignment of notes' proceeds and did not divest debtor of ultimate right to all proceeds not required to satisfy debt owed to first creditor, (3) that debtor's remaining interest in notes' proceeds was the interest that debtor had assigned to plaintiff as collateral on November 5, 1975, and that such assignment, under UCC § 9-204(1), gave plaintiff valid security interest in debtor's residuary interest in notes' proceeds, (4) that plaintiff's security interest in notes' proceeds was not perfected until August 24, 1976, when it became perfected under UCC § 9-305 by possession of notes following first creditor's delivery thereof to plaintiff, (5) that IRS tax lien was not superior to plaintiff's perfected security interest in notes, since neither plaintiff nor its client had received any notice of such lien until September 20, 1976, and (6) that neither plaintiff nor its client could accelerate unpaid balance due on notes, since plaintiff, as nominee for its client, was merely holder of security interest in notes and was not "holder" of notes within meaning of UCC § 1-201(20) because of first creditor's failure to indorse them to plaintiff's order (holding that plaintiff was entitled to receive, on behalf of its client, all installment payments due on notes, commencing with installment due on October 1, 1976). *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Where owners of real property subject to vendor's lien entered into agreement with holder of vendor's lien note that bank would pay note upon presentation of necessary documents to enable bank to succeed to full rights of holder, where holder sent note and assignment of note and lien to bank but bank declined to complete transaction because no endorsement had been made upon note itself, and where, after papers were returned to holder, deed of trust on property was foreclosed: (1) tender made by property owners qualified as legal tender under UCC § 2-511(2), unless holder was excused from his obligation to endorse note upon instrument itself; (2) assignment of vendor's lien note, without endorsement upon instrument itself, was not in compliance with provisions of UCC § 3-202(2) or commercial

practices governing such transaction. Since holder failed to endorse note, he could not claim failure to tender money in discharge of obligation represented by note, and foreclosure of lien without giving owners reasonable time to comply with demands then made was unauthorized. Furthermore, tender of payment by owners invoked provisions of UCC § 3-604(1), so as to relieve owners of liability subsequent to such tender to pay interest, costs and attorney's fees. *Penny v. Kelley*, 528 S.W.2d 330 (Civ. App. 1975).

Where note pledged to bank was never indorsed as required by §§ 3-201(3) and 3-202(2), bank was not holder in due course but was simply bona fide assignee for value and without notice. *Lane v. Midwest Bancshares Corp.*, 337 F. Supp. 1200 (E.D. Ark. 1972).

13. —Forged or unauthorized indorsement.

Forged signature of payee on front of check did not preclude defendant's conviction for forgery since UCC § 3-202(2) does not specify any specific location for an indorsement, nor was there any indication that the signature was not intended as an indorsement within the meaning of UCC § 3-402. *United States v. Tufi*, 536 F.2d 855 (9th Cir. Haw. 1976).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. *Atlas*

Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

Where payee of cashier's check specially endorsed check to order of specified corporation and individual, where endorsement of individual was forged, and where collecting bank accepted check and credited it to account of endorsee company, collecting bank could not stand in shoes of either holder or holder in due course, since endorsement of individual endorser was forged, and it was liable to owner of cashier's check (i.e., purchaser of check) under UCC § 3-419(1)(c) for conversion, notwithstanding fact that it placed funds received into account of corporate endorser. *Tubin v. Rabin*, 382 F. Supp. 193 (N.D. Tex. 1974), supplemented, 389 F. Supp. 787 (N.D. Tex. 1974), *aff'd*, 533 F.2d 255 (5th Cir. Tex. 1976).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized signature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. *Sumiton Bank v. Funding Sys. Leasing Corp.*, 512 F.2d 774 (5th Cir. Ala. 1975).

Where person who presented check to collecting bank did not have authority to negotiate check, collecting bank could not become holder of check based upon unauthorized endorsement, and hence could not become holder in due course. *Thieme v. Seattle-First Nat'l Bank*, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Where plaintiff took draft upon indorsement of one of two named payees and forged indorsement of other payee, transfer conferred upon plaintiff interest of payee who did indorse draft, and no more. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

14. —Separate writings as indorsements.

UCC § 3-202(2), requiring indorsement to be on instrument itself or on paper "so firmly affixed" to instrument as to become part thereof, evidences clear intent to restrict use of "allonge" (paper annexed to note for purpose of writing indorsements

thereon where instrument itself has insufficient space for such indorsements). *Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719 (Tex. Civ. App. 1977), writ *ref'd n.r.e.*, (Sept. 27, 1977).

Bank which took four notes from debtor, which were executed to debtor by third party and assigned by debtor to bank as collateral for another note that debtor executed to bank, was not holder in due course of such notes where (1) debtor did not indorse notes; (2) debtor's signature on single collateral assignment did not constitute indorsement of notes under UCC § 3-202(2), even though such assignment was stapled to notes and expressly referred to them, since assignment was not "so firmly affixed" to notes as to become extension or part of each note; and (3) doctrine of incorporation by reference would not be extended to indorsements of negotiable instruments. *Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719 (Tex. Civ. App. 1977), writ *ref'd n.r.e.*, (Sept. 27, 1977).

Stapling endorsement to checks was permanent attachment so that it became "a part thereof" within meaning of UCC § 3-202(2) and was sufficient to make assignee of checks holder thereof where checks were endorsed to assignee by name, thus qualifying as special endorsement, where subject endorsement was typed on two legal size sheets of paper, and it would have been physically impossible to place all of this language on two small checks, and where endorsement was affixed by stapling it to checks. *Lamson v. Commercial Credit Corp.*, 187 Colo. 382, 531 P.2d 966 (1975).

The indorsement necessary for negotiation under UCC § 3-202 cannot be on separate paper pinned or clipped to instrument purportedly being indorsed. *Tallahassee Bank & Trust Co. v. Raines*, 125 Ga. App. 263, 187 S.E.2d 320 (1972).

An endorsement written on a separate sheet of paper not firmly affixed to note, but merely clipped to it, does not meet the requirements of subsec. (2). *James Talcott, Inc. v. Fred Ratowsky Assocs.*, 38 Pa. D. & C.2d 624 (1965).

15. Partial or limited assignments.

When the holder of promissory notes assigned his interest therein as collateral

to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

The pledgee of promissory notes to secure a debt is the purchaser of a limited interest under § 3-302(4), and not the holder of a limited assignment under § 3-202(3). *Wood v. Willman*, 423 P.2d 82 (Wyo. 1967).

A fractional interest in a negotiable instrument may be "assigned" even though an indorsement must be an indorsement of the entire instrument as "indorsement" relates to negotiation and not assignment. *D'Orazi v. Bank of Canton*, 254 Cal. App. 2d 901 (5th Dist. 1967).

16. Conditional or restrictive indorsement.

Written instructions on reverse side of checks which were properly dated (i.e.,

dated as of time of issue), limiting time for deposit to future date, did not preclude instruments from being payable on demand as required by UCC § 3-104(2)(b); instructions on checks could not be regarded as qualified or restrictive endorsements since drawer was not holder of checks and, since instructions were not endorsements, they were not binding on payee or on subsequent holders. *Silver Creations, Ltd. v. UPS*, 133 N.J. Super. 543, 337 A.2d 641, 88 A.L.R.3d 1093 (L. Div. 1975).

The plaintiff's motion for summary judgment in lieu of complaint against an insurance broker brought on five separate "premium finance agreements" was denied, where the assignment of the notes by the broker to plaintiff was controlled by Banking Law § 566 subd 2 which provided that the assigning broker could only be held as an indorser "with recourse" upon an express agreement to that effect, notwithstanding contrary provisions of the Uniform Commercial Code that would be applicable if the instrument was a conventional promissory note. Accordingly, plaintiff was granted leave to serve a complaint. *Standard Premium Plan Corp. v. Wolf*, 56 Misc. 2d 522 (1968).

RESEARCH REFERENCES

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-202. Negotiation subject to rescission.

(a) Negotiation is effective even if obtained (i) from an infant, a corporation exceeding its powers, or a person without capacity, (ii) by fraud, duress, or mistake, or (iii) in breach of duty or as part of an illegal transaction.

(b) To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy.

SOURCES: Former § 75-3-202: Codes, 1942, § 41A:3-202; Laws, 1966, ch. 316, § 3-202; Laws, 1986, ch. 401, § 2; Laws, 1992, ch. 420, § 21, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-207.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

I. DECISIONS UNDER CURRENT LAW.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-207.

11. In general.

Free right of negotiation inures to benefit of payee of check even though he may have obtained instrument by fraud. *Johnson v. State*, 158 Ind. App. 611, 304 N.E.2d 555 (1973).

An infant cannot rescind a negotiable instrument as against a subsequent holder in due course. *Snyder v. Town Hill Motors, Inc.*, 193 Pa. Super. 578, 165 A.2d 293 (1960).

Where a minor purchased an automobile from a friend, agreeing to give the latter a check as part payment, and the friend directed the minor to indorse and deliver the check to a motor company as down payment on an automobile for the friend, the motor company, having received the instrument by negotiation from the friend for value, in good faith, and without notice that it was overdue or had been dishonored or that there was any defense against it, was a subsequent holder in due course. The fact that the check was not manually transferred from the minor to the friend and then to the motor company was immaterial; constructive delivery being sufficient. *Snyder v. Town Hill Motors, Inc.*, 193 Pa. Super. 578, 165 A.2d 293 (1960).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. *Garnett v. Associates Dist. Corp.*, 233 Miss. 849, 103 So. 2d 368 (1958).

Defenses existing between original parties were not available against bona fide purchaser, acquiring note and conditional sale contract before maturity. *Commercial Credit Co. v. Summers*, 154 Miss. 501, 122 So. 541 (1929).

Purchaser after maturity from holder in due course held not affected by agreement for cancellation between maker and payee. *Rhymes v. Boggess*, 146 Miss. 707, 111 So. 844 (1927).

Purchaser's knowledge that stock for which note was executed was valueless at time of purchase held no defense. *McAnge v. Falls*, 145 Miss. 471, 110 So. 840 (1927).

Accommodation party liable to holder for value only when he became such before maturity. *Rylee v. Wilkinson*, 134 Miss. 663, 99 So. 901 (1924).

Failure of consideration no defense against bona fide purchaser. *Despres, Bridges & Noel v. Hough Drug Co.*, 123 Miss. 598, 86 So. 359 (1920).

Failure of corporation payee to file charter as condition to doing business no defense against bona fide holder. *Despres, Bridges & Noel v. Hough Drug Co.*, 123 Miss. 598, 86 So. 359 (1920).

Where note was assigned as security, assignee became holder for value and it became free of any defense existing between maker and payee. *First Nat'l Bank v. John McGrath & Sons Co.*, 111 Miss. 872, 72 So. 701 (1916).

§ 75-3-203. Transfer of instrument; rights acquired by transfer.

(a) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee.

SOURCES: Former § 75-3-203: Codes, 1942, § 41A:3-203; Laws, 1966, ch. 316, § 3-203; Laws, 1992, ch. 420, § 22, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-201.

11. In general.
12. Transferee as acquiring transferor's rights.
13. —Fraud or illegality.
14. —Notice of claim or defense.
15. —Security interests.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-201.

11. In general.

It is elementary commercial law that a note can be transferred from a holder to a transferee, and that the transferee has at least the same rights as the transferor

(holding that transferee of over-due promissory note was proper party to enforce collection of note). *Ford Motor Credit Co. v. Soileau*, 357 So. 2d 563 (La. App. 1978).

Transfer of instrument vests in transferee such rights as transferor has therein and, thus, payee of check succeeds to all rights of drawer when such check is transferred and delivered to payee. *Johnson v. State*, 158 Ind. App. 611, 304 N.E.2d 555 (1973).

12. Transferee as acquiring transferor's rights.

Protection of holder-in-due-course status was not transferred by bank to plaintiff under UCC § 3-201(1), with respect to certificate of deposit which plaintiff purportedly purchased from bank and which was dishonored on its maturity by second bank, to which first bank presented it for payment, because of second bank's prior lien thereon, where first bank had no right to sell certificate to plaintiff, was not its true transferor, and true transferor was not a holder in due course. *Rozen v. North*

Carolina Nat'l Bank, 588 F.2d 83 (4th Cir. N.C. 1978).

A money order may be either negotiable or nonnegotiable. If it is negotiable, the term "purchaser," with reference to the instrument, includes under UCC § 3-202(1) one who is a "holder" of the instrument. If a money order is not negotiable, the term "purchaser" will still include virtually all later transferees of the instrument, since such persons will have acquired their interest by some sort of voluntary transaction comprehended by UCC § 3-201. *Aetna Cas. & Sur. Co. v. Schmitt*, 441 F. Supp. 440 (N.D. Cal. 1977).

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depositary bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depositary bank, and (4) depositary bank then sued drawer-drawee for payment of draft, court held that depositary bank was not entitled to recover because (1) under UCC § 3-201(1), depositary bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depositary bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depositary bank could not negotiate draft or become holder or holder in due course thereof, and (4) depositary bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. *Foremost Ins. Co. v. First City Sav. & Loan Ass'n*, 374 So. 2d 840 (Miss. 1979).

Plaintiff-assignee of facsimile copy of promissory note was entitled to maintain action on note against defendant-maker, although plaintiff did not have possession of note, where bank that held note returned it to maker, though it had not been

paid, and then subsequently prepared facsimile and assigned it to plaintiff. Plaintiff was not holder of note under UCC § 1-201(20), since he was never in possession of note, but he was transferee of note, though bank did not deliver it to him, and, as such, he could maintain action on note since maker had possession of note and note was in evidence. *Scheid v. Shields*, 269 Or. 236, 524 P.2d 1209 (1974).

Where corporation paid note signed by corporation president but not by corporation, corporation acquired rights of transferee and could not enforce note against maker until date when it could have been enforced by transferor; so that corporation as account debtor was not entitled to set off, since it had had notification of assignment of accounts more than 3 months before claim against assignor on note accrued. *Commercial Sav. Bank v. G & J Wood Prods. Co.*, 46 Mich. App. 133, 207 N.W.2d 401 (1973).

Since bank-transferor was holder in due course and plaintiff-transferee was not prior holder, plaintiff-transferee acquired rights of holder in due course irrespective of question of value. *Canyonville Bible Academy v. Lobemaster*, 108 Ill. App. 2d 318, 247 N.E.2d 623 (4th Dist. 1969).

One discharging an ordinary negotiable instrument by payment could have the rights of a holder in due course only if his immediate predecessor had similar rights, and where the immediate predecessor was an agent he could not have had the rights of a holder in due course as against the principal. *E.F. Hutton & Co. v. Manufacturers Nat'l Bank*, 259 F. Supp. 513 (E.D. Mich. 1966).

13. —Fraud or illegality.

In the absence of any fraud or illegality, the accommodation maker of note who paid it and was assigned the note and real estate mortgage securing it became subrogated to the rights of the former holder and could sue the maker on the note and foreclose the mortgage. *Simson v. Bilderbeck, Inc.*, 76 N.M. 667, 417 P.2d 803 (1966).

14. —Notice of claim or defense.

The exclusion from the shelter principle in UCC § 3-201(1) of one who, with notice of prior claims, takes back an instrument

from a holder in due course, rests on sound logic. Operation of the shelter principle in favor of such a person would defeat the purpose of subjecting him to defenses of the maker. Without this exception to the shelter principle, one who is not a holder in due course, by a transfer and an agreement to repurchase, could readily avoid the limitations under which he held the instrument in the first place. *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 83 (4th Cir. N.C. 1978).

Protection of holder-in-due-course status was not transferred by bank to plaintiff under UCC § 3-201(1), with respect to certificate of deposit which plaintiff purportedly purchased from bank and which was dishonored on its maturity by second bank, to which first bank presented it for payment, because of second bank's prior lien thereon, where first bank had no right to sell certificate to plaintiff, was not its true transferor, and true transferor was not a holder in due course. *Rozen v. North Carolina Nat'l Bank*, 588 F.2d 83 (4th Cir. N.C. 1978).

Where transferee bank's security interest in notes was not obtained prior in time to interest therein that it took by assignment in transfer from transferor bank, transferee bank was not prior holder of note, within meaning of § 3-201, with notice of defenses thereto. *Doctors Hosp. of Texarkana, Inc. v. Republic Nat'l Bank*, 498 S.W.2d 466 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 17, 1973).

One who took as successor to holder in due course, by reacquiring notes after participating fully in underlying transactions, had actual notice of defense of discharge, so that defense could be asserted, since successor did not have holder in due course status under UCC § 3-302 because of exception within UCC § 3-201(1) relating to transferee who as prior holder had notice of defense. *Coplan Pipe & Supply Co. v. Ben-Frieda Corp.*, 256 So. 2d 218 (Fla. App. 1972).

Where a holder takes with knowledge of a defense, he cannot improve his position by a transfer to a holder in due course and the subsequent reacquisition of the instrument from such holder. *Program Aids Co. v. W. R. Bean & Son, Inc.*, 4 U.C.C. Rep. Serv. 210 (1967, NY Sup).

One with the rights of a holder in due course of a promissory note, who has not otherwise lost such rights, does not diminish his status by purchasing the note later at a judicial sale, although he may not by virtue of such purchase alone become a due course holder. *Finance Co. of Am. v. Wilson*, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

A bank which for the second time accepted for deposit to the personal account of the officer of a corporation in receivership a long past due check payable to the corporation's order, at a time when the bank had knowledge of the receivership, could not be a holder in due course when the drawee bank again refused payment. *County Trust Co. v. Pascack Valley Bank & Trust Co.*, 93 N.J. Super. 252, 225 A.2d 605 (App. Div. 1966).

15. —Security interests.

Under UCC §§ 3-201(2), which deals with transfer of security interest in instrument, and 9-207(1), which deals with secured party's duty to preserve collateral in his possession, where payee of note executed by defendant assigned such note to bank as collateral security for loan, (1) payee had no right to compromise or settle note, or to take any action that might diminish bank's interest therein, and (2) bank's title thereto, to extent of debt owed to it by payee, was paramount. Moreover, after balance of payee's debt to bank had been paid by note's maker and bank had returned note to payee, note was still valid and outstanding, although maker was entitled to credit thereon for amount that he had paid bank in order to discharge payee's indebtedness to bank. *Vinson v. McCarty*, 413 So. 2d 1026 (Miss. 1982).

When the holder of promissory notes assigned his interest therein as collateral to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of

being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Where bank issued cashier's check to individual who had personally guaranteed certain notes which were payable to borrowers from bank and were held by bank as collateral security for loans made to such borrowers, and where guarantor subsequently became bankrupt, bank was, at very least, transferee of unindorsed order instruments which bankrupt had personally guaranteed and, therefore, by virtue of proof that it took notes in proper transactions with holders thereof and "shelter" provisions of UCC § 3-201, bank succeeded to rights of transferors of holders of instruments, to full extent of its security

interest; under UCC §§ 3-301 and 3-603(1), holder of instrument, whether or not true owner, could enforce payment thereon and discharge paying party, and thus, if bank could demand payment from guarantor when due, bank was entitled to file in its own right proof of claim in bankruptcy and to assert setoff against cashier's check. In re *Johnson*, 552 F.2d 1072 (4th Cir. Va. 1977).

Where corporate officer delivered to bank note payable to corporation and where proceeds of note were credited to corporate account and were thereafter drawn against by corporation, transfer of note to bank for value gave bank "the specifically enforceable right to have the unqualified indorsement" of corporation on note, even though bank had no corporate resolution authorizing officer to deal with bank. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 60 Misc. 2d 499 (1969).

§ 75-3-204. Indorsement.

(a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument; provided, however, that an indorsement of instruments representing student loans, including loans that are insured by the United States Secretary of Education under 20 U.S.C.A. 1071, et seq., as amended, or by a state or nonprofit private institution or organization with which the United States Secretary of Education has an agreement under 20 U.S.C.A. 1078(b) as amended, may be made by signed blanket indorsement, rather than in the manner otherwise provided in this subsection, if a notation to that effect is made in the name of the transferee on the instrument representing the student loan.

(b) "Indorser" means a person who makes an indorsement.

(c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

(d) If an instrument is payable to a holder under a name that is not the name of the holder, indorsement may be made by the holder in the name stated

in the instrument or in the holder's name or both, but signature in both names may be required by a person paying or taking the instrument for value or collection.

SOURCES: Former § 75-3-204: Codes, 1942, § 41A:3-204; Laws, 1966, ch. 316, § 3-204; Laws, 1992, ch. 420, § 23, eff from and after January 1, 1993.

Federal Aspects — Loans inspired by the United States Secretary of Education under 20 U.S.C.A. 1071, et seq., see 20 USCS § 1071 et seq.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-201.

11. In general.
12. Right to indorsement.
13. —“For value”.
14. —Payable to order or bearer.
15. When negotiation occurs.
16. —Ownership rights absent indorsement.
17. —Presumption of ownership.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-201.

11. In general.

Under UCC § 3-203 (dealing with wrong or misspelled names), check mistakenly made payable to “Robert L. Agaliois” instead of “Louis Agaliois” could properly be indorsed by intended payee in his own name, or in name of named payee, or with both such names. *Agaliois v. Agaliois*, 38 N.C. App. 42, 247 S.E.2d 28 (1978).

Under UCC § 3-203, check with misspelled name of payee was valid and negotiable where check was endorsed with correct spelling. *State v. Powell*, 220 Kan. 168, 551 P.2d 902 (1976).

Where note pledged to bank was never indorsed as required by §§ 3-201(3) and 3-202(2), bank was not holder in due course but was simply bona fide assignee for value and without notice. *Lane v. Mid-*

west Bancshares Corp., 337 F. Supp. 1200 (E.D. Ark. 1972).

Payee is under no duty to authorize check made out to payee under erroneous designation, and such an unendorsed check would not constitute payment or tender of payment to payee. *Moore v. Copeland*, 478 S.W.2d 573 (Tex. Civ. App. 1972), ref. n.r.e (June 21, 1972).

A transferee who has neglected to obtain the indorsement necessary to make him a holder may enforce a note, foreclose on collateral, and obtain a deficiency judgment against the debtor. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

The instant section purports to give only an indorsee for value, and not the maker of the note, the power to require indorsement in both names under the circumstances stated in the section. *Watertown Fed. Sav. & Loan Ass'n v. Spanks*, 346 Mass. 398, 193 N.E.2d 333 (1963).

12. Right to indorsement.

Where corporate officer delivered to bank note payable to corporation and where proceeds of note were credited to corporate account and were thereafter drawn against by corporation, transfer of note to bank for value gave bank “the specifically enforceable right to have the unqualified indorsement” of corporation on note, even though bank had no corporate resolution authorizing officer to deal with bank. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 60 Misc. 2d 499 (1969).

13. —“For value”.

Where obligor by property settlement agreement and contract agreed for note to be transferred to wife and knew that such

transfer was to be made and that no particular method for such transfer was provided, delivery to wife of promissory note payable to her father with intent to invest wife with ownership was effective gift of note and did not require written transfer. *Waters v. Waters*, 498 S.W.2d 236 (Tex. Civ. App. 1973), ref. n.r.e (Jan. 16, 1974).

The assignee of an unindorsed note may enforce the note as against an accommodation party where the transfer was made for value, as in such case he had the right to obtain the necessary indorsement and therefore should be regarded as a holder. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

14. —Payable to order or bearer.

Final clause of UCC § 3-201(3), which provides that until instrument is indorsed there is no presumption that transferee is its owner, is intended to make clear that transferee without indorsement of order instrument is not holder of such instrument and thus is not aided by presumption, provided by UCC § 3-307(2), that holder of instrument is entitled to recover thereon. In such case, terms of obligation do not run to transferee without indorsement, and he must account for his possession of the unindorsed paper by proving transaction through which he acquired it (where transferee of two promissory notes testified only as to some of the circumstances under which she acquired possession of notes, and court ordered new trial of action). *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

Although, under UCC § 3-201, holder of instrument payable to his order may transfer it for value without endorsing it, mere possession of unendorsed instrument is not prima facie evidence of ownership; thus, if face of instrument indicates title is in any person other than possessor, burden would be on possessor to prove his ownership by a valid transfer. *N.E. England Assocs. v. Davis*, 333 So. 2d 696 (La. App. 1976).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized sig-

nature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. *Sumiton Bank v. Funding Sys. Leasing Corp.*, 512 F.2d 774 (5th Cir. Ala. 1975).

15. When negotiation occurs.

In action by materials supplier against subcontractor to recover entire proceeds of four checks drawn by general contractor and made jointly payable to both supplier and subcontractor, where subcontractor surrendered all four checks to supplier without indorsement and general contractor's bank, at supplier's request, exchanged such checks for two cashier's checks made payable to supplier and subcontractor, (1) bank by exchanging checks originally issued for cashier's checks did not alter rights of parties named in originally issued checks; (2) drawer of original checks (general contractor) was not placed at disadvantage because drawer's account was immediately chargeable on presentation and acceptance of original checks; (3) payees of original checks (supplier and subcontractor) were also not placed at disadvantage because funds in same amount were available to them from the cashier's checks; (4) validity of drawer's order to bank to make payment to payees named in original checks was not in question; and (5) making of cashier's checks payable to payees named therein (supplier and subcontractor) did not circumvent purpose of requirement of indorsements, since indorsements would still be routinely required under UCC § 3-104(2)(b) and UCC §§ 3-201 et seq. to negotiate the cashier's checks. In such case, bank was not negligent in performing customer's orders under rule that bank will be protected if it pays without indorsement as long as payee actually receives money ordered by drawer to be paid. *Swan Air Conditioning Co. v. Crest Constr. Corp.*, 568 P.2d 1330 (Okla. Ct. App. 1977).

Notwithstanding that transferor of notes was a holder, bank that took several unindorsed notes as collateral for loan did not acquire status of holder under UCC § 3-201, which provides that transfer of instrument vests in transferee such rights as transferor had, since statute also dis-

tinguishes between mere transfer and negotiation and provides that negotiation conferring holder status occurs only when indorsement is made. *Security Pac. Nat'l Bank v. Chess*, 58 Cal. App. 3d 555 (2d Dist. 1976).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized signature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. *Sumiton Bank v. Funding Sys. Leasing Corp.*, 512 F.2d 774 (5th Cir. Ala. 1975).

Where note pledged to bank was never indorsed as required by §§ 3-201(3) and 3-202(2), bank was not holder in due course but was simply bona fide assignee for value and without notice. *Lane v. Midwest Bancshares Corp.*, 337 F. Supp. 1200 (E.D. Ark. 1972).

16. —Ownership rights absent indorsement.

In action by corporation and individual plaintiffs, who were sole shareholders of such corporation, to recover on dishonored check made out to individual plaintiffs by one who represented defendant buyers of plaintiff corporation, where (1) plaintiffs, after being informed by defendants that check would not be honored, indorsed check to second corporation with notation, "for funds advanced," (2) second corporation indorsed check to bank for deposit only and sent check to bank for collection, (3) bank, after indorsing and sending check for collection, physically returned it after dishonor to second corporation, and (4) second corporation then physically returned it without indorsement to plaintiffs and assigned to plaintiffs all of second corporation's right, title, and interest therein, trial court properly held (1) that plaintiffs had standing to sue on check, even though they were not holders or transferees for value, since transfers specified in UCC § 3-201(1) are not limited to transfers for value, and (2) that since plaintiffs, although transferees without indorsement, proved transaction by which they had acquired check from holder, they therefore acquired rights of a

holder and were entitled, on check's production, to presumption of entitlement to recovery under UCC § 3-307(2) because defendants did not establish defense to recovery. *Perry & Greer, Inc. v. Manning*, 282 Or. 25, 576 P.2d 791 (1978).

Final clause of UCC § 3-201(3), which provides that until instrument is indorsed there is no presumption that transferee is its owner, is intended to make clear that transferee without indorsement of order instrument is not holder of such instrument and thus is not aided by presumption, provided by UCC § 3-307(2), that holder of instrument is entitled to recover thereon. In such case, terms of obligation do not run to transferee without indorsement, and he must account for his possession of the unindorsed paper by proving transaction through which he acquired it (where transferee of two promissory notes testified only as to some of the circumstances under which she acquired possession of notes, and court ordered new trial of action). *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

Although, under UCC § 3-201, holder of instrument payable to his order may transfer it for value without endorsing it, mere possession of unendorsed instrument is not prima facie evidence of ownership; thus, if face of instrument indicates title is in any person other than possessor, burden would be on possessor to prove his ownership by a valid transfer. *N.E. England Assocs. v. Davis*, 333 So. 2d 696 (La. App. 1976).

A transferee who has neglected to obtain the indorsement necessary to make him a holder may enforce a note, foreclose on collateral, and obtain a deficiency judgment against the debtor. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

17. —Presumption of ownership.

In action to determine whether two certificates of deposit should be included in estate of decedent, certificates of deposit were not negotiable under UCC § 3-104 where there were neither payable to order nor to bearer on their face; certificates of deposit were governed by UCC pursuant to UCC § 3-805 where they satisfied all attributes of negotiable instrument except words of negotiability; cousin of decedent

was entitled to one of certificates of deposit where decedent had indorsed it in blank and physically delivered it to him, thereby creating presumption of valid and intentional delivery under UCC § 3-201 of inter vivos gift, and where this presumption was not overcome by evidence that periodic interest payments which accrued on certificate continued to be deposited into separate savings account belonging to decedent. *Rand v. Moore*, 414 So. 2d 885 (Miss. 1981).

A decedent's indorsement in blank on the back of a certificate of deposit combined with physical delivery to his cousin created a presumption of a valid and intentional delivery under §§ 75-3-201 and 75-3-805, which presumption was not overcome by evidence that the periodic interest payments accruing on the certificate continued to be deposited into separate savings accounts belonging to the decedent. *Rand v. Moore*, 414 So. 2d 885 (Miss. 1981).

Title—that is, the ownership rights—to a negotiable instrument generally does not pass, as between the immediate parties, until there is a manual or actually authorized delivery of the instrument. However, where a negotiable instrument is no longer in the possession of a person whose signature appears thereon, a valid and intentional delivery by that person is presumed until the contrary is proved; holding that check payable to deceased, which deceased before committing suicide indorsed in blank and placed on table (in apartment that she shared with plaintiff) beside handwritten note in which she bequeathed all her possessions to plaintiff, had been validly delivered to plaintiff, since deceased plainly intended to give check to plaintiff and had expected that he would find it on table where she left it). *Scherer v. Hyland*, 153 N.J. Super. 521, 380 A.2d 704 (1976), *aff'd*, 75 N.J. 127, 380 A.2d 698 (1977).

§ 75-3-205. Special indorsement; blank indorsement; anomalous indorsement.

(a) If an indorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the indorsement identifies a person to whom it makes the instrument payable, it is a “special indorsement.” When specially indorsed, an instrument becomes payable to the identified person and may be negotiated only by the indorsement of that person. The principles stated in Section 75-3-110 apply to special indorsements.

(b) If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a “blank indorsement.” When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

(c) The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing, above the signature of the indorser, words identifying the person to whom the instrument is made payable.

(d) “Anomalous indorsement” means an indorsement made by a person who is not the holder of the instrument. An anomalous indorsement does not affect the manner in which the instrument may be negotiated.

SOURCES: Former § 75-3-205; Codes, 1942, § 41A:3-205; Laws, 1966, ch. 316, § 3-205; Laws, 1992, ch. 420, § 24, *eff from and after January 1, 1993*.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM
COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC
§ 75-3-204.

11. In general.

III. DECISIONS UNDER FORMER
STATUTES.

12. In general.

I. DECISIONS UNDER UNIFORM
COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER
UCC § 75-3-204.

11. In general.

Under UCC § 3-204(2), promissory notes originally made payable to order of specified payee became, on payee's in blank indorsement of notes, payable to bearer and negotiable by delivery alone. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized signature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. *Sumiton Bank v. Funding Sys. Leasing Corp.*, 512 F.2d 774 (5th Cir. Ala. 1975).

Stapling endorsement to checks was permanent attachment so that it became "a part thereof" within meaning of UCC § 3-202(2) and was sufficient to make assignee of checks holder thereof where checks were endorsed to assignee by name, thus qualifying as special endorsement, where subject endorsement was typed on two legal size sheets of paper, and it would have been physically impossible to place all of this language on two small checks, and where endorsement was affixed by stapling it to checks. *Lamson v.*

Commercial Credit Corp., 187 Colo. 382, 531 P.2d 966 (1975).

Where payee of cashier's check specially endorsed check to order of specified corporation and individual, where endorsement of individual was forged, and where collecting bank accepted check and credited it to account of endorsee company, collecting bank could not stand in shoes of either holder or holder in due course, since endorsement of individual endorser was forged, and it was liable to owner of cashier's check (i. e., purchaser of check) under UCC § 3-419(1)(c) for conversion, notwithstanding fact that it placed funds received into account of corporate endorser. *Tubin v. Rabin*, 382 F. Supp. 193 (N.D. Tex. 1974), supplemented, 389 F. Supp. 787 (N.D. Tex. 1974), aff'd, 533 F.2d 255 (5th Cir. Tex. 1976).

Party to whom presentment was made of check bearing blank rubber stamp endorsement, not restricted to "for deposit only" had right to deliver cash to party making presentment instead of depositing proceeds of check in endorser's account, since blank endorsement constitutes authorized endorsement under UCC § 3-204. *Palmer & Ray Dental Supply of Abilene, Inc. v. First Nat'l Bank*, 477 S.W.2d 954 (Tex. Civ. App. 1972).

Where plaintiff's employee made deposits for it at defendant bank but instead of depositing checks at issue she drew cash on them and did not account to plaintiff for such money, blank rubber stamp indorsement of plaintiff affixed to each of checks constituted authorized indorsement, relieving bank of liability for conversion. *Palmer & Ray Dental Supply of Abilene, Inc. v. First Nat'l Bank*, 477 S.W.2d 954 (Tex. Civ. App. 1972).

Authorized representative of payee-hospital indorsed note without specifying to whom or to whose order instrument was payable; held, mere delivery is sufficient to constitute transferee holder thereof and to make transfer valid negotiation. *Davtian v. Barsamian*, 106 R.I. 185, 256 A.2d 510 (1969).

In a case where forged indorsements were placed upon a check, it was said that the forged indorsements were wholly in-

operative as the signatures of the payee under §§ 3-404(1) and 1-201(43), and that this was so both as to restrictive indorsements for deposit under § 3-205(c) and as to indorsements in blank under § 3-204(2). *Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

Where an employee indorsed a check payable to his order, without any restriction or limitation, and subsequently lost the check and a stop payment was ordered by the bank, plaintiff who cashed the check and received the full amount in good faith, was entitled to the amount as against the employee who failed to restrict an indorsement. *American Book Co. v. White Sys. of Jackson*, 223 Miss. 510, 78 So. 2d 582 (1955).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each

preceding indorser may recover from the person who indorsed the bill to him. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed same for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was filed such bank had not reimbursed its depositor. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

While a bank is required at its peril to know the signature of its depositor, it is not required to know the signature of the payee named in a check of its depositor, who is unknown to the bank and with whose signature it is not familiar, and under no duty to become familiar. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

§ 75-3-206. Restrictive indorsement.

(a) An indorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument.

(b) An indorsement stating a condition to the right of the indorsee to receive payment does not affect the right of the indorsee to enforce the instrument. A person paying the instrument or taking it for value or collection may disregard the condition, and the rights and liabilities of that person are not affected by whether the condition has been fulfilled.

(c) If an instrument bears an indorsement (i) described in Section 75-4-201(b), or (ii) in blank or to a particular bank using the words "for deposit," "for collection," or other words indicating a purpose of having the instrument collected by a bank for the indorser or for a particular account, the following rules apply:

(1) A person, other than a bank, who purchases the instrument when so indorsed converts the instrument unless the amount paid for the instrument is received by the indorser or applied consistently with the indorsement.

(2) A depository bank that purchases the instrument or takes it for collection when so indorsed converts the instrument unless the amount paid by the bank with respect to the instrument is received by the indorser or applied consistently with the indorsement.

(3) A payor bank that is also the depository bank or that takes the instrument for immediate payment over the counter from a person other than a collecting bank converts the instrument unless the proceeds of the instrument are received by the indorser or applied consistently with the indorsement.

(4) Except as otherwise provided in paragraph (3), a payor bank or intermediary bank may disregard the indorsement and is not liable if the proceeds of the instrument are not received by the indorser or applied consistently with the indorsement.

(d) Except for an indorsement covered by subsection (c), if an instrument bears an indorsement using words to the effect that payment is to be made to the indorsee as agent, trustee, or other fiduciary for the benefit of the indorser or another person, the following rules apply:

(1) Unless there is notice of breach of fiduciary duty as provided in Section 75-3-307, a person who purchases the instrument from the indorsee or takes the instrument from the indorsee for collection or payment may pay the proceeds of payment or the value given for the instrument to the indorsee without regard to whether the indorsee violates a fiduciary duty to the indorser.

(2) A subsequent transferee of the instrument or person who pays the instrument is neither given notice nor otherwise affected by the restriction in the indorsement unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of fiduciary duty.

(e) The presence on an instrument of an indorsement to which this section applies does not prevent a purchaser of the instrument from becoming a holder in due course of the instrument unless the purchaser is a converter under subsection (c) or has notice or knowledge of breach of fiduciary duty as stated in subsection (d).

(f) In an action to enforce the obligation of a party to pay the instrument, the obligor has a defense if payment would violate an indorsement to which this section applies and the payment is not permitted by this section.

SOURCES: Former § 75-3-206: Codes, 1942, § 41A:3-206; Laws, 1966, ch. 316, § 3-206; Laws, 1992, ch. 420, § 25, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-205, 75-3-206.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-205, 75-3-206.

11. In general.

The drawer of a check may sue a depository bank which accepts the check and pays out the proceeds in violation of a forged restrictive indorsement based on either money had and received or conver-

sion where the indorsement, although forged by an employee of the drawer who supplied the drawer with the name of the payee intending the latter to have no interest in the instrument (Uniform Commercial Code, § 3-405, subd [1], par [c]), is nonetheless "effective", since in those cases where the forgery is effective, the depository bank may be deemed to have dealt with valuable property of the drawer, inasmuch as the check is both a valuable instrument and a valid instruction to the drawee to honor the check and debit the drawer's account accordingly; additionally, only a depository bank may be held liable for payment in disregard of a restrictive indorsement (Uniform Commercial Code, § 3-419, subd [4]; § 3-206, subd [2]) since that bank is in the best position to ensure that the restriction is satisfied. *Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank*, 46 N.Y.2d 459, 386 N.E.2d 1319 (1979).

Under the common law, a collecting bank as well as a depository bank when presented with restrictive indorsements on checks has a duty to inquire and its failure to do so subjects it to liability, and failure to conform to the standard of care set forth in Section 3-206 of the Uniform Commercial Code, which enjoins a depository bank to pay or apply value given for restrictively indorsed checks according to their tenor, is indicative of bad faith. Accordingly, a complaint which alleges that checks restrictively indorsed were accepted by defendant bank and the proceeds were applied to the credit of accounts other than those indicated in the indorsements, an employee of plaintiff having stolen the checks, restrictively indorsed them and then deposited them to the employee's or his confederate's accounts with the defendant bank, states a cause of action. *Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank*, 61 A.D.2d 628 (1st Dep't 1978), *aff'd*, 46 N.Y.2d 459, 414 N.Y.S.2d 298, 386 N.E.2d 1319 (1979).

Under UCC § 3-206(3) and other sections of Uniform Commercial Code dealing with restrictive indorsements, depository bank that does not apply instrument consistently with restrictive indorsement thereon is liable in conversion, and any

defense afforded by UCC § 3-419(3) would not be available to such bank. *C.S. Bowen Co. v. Maryland Nat'l Bank*, 36 Md. App. 26, 373 A.2d 30 (1977).

Writing which was physically attached to note and which purported to be "for collection purposes" constituted restrictive indorsement under UCC § 3-205. *Booker v. Everhart*, 33 N.C. App. 1, 234 S.E.2d 46 (1977), review allowed, 293 N.C. 159, 236 S.E.2d 702 (1977), *rev'd* on other grounds, 294 N.C. 146, 240 S.E.2d 360 (1978).

While a postal domestic money order is similar in many respects to a negotiable instrument, it is not so similar in all respects because the restriction contained in such a money order that "more than one indorsement is prohibited by law" is contrary to § 3-301 of the instant chapter relative to the transfer and negotiation of an instrument by a holder, and it is not in harmony with § 3-206(1) which provides that "No restrictive indorsement prevents further transfer or negotiation of the instrument". *United States v. First Nat'l Bank*, 263 F. Supp. 298 (D. Mass. 1967).

In a case where forged indorsements were placed upon a check, it was said that the forged indorsements were wholly inoperative as the signature of the payee under §§ 30404(1) and 1-201(43), and that this was so both as to restrictive indorsements for deposit under § 3-205(c) and as to indorsements in blank under § 3-204(2). *Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

Where an employee indorsed a check payable to his order, without any restriction or limitation, and subsequently lost the check and a stop payment was ordered by the bank, plaintiff who cashed the check and received the full amount in good faith, was entitled to the amount as against the employee who failed to restrict an indorsement. *American Book Co. v. White Sys. of Jackson*, 223 Miss. 510, 78 So. 2d 582 (1955).

Where a check was genuine and was duly indorsed in blank by the payee

named therein, and the check was negotiable even though in possession of a person not entitled thereto, and innocent purchaser for value becomes a holder in due course. *Bruce v. State*, 217 Miss. 368, 64 So. 2d 332 (1953).

chaser for value becomes a holder in due course. *Bruce v. State*, 217 Miss. 368, 64 So. 2d 332 (1953).

§ 75-3-207. Reacquisition.

Reacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise. A former holder who reacquires the instrument may cancel indorsements made after the reacquirer first became a holder of the instrument. If the cancellation causes the instrument to be payable to the reacquirer or to bearer, the reacquirer may negotiate the instrument. An indorser whose indorsement is canceled is discharged, and the discharge is effective against any subsequent holder.

SOURCES: Former § 75-3-207: Codes, 1942, § 41A:3-207; Laws, 1966, ch. 316, § 3-207; Laws, 1992, ch. 420, § 26, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-208.

11. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-208.

11. In general.

Promissory notes, executed by closely held corporation and endorsed by stockholders of corporation, were not discharged when they were acquired from payee bank by executor of deceased endorser; among other things, instruments were acquired by executor, not be deceased endorser, and executor was, therefore, not prior party to instrument. *Eikel v. Bristow Corp.*, 529 S.W.2d 795 (Tex. Civ. App. 1975).

Where payee of check endorsed it to third party but, instead of transferring check to endorsee, cancelled endorsement and then deposited check in her own account, depository bank, as collecting bank, was under no duty to inquire as to deleted endorsement. *Handley v. Horak*, 82 Misc. 2d 692 (1975).

Where payee of check from insurer endorsed check to his physician, physician endorsed check but then gave it back to payee for purpose of returning check to insurer on basis that it was of lesser amount than physician felt insurer was obligated to pay under payee's policy, and where payee crossed out physician's restrictive endorsement, re-endorsed check and presented it to bank for payment, bank was not liable in conversion as depository bank for failing to inquire further into title to check. *Schoonmaker v. Merchants Nat'l Bank & Trust Co.*, 81 Misc. 2d 967 (1974).

Where several banks orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company got possession of checks when banks were reimbursed, not at later time when company, upon discovering forged indorsements on checks, paid grower-payee; and by getting grower-payee to indorse check already in company's possession, and which had ceased to be negotiable instrument, company did not relinquish its claim against bank for wrongfully paying check bearing forged indorsement; to the contrary, company's conduct went to prove damage which company suffered from bank's paying to another its check intended for grower, but of which grower never became holder. *Columbian Peanut Co. v. Frosteg*, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied,

474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973).

§ 75-3-208. Repealed.

Repealed by Laws, 1992, ch. 420 § 112, eff from and after January 1, 1993. [Codes, 1942, § 41A:3-208; Laws, 1966, ch. 316, § 3-208]

Editor's Note — Former § 75-3-208 dealt with reacquisition of instruments.

PART 3.

ENFORCEMENT OF INSTRUMENTS.

SEC.

- 75-3-301. Person entitled to enforce instrument.
- 75-3-302. Holder in due course.
- 75-3-303. Value and consideration.
- 75-3-304. Overdue instrument.
- 75-3-305. Defenses and claims in recoupment.
- 75-3-306. Claims to an instrument.
- 75-3-307. Notice of breach of fiduciary duty.
- 75-3-308. Proof of signatures and status as holder in due course.
- 75-3-309. Enforcement of lost, destroyed, or stolen instrument.
- 75-3-310. Effect of instrument on obligation for which taken.
- 75-3-311. Accord and satisfaction by use of instrument.
- 75-3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check.

§ 75-3-301. Person entitled to enforce instrument.

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 75-3-309 or 75-3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

SOURCES: Former § 75-3-301: Codes, 1942, § 41A:3-301; Laws, 1966, ch. 316, § 3-301; Laws, 1992, ch. 420, § 27, eff from and after January 1, 1993.

Cross References — Plaintiff who proves entitlement to enforce instrument under this section as entitled to payment upon proof or admission of validity of signatures and compliance with § 75-3-308(a), see § 75-3-308.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM
COMMERCIAL CODE.

II. DECISIONS UNDER FORMER UCC
§ 75-3-301.

1.-10. [Reserved for future use].

11. In general.

12. Requirements for action.
13. Ownership.
14. Guarantee.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-301.

11. In general.

The holder of a note may waive the right to foreclose for past defaults in payment (see UCC § 3-301) if he has regularly accepted late payments and not notified the debtor that future defaults will provide the basis for foreclosure proceedings. *Rutherford v. Rutherford*, 573 S.W.2d 299 (Tex. Civ. App. 1978).

In suit to recover on two promissory notes in plaintiff's possession, plaintiff was not "holder" of notes within meaning of UCC § 1-201(20) where notes were not drawn, issued, or indorsed to her or to her order, or to bearer or in blank, and trial court erred in according plaintiff rights of holder under UCC § 3-301. *Smathers v. Smathers*, 34 N.C. App. 724, 239 S.E.2d 637 (1977).

Assignee of note given for purchase of land in interstate transaction was not holder in due course where facts known to assignee at time of assignment, i.e., apparent multiple violations of Interstate Land Sales Act (15 USCA 1703(b)), should have alerted assignee to possible irregularities in making of note. *Stewart v. Thornton*, 116 Ariz. 107, 568 P.2d 414 (1977).

Possessor of promissory notes, which were made payable to payee with name different from name of possessor and which were unendorsed by named payee, was entitled to recover on notes pursuant to UCC § 3-301, even though possessor was not a holder under UCC § 1-201(20), where evidence at trial established that name of payee was former name of possessor. *Lawson v. Finance Am. Private Brands, Inc.*, 537 S.W.2d 483 (Tex. Civ. App. 1976).

Joint payee, who in good faith takes instrument for value, without notice of any dishonor or defense, is entitled to enforce instrument against maker

thereof. *National Sec. Fire & Cas. Co. v. Mazzara*, 289 Ala. 542, 268 So. 2d 814 (1972).

While a postal domestic money order is similar in many respects to a negotiable instrument it is not so similar in all respects because the restriction contained in such a money order that "more than one indorsement is prohibited by law" is contrary to § 3-301 of the instant chapter relative to the transfer and negotiation of an instrument by a holder, and it is not in harmony with § 3-206(1) which provides that "No restrictive indorsement prevents further transfer or negotiation of the instrument". *United States v. First Nat'l Bank*, 263 F. Supp. 298 (D. Mass. 1967).

A bank which cashed a check endorsed in blank by the payee by crediting the payee's account and by the delivery of cash was entitled to summary judgment in an action against the maker who had issued a stop payment order to the drawee bank. Although the drawer of a check has the right to stop payment of it at any time before it has been certified or paid by the drawee, the drawer remains liable, unless he has a defense good against the holder. *Tidwell v. Bank of Tifton*, 115 Ga. App. 555, 155 S.E.2d 451 (1967).

Where a promissory note is made payable to one named therein as attorney for plaintiffs but not endorsed to them by the attorney, plaintiffs may enforce payment as holders of the note. *Bennett v. Cannon*, 114 Ga. App. 479, 151 S.E.2d 828 (1966).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor is a holder of the check, taking for value, and entitled to recover from the drawer thereon. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

12. Requirements for action.

In order to show right to summary judgment in suit on promissory note in which the defendant has made a general denial, the plaintiff must establish that he is the present legal owner or holder of such note. Under UCC § 1-201(20), a "holder" is the person in possession of a note drawn, issued, or indorsed to him, or to his order or to bearer, or in blank. And under UCC

§ 3-301, even if the holder is not the owner of the note, he may still enforce payment thereof in his own name. *Taylor v. Fred Clark Felt Co.*, 567 S.W.2d 863 (Tex. Civ. App. 1978), *ref. n.r.e.* (Oct. 25, 1978).

Depository bank's assignee did not have possession of check at time of commencement of action against drawer for amount which depository bank had paid from payee's account against credit created by deposit of drawer's check before that check had been dishonored; held, assignee was not "holder" and could not maintain action against drawer, even though, after commencement of action, payee had given depository bank check and, prior to commencement of action, payee had assigned partial interest in proceeds of check to depository bank. *Investment Serv. Co. v. Martin Bros. Container & Timber Prods. Corp.*, 255 Or. 192, 465 P.2d 868 (1970).

13. Ownership.

Under UCC § 3-301, "ownership" of notes is not indispensable to "holdership" (holding that original payees of two notes were holders under UCC § 1-201(20) because they still had possession of notes). *In re Cooke*, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Although a holder does not become the holder in due course of an instrument by purchase of it at a judicial sale or by taking it under legal process, one with the rights of a holder in due course, and who has not lost such rights, does not diminish his status by purchasing an instrument at a judicial sale merely because he could not by virtue of such purchase alone become a due course holder. *Finance Co. of Am. v. Wilson*, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

A bank which accepts a check for collection and, for that purpose, acts as its depositor's agent is also a holder of the check, and the fact that it does not own the item is immaterial insofar as its status as a holder is concerned. *Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n*, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

14. Guarantee.

Where bank issued cashier's check to individual who had personally guaranteed certain notes which were payable to borrowers from bank and were held by bank as collateral security for loans made to such borrowers, and where guarantor subsequently became bankrupt, bank was, at very least, transferee of unindorsed order instruments which bankrupt had personally guaranteed and, therefore, by virtue of proof that it took notes in proper transactions with holders thereof and "shelter" provisions of UCC § 3-201, bank succeeded to rights of transferors of holders of instruments, to full extent of its security interest; under UCC §§ 3-301 and 3-603(1), holder of instrument, whether or not true owner, could enforce payment thereon and discharge paying party, and thus, if bank could demand payment from guarantor when due, bank was entitled to file in its own right proof of claim in bankruptcy and to assert setoff against cashier's check. *In re Johnson*, 552 F.2d 1072 (4th Cir. Va. 1977).

Where defendants executed promissory note which was delivered to bank, note was guaranteed by Small Business Administration, defendants defaulted on payments under note, and note was assigned in accord with guarantee agreement to S.B.A., which made payment to bank of 50 per cent of unpaid balance of note, fact that government did not own entire equitable interest in note did not prevent government from maintaining suit on note as its legal owner and holder. *United States v. Sellers*, 487 F.2d 1268 (5th Cir. Tex. 1973).

In action by guarantor of renewal and extension promissory notes against maker, fact that guarantor was not holder in due course, because he took notes with notice that they were overdue, did not, under UCC § 3-302, prevent him as holder of notes under UCC § 1-201(20) from enforcing payment in his own name under UCC § 3-301. *Blake v. Coates*, 292 Ala. 351, 294 So. 2d 433 (1974).

RESEARCH REFERENCES

Law Reviews. Beane, Rights of Drawers, Banks, and Holders in Bank Checks and Other Cash Equivalents. 19 Tulsa L. J. 612, Summer, 1984.

§ 75-3-302. Holder in due course.

(a) Subject to subsection (c) and Section 75-3-106(d), “holder in due course” means the holder of an instrument if:

(1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in Section 75-3-306, and (vi) without notice that any party has a defense or claim in recoupment described in Section 75-3-305(a).

(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a), but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or creditor’s sale or similar proceeding, (ii) by purchase as part of a bulk transaction not in ordinary course of business of the transferor, or (iii) as the successor in interest to an estate or other organization.

(d) If, under Section 75-3-303(a)(1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

(e) If (i) the person entitled to enforce an instrument has only a security interest in the instrument and (ii) the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.

(f) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

(g) This section is subject to any law limiting status as a holder in due course in particular classes of transactions.

SOURCES: Former § 75-3-302: Codes, 1942, § 41A:3-302; Laws, 1966, ch. 316, § 3-302; Laws, 1992, ch. 420, § 28, eff from and after January 1, 1993.

Cross References — Rights of holder of consumer's note taken by dance studio to take free of consumer's defenses against dance studio, see § 75-81-109.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-302.

11. In general.
12. Scope.
13. —Trade acceptances and letters of credit.
14. Taking for value.
15. —Satisfaction of antecedent debt.
16. —Receipt of deposit and payment of checks by bank.
17. —Other banking transactions.
18. Good faith and notice, generally.
19. —Particular applications.
20. —Banking transactions.
21. — —Acceptance of checks on which payment is stopped.
22. — —Acceptance of instruments without proper indorsement.
23. — —Knowledge of underlying nature of conduct resulting in defenses.
24. — —Withdrawals while depositor's balance is low.
25. —Instrument so irregular as to give notice of defense.
26. —Knowledge of irregularity of underlying transaction.
27. —Knowledge of agent or employee.
28. —Past due instrument.
29. Effect of failure to make inquiry.
30. —Failure in circumstances calling for further inquiry.
31. Payee as holder in due course, generally.
32. —Particular applications.
33. Purchaser at judicial sale.
34. Acquisition in taking over estate.
35. Bulk transactions.
36. Purchaser of limited interest.
37. Evidence and burden of proof.

38. Issues for determination by jury.
39. Miscellaneous defenses.

III. DECISIONS UNDER FORMER UCC § 75-3-305.

40. In general.
41. Claims to instrument by others.
42. Defenses of party to instrument with whom holder has not dealt.
43. Want or failure of consideration.
44. Incapacity of party.
45. Duress.
46. Illegality of transaction.
47. Misrepresentation or fraud, generally.
48. —Standards for determination.
49. —Misrepresentation as to nature of instrument.
50. —Misrepresentation as to other matters.
51. Procedural matters.
52. Miscellaneous claims or defenses.

IV. DECISIONS UNDER FORMER UCC § 75-3-306.

53. In general.
54. Particular defenses.
55. —Defenses available in simple contract.
56. —Want or failure of consideration.
57. —Nonperformance of condition precedent.
58. —Breach of fiduciary duty.
59. —Claims of third persons.
60. —Setoff.
61. —Fraud or illegality.
62. Procedural matters.

V. DECISIONS UNDER FORMER UCC § 75-3-302.

63. In general.
64. Decisions under Code 1942 § 57.
65. Decisions under Code 1942 § 101.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-302.

11. In general.

Bank became holder in due course of instrument when it took properly executed check from payee, for value, in good faith, and without notice that there was any defense against it or claim to it by any other person. *People v. Lombardi*, 13 Ill. App. 3d 754, 301 N.E.2d 70 (1st Dist. 1973).

A collecting bank may be a holder in due course when it takes an instrument for value, in good faith and without notice that it is overdue or has been dishonored or of any defense against it or claim to it on the part of any person. *Central Bank & Trust Co. v. First Northwest Bank*, 332 F. Supp. 1166 (E.D. Mo. 1971), *aff'd*, 458 F.2d 511 (8th Cir. Mo. 1972).

A bank's continuing status as a collecting agent does not prevent it from becoming a holder in due course if the bank satisfies the requirements of UCC § 3-302. *Waltham Citizens Nat'l Bank v. Flett*, 353 Mass. 696, 234 N.E.2d 739 (1968).

A holder through a holder in due course has all the rights of a holder in due course. *Brock v. Adams*, 79 N.M. 17, 439 P.2d 234 (1968).

Where a purchaser of negotiable securities through a broker has acquired the protected status of a holder in due course, the broker has complied with his contractual obligation of conveying good title to the buyer. *White v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 90 N.J. Super. 565, 218 A.2d 655 (L. Div. 1966).

12. Scope.

Agreement to pay "within the next 60 days the sum of \$5,000 from the jobs now under construction" did not contain an unconditional promise to pay and therefore was not a negotiable instrument. *Webb & Sons v. Hamilton*, 30 A.D.2d 597 (3d Dep't 1968).

13. —Trade acceptances and letters of credit.

Bank issuing letter of credit may be enjoined from honoring demand for pay-

ment pursuant to UCC § 5-114 even where beneficiary of letter of credit took letter in good faith under UCC § 3-302 since § 302 protects one who takes draft or demand pursuant to letter of credit rather than beneficiary of letter of credit who issues demand. *United Technologies Corp. v. Citibank*, 469 F. Supp. 473 (S.D.N.Y. 1979).

The purchaser of trade acceptances for value, before their due dates and in the regular course of business, and without notice of dishonor or any defenses, is a holder in due course within the meaning of this section. *Equitable Dist. Corp. v. Fischer*, 12 Pa. D. & C.2d 326 (1957).

14. Taking for value.

Bank which took note for value, in good faith, and without notice of any defenses that maker might have was holder in due course under UCC § 3-302(1) and, under UCC § 3-305(2), took instrument free from maker's defense of lack of consideration. *Worthey v. First State Bank*, 573 S.W.2d 279 (Tex. Civ. App. Waco 1978).

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). *Northwestern Bank v. Neal*, 271 S.C. 544, 248 S.E.2d 585 (1978).

Allegations that company which was transferred in exchange for note had never made profit was not sufficient to establish that transfer of note was not for value within meaning of UCC § 3-302, since no facts were alleged relating to worth of company's assets, and allegations that holder of note required payment of substantial portion of note by transferor if

maker defaulted, and further required that transferor's terms of transfer be concealed from maker, were insufficient to show that holder had "notice of fraud" within meaning of UCC § 1-201(25). *Ritz v. Karstenson*, 39 Ill. App. 3d 877, 350 N.E.2d 870 (2d Dist. 1976).

UCC § 4-208 provides for bank to acquire security interest in items presented for collection under certain circumstances; this security interest is considered to be "value" for purposes of becoming holder in due course of item, and if bank meets other requirements of UCC § 3-302 it can become holder in due course of "item and any accompanying documents or the proceeds of either." *Commercial Dist. Corp. v. Milwaukee W. Bank*, 61 Wis. 2d 671, 214 N.W.2d 33 (1974).

Indorsee of check drawn by insurer in settlement of claim for damage to automobile acquired for indorsee's use by gifts from his grandparents and as to which his mother was record title holder, did not take check "for value," either on theory that he had claim against insured for damage to car or personal property therein, or on theory that he intended to use amount of check for purchase of new car and made "irrevocable commitment to third person" therefor. *Bennett v. United States Fid. & Guar. Co.*, 19 N.C. App. 66, 198 S.E.2d 33 (1973), cert. denied, 284 N.C. 121, 199 S.E.2d 659 (1973).

Nothing in the Uniform Commercial Code abrogates holder in due course status predicated on whether the acceptance preceded or succeeded acquisition of title to a draft. *F & M Nat'l Bank v. Boardwalk Nat'l Bank*, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

An employee given a note for his wages is not a holder in due course. *Lukens v. Goit*, 430 P.2d 607 (Wyo. 1967).

Where seller, in consideration of receipt of cashier's checks aggregating \$600,000, made actual physical delivery of certificates evidencing all of his stock in a corporation in escrow to be delivered to the purchaser when the seller had been relieved of his bank guarantees without anything further to be done on his part, the transfer was irrevocable for the only remaining act to complete delivery was

solely within the power of the purchaser; and such delivery in escrow constituted an "irrevocable commitment" as provided in clause (c) of § 3-303, and the seller had taken the cashier's checks for value and was a "holder in due course." *Crest Fin. Co. v. First State Bank*, 37 Ill. 2d 243, 226 N.E.2d 369 (1967).

15. —Satisfaction of antecedent debt.

Where a bank, which under UCC § 3-202(1) was holder of note delivered to it with necessary endorsements of both copayees, took such note (1) "for value" under UCC §§ 3-302(1)(a) and 3-303(a) because it had taken it as collateral for loan to note's copayees, and (2) "in good faith" under UCC § 3-302(1)(b) and "without notice" under UCC § 3-302(1)(c) of any claims against note's copayees, court held (1) that bank was holder in due course of such note under UCC § 3-302(1), (2) that under UCC § 3-305(1), bank took note free from all claims to it by any person, and (3) that bank therefore was entitled to priority of payment over judgment creditor of note's copayees in situation where, prior to copayees' transfer of note to bank, judgment creditor of copayees had served writ of garnishment on maker of note. *Bricks Unlimited, Inc. v. Agee*, 672 F.2d 1255 (5th Cir. 1982).

When the holder of promissory notes assigned his interest therein as collateral to secure payment of a prior indebtedness, a sum less than the aggregate amount of the notes, and indorsed and delivered them to that creditor, he did not irrevocably divest himself of the ultimate right to all of the proceeds of the notes, but retained ownership of those proceeds not required to satisfy that indebtedness, and, therefore, the negotiation of all of the notes operated only as a partial assignment of the proceeds of the notes; the interest retained by him was capable of being transferred and, when it was transferred by another collateral assignment, the transferee acquired a valid security interest as to his residuary interest in the notes, which security interest was perfected by a subsequent delivery of the notes to it. *Lipkowitz & Plaut v. Affrunti*, 95 Misc. 2d 849 (1978).

Although antecedent claim may constitute value under UCC § 3-303(b), where

no antecedent claim existed, holder of note (1) did not take instrument for value, (2) was not holder in due course under UCC § 3-302(1)(a), and (3) held note subject to defense of lack of consideration. *Quazzo v. Quazzo*, 136 Vt. 107, 386 A.2d 638 (1978).

Where holder acquired series of notes from payee, became holder in due course thereof, and accelerated balance due after maker defaulted, but, after discussions between maker, payee, and holder, holder accepted payment partly in cash and partly by way of new note, payable to payee and indorsed over to holder, holder was not holder in due course with respect to new note and was subject to any claims or defenses against payee of which holder had knowledge prior to accepting new note; course of conduct surrounding issuance of new note did not constitute renewal of existing notes, but rather resulted in partial payment and novation with respect to balance due; holder in due course status under old notes disappeared with extinguishment of total debt represented thereby and holder's status with respect to new note was determined by circumstances existing at time it received delivery of new note. *Lazere Fin. Corp. v. Crystal Mart, Inc.*, 78 Misc. 2d 379 (1974).

Attorneys who acquired note as payment for services performed by them for corporate payee could be holders in due course only to extent of amount of value of services performed; and in absence of evidence of value of such services, summary judgment for attorneys was error. *Fernandez v. Cunningham*, 268 So. 2d 166 (Fla. App. 1972).

Bank which accepted a cashier's check in payment of an antecedent debt would have been a holder in due course where it acted in good faith and without notice that the debtor had committed a fraud in securing the money represented by the check. *Nicklaus v. Peoples Bank & Trust Co.*, 258 F. Supp. 482 (E.D. Ark. 1965), *aff'd*, 369 F.2d 683 (8th Cir. Ark. 1966).

A bank accepting a forged check in payment of an antecedent debt in good faith and without notice of any infirmity in the instrument is a holder in due course. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. Okla. 1964).

An attorney to whom promissory notes were transferred by his client as a portion of a retainer for services to be performed in the future, and in payment for certain prior legal services the value of which was not disclosed, is not a purchaser for value and cannot be a holder in due course of the notes. *Korzenik v. Supreme Radio, Inc.*, 27 Mass. App. Dec. 25 (1963), *aff'd*, 347 Mass. 309, 197 N.E.2d 702 (1964).

16. —Receipt of deposit and payment of checks by bank.

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it has a security interest in the item and thereupon becomes a holder in due course of the check. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

Under both the Negotiable Instruments Law and the Uniform Commercial Code a bank which received a deposit of two checks and paid checks drawn by the depositor on the total amount of these checks was a holder for value of the two deposited checks, notwithstanding the fact that they were deposited with the usual bank deposit slip reciting that the item was received by the bank for collection only. *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

17. —Other banking transactions.

An award of summary judgment in favor of plaintiff is affirmed where defendant insurer delivered to its insured a draft drawn on itself and payable through its bank in an attempt to honor its apparent obligation under an automobile theft policy, which draft was payable also to plaintiff due to plaintiff's security interest in the insured vehicle, and plaintiff deposited the draft in its bank account after the insured indorsed the check over to plaintiff thereby extinguishing plaintiff's security interest in the vehicle, following which defendant stopped payment on the draft upon learning that its insured's claim was fraudulent, at which time plaintiff's account was debited with the amount of the dishonored draft and plain-

tiff demanded of the defendant payment of the draft. Since the check was drawn by the drawer on itself as drawee, payable through its bank, the bank was not authorized to pay the draft, but was merely designated as a collecting bank to present the draft to the drawer-drawee for payment (Uniform Commercial Code, § 3-120), and because the draft was not drawn without recourse, and there was no drawee other than defendant itself who accepted responsibility for it, defendant remained liable thereon (Uniform Commercial Code, § 3-413, subd [2]); although the draft was principally issued to the insured, plaintiff's name was added as payee only to protect its duly filed security interest in the insured vehicle, and upon issuance of the draft defendant acknowledged its insured's claim that the vehicle had been stolen, thus entitling plaintiff to rely upon that representation and to accept the draft as a holder in due course in payment and release of its lien on the vehicle, constituting the giving of value for the draft (Uniform Commercial Code, § 3-302, subd [1]; § 3-303, subds [b], [c]); after defendant stopped payment on the draft it remained liable on it to plaintiff as a holder in due course. *GMAC v. General Accident Fire & Life Assurance Corp.*, 67 A.D.2d 316 (4th Dep't 1979).

Where creditor bank, on date loan was due and after being informed by debtor that debtor would default, set off credit balances in debtor's accounts against amount of debt; where remittance check of debtor's customer, pursuant to prior agreement between debtor and bank, was taken by bank from debtor's post-office lockbox and indorsed and deposited in debtor's account; where after depositing such check, bank then exercised alleged right of setoff against it; and where customer then issued stop-payment order on check and bank sued customer for payment thereof, alleging that it had acquired holder-in-due-course status as to such check and that its right to receive payment was not affected by debtor's alleged failure to discharge contractual obligations to customer, (1) bank acted prematurely in setting off deposits in debtor's account on date loan was due; (2) although such premature setoff arguably became

operative on following day, it did not determine issue as to whether bank was entitled to payment on check; (3) bank was mere holder of check under UCC § 1-201(20) and not holder in due course under UCC § 3-302(1), since it did not give value for check under UCC § 3-303(b) and UCC § 4-208(1); (4) failure to give value stemmed from fact that bank, after customer issued stop-payment order on check, reversed its provisional credit of check to debtor's account and thus reinstated that part of debtor's obligation against which such credit was set off; and (5) since bank did not give value for check and thus was not holder in due course, it could not recover on check. *Marine Midland Bank-New York v. Graybar Elec. Co.*, 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

Where defendant bank received check from plaintiff's employee, drawn by plaintiff and made payable to defendant, applied check to discharge employee's personal indebtedness to defendant, and released collateral for loan to employee, defendant gave value for checks, as defined in UCC § 3-302, by surrendering security for employee's indebtedness. *Richardson Co. v. First Nat'l Bank*, 504 S.W.2d 812 (Tex. Civ. App. 1974), *ref. n.r.e* (Apr. 3, 1974).

Where the drawee of drafts maintained a checking account in a collector bank and made a check payable to the bank's order in purported payment of the drafts, which were stamped "paid" and surrendered to the drawee, delivery of the check constituted payment just as effectively as if cash had been given. The payment to the collecting bank was equivalent to payment of the owner of the instrument, a holder in due course. *F & M Nat'l Bank v. Boardwalk Nat'l Bank*, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

Bank which permitted new president and sole stockholder of corporation to cash checks drawn payable to corporation, in derogation of corporate resolution on file with bank which only authorized officers to endorse checks for deposit and collection, was not a holder in due course, and was liable to creditors of bankrupt corporation for total amount of checks which it

permitted sole stockholder to cash rather than deposit to corporation's account. *Maley v. East Side Bank*, 361 F.2d 393 (7th Cir. Ill. 1966).

18. Good faith and notice, generally.

Bank issuing letter of credit may be enjoined from honoring demand for payment pursuant to UCC § 5-114 even where beneficiary of letter of credit took letter in good faith under UCC § 3-302 since § 302 protects one who takes draft or demand pursuant to letter of credit rather than beneficiary of letter of credit who issues demand. *United Technologies Corp. v. Citibank*, 469 F. Supp. 473 (S.D.N.Y. 1979).

Bank which took note for value, in good faith, and without notice of any defenses that maker might have was holder in due course under UCC § 3-302(1) and, under UCC § 3-305(2), took instrument free from maker's defense of lack of consideration. *Worthey v. First State Bank*, 573 S.W.2d 279 (Tex. Civ. App. Waco 1978).

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1). *Northwestern Bank v. Neal*, 271 S.C. 544, 248 S.E.2d 585 (1978).

Definition of "good faith" as used in § 3-302(1) does not require that, in addition to being honest, holder must exercise due care. *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

Negligence goes to notice requirement for being a holder in due course and not to good faith requirement. *Industrial Nat'l*

Bank v. Leo's Used Car Exch. Inc., 362 Mass. 797, 291 N.E.2d 603 (1973).

Nothing in Code definition of "good faith" suggests that, in addition to being honest, holder of negotiable instrument must exercise due care to be in good faith; and bank did act in good faith, and was holder in due course, although it failed to exercise ordinary care by violating its own rule of management when its teller cashed checks in question without managerial approval. *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

Assuming that notes were acquired by holder after learning from maker of alleged express agreement, not reflected on notes, that notes were not to be discounted, actual knowledge by holder as to alleged agreement, although it might have aroused suspicion, did not amount to lack of good faith in acquisition of notes. *Factors & Note Buyers, Inc. v. Green Lane, Inc.*, 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

19. —Particular applications.

A credit corporation did not meet the requirement that a holder in due course must take "in good faith," and "without notice ... of any defenses or claims on the part of any person" where the credit corporation and the seller of the equipment involved had interlocking directorates. *Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15 (Miss. 1981).

Where note, executed as separate document along with conditional sales contract, was assigned to bank for valuable consideration and bank sued maker for balance due on note, court held (1) that trial court erred in holding that note and conditional sales contract had merged, thus rendering note nonnegotiable and causing bank not to be holder in due course; (2) that note satisfied requirements of negotiability under UCC § 3-104(1); (3) that under UCC § 3-119(2), negotiability of note was not affected by separate sales contract; and (4) that since bank had paid value in good faith for note on day it was executed and assignment of note had preceded any notice of claim about merchandise sold, bank was holder in due course under UCC § 3-302(1).

Northwestern Bank v. Neal, 271 S.C. 544, 248 S.E.2d 585 (1978).

In action by cashing bank to recover from drawer and indorser of two checks drawn on insufficient funds, where defendant indorser stole, completed, and cashed at plaintiff bank (where indorser was customer) two checks which had been signed in blank by defendant drawer and delivered by drawer to her husband, and where plaintiff bank had no notice of any defenses against, or claims to, such checks by any person, plaintiff under UCC § 3-302 was holder in due course of such checks and could, under UCC § 3-407 and UCC § 3-115, enforce them as completed. Central State Bank v. Kilroy, 57 A.D.2d 940 (2d Dep't 1977).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (3) where bank endorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, bank in accepting buyer's cashier's checks and dealing with proceeds thereof did not violate good faith requirement of UCC § 3-302(1)(b)-and thus was holder in due course as to such checks and not liable to buyer for fraud and conversion in sale transaction-because (1) checks were valid cashier's checks that showed no sign of alteration or irregularity; (2) although transaction was restructured from what buyer had expected by bank's not becoming party to sale contract, buyer accepted such risk by turning over cashier's checks to owner-seller; (3) there was nothing inherently irregular or suspicious in bank's method of handling such checks and proceeds thereof; (4) bank was not aware of

understanding between buyer and owner-seller and did not sign sale contract because bank had nothing to sell; and (5) both trial court's findings and record on appeal did not support buyer's contention that bank had failed to comply with definition of good faith in UCC § 1-201(19) by not being honest in fact in its conduct in sale transaction. Leininger v. Anderson, 255 N.W.2d 22 (Minn. 1977).

Where collecting bank had paid out money on forged check by permitting withdrawals from fictitious account, credit allowed for check in fictitious account had been withdrawn within meaning of § 4-208, so that collecting bank was holder for value. Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

Where record contained no evidence tending to show that collecting bank in accepting forged check for deposit and permitting withdrawal of funds from fictitious account connived with forger or had any reason to believe that check was not genuine, there was no evidence tending to establish bank's lack of good faith, even if such conduct constituted failure to exercise ordinary care or even gross negligence. Aetna Life & Cas. Co. v. Hampton State Bank, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

Where person who presented check to collecting bank did not have authority to negotiate check, collecting bank could not become holder of check based upon unauthorized endorsement, and hence could not become holder in due course. Thieme v. Seattle-First Nat'l Bank, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Although the makers of notes had been induced to borrow money from the plaintiff bank by fraudulent representations of a bank officer, where those representations were not chargeable to the bank, the bank took the instruments as a holder in due course, subject only to the defense of fraud as to the nature of the instrument. City Nat'l Bank v. Vanderboom, 290 F. Supp. 592 (W.D. Ark. 1968), aff'd, 422 F.2d 221 (8th Cir. Ark. 1970), cert. denied, 399 U.S. 905, 90 S. Ct. 2196, 26 L. Ed. 2d 560 (1970).

Where a bank accepted a check naming its depositor as payee and gave instant

credit to the deposit by acceptance of a second check drawn by its depositor on its account with the bank in payment of a note simultaneously returned to the depositor, and the bank had taken the check in good faith without notice of any defense against it or claim to it on the part of any person, or without notice of dishonor; the bank was the holder in due course and had acquired a security interest in the check. *Waltham Citizens Nat'l Bank v. Flett*, 353 Mass. 696, 234 N.E.2d 739 (1968).

Transferee of negotiable note did not take in good faith and was not holder in due course, where transferee was finance company which was closely connected with dealer whose paper it bought, furnishing form of sale contract and note for use by dealer. *American Plan Corp. v. Woods*, 16 Ohio App. 2d 1, 240 N.E.2d 886 (1968).

Where a minor purchased an automobile from a friend, agreeing to give the latter a check as part payment, and the friend directed the minor to indorse and deliver the check to a motor company as down payment on an automobile for the friend, the motor company, having received the instrument by negotiation from the friend for value, in good faith, and without notice that it was overdue or had been dishonored or that there was any defense against it, was a subsequent holder in due course. The fact that the check was not manually transferred from the minor to the friend and then to the motor company was immaterial; constructive delivery being sufficient. *Snyder v. Town Hill Motors, Inc.*, 193 Pa. Super. 578, 165 A.2d 293 (1960).

20. —Banking transactions.

In action by cashing bank to recover on check on which payment was subsequently stopped, where check was made payable to named payee as payment for cattle-feeding contract between payee and drawer, another bank holding perfected security interests in all of payee's property called in secured loan to payee and directed payee to turn in all proceeds on payee's accounts receivable and not to pay any of payee's general creditors, payee cashed check in suit at still another bank and paid off certain general creditors,

drawer of check stopped payment thereon at request of secured bank, and handwritten part of check stated that it was drawn for \$13,430 but check imprinter inadvertently entered "\$3,430" on check, cashing bank was holder in due course and entitled to recover under UCC § 3-302(1)(c) because (1) it had no notice under UCC § 1-201(25) of secured bank's claim to check's proceeds from mere publication in biweekly reporting service 17 months previously of secured bank's filing of security agreements on payee's property, even though cashing bank did subscribe to such reporting service; (2) check was negotiable on its face, since it was indorsed by payee and payee's indorsement was not restrictive; (3) statement by payee's wife to officer of cashing bank that check was being cashed to prevent secured bank from "grabbing it" occurred after check was cashed and thus was irrelevant under UCC § 3-304(6) to issue of notice; and (4) cashing bank took check in good faith under UCC § 3-302(1)(b), despite \$10,000 error on face of check, since cashing bank had contacted drawee bank to ascertain correct amount of check and to discover whether sufficient funds were on deposit to cover it. *McCook County Nat'l Bank v. Compton*, 558 F.2d 871 (8th Cir. S.D. 1977), cert. denied, 434 U.S. 905, 98 S. Ct. 302, 54 L. Ed. 2d 191 (1977).

21. — —Acceptance of checks on which payment is stopped.

In action under UCC § 3-413(2) against drawer of dishonored check, where (1) drawer wrote check on his account at drawee bank, payable to contractor for building a house, (2) payee deposited check in his account at plaintiff depository bank, (3) plaintiff cashed check, covered overdrafts on payee's account, credited main part of check's proceeds to such account, and paid payee remainder in cash, (4) after plaintiff had cashed check, drawer filed stop-payment order on it, resulting in its dishonor, and (5) plaintiff, despite its normal practice of withholding credit on a check until five days after its deposit, waived such waiting period as to check in suit because it believed drawer to be responsible person and because it had also obtained verification from drawee bank that check was good at that time,

court held (1) that plaintiff was holder in due course under UCC § 3-302(1)(b) and (c), since at time it cashed check, it had no notice of any defenses thereto and also no reason to believe that drawer would not honor it, (2) that in such circumstances, plaintiff's extension of immediate credit on the check did not manifest bad faith, since the Uniform Commercial Code, although not requiring a depository bank to give immediate credit on a check, encourages such practice by granting the bank rights against drawer of check on which immediate credit is extended, and (3) that since plaintiff was holder in due course, it therefore, under UCC § 3-305(2), took check in suit free from all but a limited number of defenses to it. *Frantz v. First Nat'l Bank*, 584 P.2d 1125 (Alaska 1978).

In order for notice of defenses to disqualify party from becoming holder in due course under UCC § 3-302(1)(c), defenses must be against instrument itself. Thus, bank could recover on checks on which drawer had stopped payment where drawer had no defenses against checks at time bank became holder thereof because checks were regular on their face and represented bona fide transactions in which drawer had received all that he had bargained for. *Community Bank v. Ell*, 278 Or. 417, 564 P.2d 685 (1977), reh'g denied, 279 Or. 245, 566 P.2d 903 (1977).

Bank which issued a cashier's check to replace a personal check took the personal check in good faith and for value and was thus holder in due course under UCC §§ 3-302 and 3-303 where bank manager ascertained validity of check by telephone call to drawer's bank prior to drawer's placement of stop payment order on check. *Manufacturers & Traders Trust Co. v. Murphy*, 369 F. Supp. 11 (W.D. Pa. 1974), aff'd, 517 F.2d 1398 (3d Cir. Pa. 1975).

Where bank accepted check from its depositor, forwarded it for collection, drawer stopped payment on check and, during interval between deposit of check and notice of stop payment order, bank granted credit and made payment upon checks drawn by its customer, bank was holder in due course to extent of advances made to its depositor; fact that standard banking practice would have been to with-

hold payment on check until it had been collected was not sufficient to establish that bank did not exercise good faith in handling check. *St. Cloud Nat'l Bank & Trust Co. v. Sobania Constr. Co.*, 302 Minn. 71, 224 N.W.2d 746 (1974).

Evidence that bank, in cashing 2 checks on which payment was later stopped, violated its own rule requiring teller to gain manager's approval before cashing corporate checks, was insufficient to establish that bank lacked good faith and therefore could not be a holder in due course. *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

Bank took check "in good faith" even though it credited depositor's account immediately so that depositor was able to draw against amount of check before drawer stopped payment thereon, where bank had no knowledge of drawer's claims against depositor. *Exchange Nat'l Bank v. Beshara*, 236 So. 2d 198 (Fla. App. 1970).

In an action by a bank which had accepted certain checks against the drawer who had stopped payment, the failure of the court to instruct the jury on the elements essential to the status of a holder in due course, or that the plaintiff bank had taken the checks for value and had a security interest therein was error. *Peoples Bank v. Haar*, 421 P.2d 817 (Okla. 1966).

Bank which received defendant's checks from the payee for value and without notice of any infirmities became a holder in due course, and the fact that the drawer delivered the checks to the payee as a loan on a promise to give back cash the next day and who stopped payment on the checks on ground of failure of consideration resulting from payee's breach of his promise could not thereby defeat the rights of the bank. *Texico State Bank v. Hullinger*, 75 Ill. App. 2d 212, 220 N.E.2d 248 (4th Dist. 1966).

22. — Acceptance of instruments without proper indorsement.

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to in-

dorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. *National Bank v. Refrigerated Trans. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978).

Bank which was authorized depository of plaintiff company was liable for face amount of 17 third-party checks made payable to plaintiff which were indorsed without authority by plaintiff's manager and deposited in manager's personal account, since bank under UCC § 3-304(2) had notice of plaintiff's claim against checks as payee thereof and thus could not claim benefits of holder-in-due-course status under UCC § 3-302(1). *Mott Grain Co. v. First Nat'l Bank & Trust Co.*, 259 N.W.2d 667 (N.D. 1977).

Depository bank which took bill of exchange without depositor's indorsement was not holder; bank did not become holder in due course by adding indorsement after notice of dishonor, and was subject to defense of payor's right of set off against payee. *United Overseas Bank v. Veneers, Inc.*, 375 F. Supp. 596 (D. Md. 1973).

Where bookkeeper deposited third party checks payable to her employer in her personal bank account, defendant

bank was not holder in due course, since it had notice of claim against instrument arising out of bookkeeper's acting for her own benefit, and since it was not a holder for value not having acquired the checks by authorized signature or indorsement. *Von Gohren v. Pacific Nat'l Bank*, 8 Wash. App. 245, 505 P.2d 467 (1973).

Where person who presented check to collecting bank did not have authority to negotiate check, collecting bank could not become holder of check based upon unauthorized indorsement, and hence could not become holder in due course. *Thieme v. Seattle-First Nat'l Bank*, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Draft payable to two payees was deposited by one without indorsement by other; held bank did not become "holder" of draft. *Federal Deposit Ins. Corp. v. Marine Nat'l Bank*, 431 F.2d 341 (5th Cir. Fla. 1970).

23. — — Knowledge of underlying nature of conduct resulting in defenses.

Where bank loaned \$25,000 to officer of corporation that was heavily indebted to bank and could not borrow such money itself, and where officer's note to bank for such sum, which was used by corporation, was executed allegedly because of fraudulent assurances by bank official that bank would not hold maker of note personally liable thereon but would instead look to corporation for payment, summary judgment on note in favor of bank would be reversed because defendant maker alleged sufficient facts to show (1) that bank was not holder in due course of such note under UCC § 3-302(1)(b), and (2) that bank therefore under UCC § 3-306(b) took note subject to all defenses of maker that would be available in action on simple contract, including defense of fraud in inducement. *Thompson v. First Nat'l Bank & Trust Co.*, 142 Ga. App. 174, 235 S.E.2d 582 (1977), rev'd on other grounds, 240 Ga. 494, 241 S.E.2d 253 (1978).

Bank that took drafts drawn under letter of credit did not take drafts in good faith as defined by UCC § 1-201(19) and without notice, as defined in UCC § 1-201(25), of defenses against them, and thus bank did not qualify as holder in due course under UCC § 3-302(1), where,

prior to time bank took draft, attorney gave bank notice by letter that letters of credit were issued pursuant to specific terms and conditions, conditions were explained, and letter warned that conditions had not and would not be fulfilled in foreseeable future; this constituted notice that any certification by beneficiary of letters of credit that payment was due thereunder might well be fraudulent; moreover, bank, having made substantial loans to beneficiary, could not have been unaware of beneficiary's severe financial difficulties. *Shaffer v. Brooklyn Park Garden Apts.*, 311 Minn. 452, 250 N.W.2d 172 (1977).

Bank which sought to recover on checks on which payment had been stopped because of defendant drawer's defense (right of setoff against payee) that was good except as against holder in due course did not establish, as matter of law, that it took checks in good faith so as to be holder in due course under UCC § 3-302(1)(b), where (1) on date two of such checks were deposited by payee, who was plaintiff bank's customer, bank suspected that payee-customer was using business dealings with defendant drawer to kite numerous other checks given by payee-customer to drawer in the course of their dealings; (2) bank on such date commenced not paying payee-customer's checks until they were covered by sufficient funds; (3) bank had long allowed payee-customer to maintain large potential overdrafts in his account; (4) payee-customer's account consisted mainly of checks received from, and given to, defendant drawer of checks in suit; and (5) jury could have found that when bank accepted payee-customer's deposit of checks in suit, bank was attempting to place on defendant drawer probable loss from drawer's dealings with payee-customer, in which dealings bank had acquiesced. *Community Bank v. Ell*, 278 Or. 417, 564 P.2d 685 (1977), reh'g denied, 279 Or. 245, 566 P.2d 903 (1977).

In action by bank against maker to recover on note, where maker executed note and security agreement in connection with purchase of construction equipment and where equipment dealer assigned note to bank but failed to deliver equipment, bank was not holder in due course

under UCC § 3-302 and thus its claim on note was subject to defense of failure of consideration under UCC § 3-306; under evidence that bank failed to advise maker of note of its acquisition of note and security agreement, that it placed payment coupon book in hands of dealer and received all monthly payments from dealer, that close working relationship existed between bank and dealer and dealer was clothed with authority to collect and forward all payments due on transaction, and that agency and authority were further shown to exist by bank's authorizing return of machinery to dealer and terminating of balances due on purchase money paper, bank did not, under UCC § 3-307(3), sustain its burden of proving that it was holder in due course and under facts and circumstances known to and participated in by bank in connection with transaction, it could not be said that bank did not have reason to know that defense of failure of consideration existed. *Kaw Valley State Bank & Trust Co. v. Riddle*, 219 Kan. 550, 549 P.2d 927 (1976).

In action by bank against makers of several notes pledged by third party as collateral for loan, trial court properly found that bank had taken notes in good faith and without notice of makers' alleged defenses, pursuant to UCC § 3-302(1) and definitions contained in UCC § 1-201, subsecs. (19), (25) and (27), where officers and employees of bank who handled the transaction testified that they had no knowledge or information concerning any defenses, and described in detail the investigation which they made and information which they gathered to satisfy themselves that notes were valid and that parties with whom they dealt were reliable; where trial court's findings described in some detail the investigations and inquiries made by bank; where trial court found those investigations were reasonable under the circumstances, and that the bank lacked knowledge to know or believe that alleged defenses existed; and where facts found by trial court established that the bank had no connection with transactions for which notes were given. *Security Pac. Nat'l Bank v. Chess*, 58 Cal. App. 3d 555 (2d Dist. 1976).

Fact that, during period of rapidly expanding franchising, bank acquired as col-

lateral for loans all notes of franchise company, which notes arose out of sale of franchises, that bank anticipated that loan would be for short-term working capital, that bank had knowledge that there was franchising arrangement between franchising company and makers of notes, that there might be accelerated payment of notes on sale of subfranchises by makers and that notes arose from franchising arrangement, did not justify inference of notice or bad faith as defined by UCC. *Third Nat'l Bank v. Hardi-Gardens Supply of Ill. Inc.*, 380 F. Supp. 930 (M.D. Tenn. 1974).

Payee's depository bank had reason to know that drawer had defense against payee, considering that bank knew that payee was using checks drawn by drawer to cover other checks drawn for drawer's benefit, and this knowledge precluded holder in due course status under UCC § 3-302(1)(c). *Oklahoma Nat'l Bank v. Equitable Credit Fin. Co.*, 489 P.2d 1331 (Okla. 1971).

24. — Withdrawals while depositor's balance is low.

Where payee indorsed checks for deposit, deposited them in its account with bank, and bank thereafter allowed payee to withdraw funds from its account in full amount of checks, notice of fact that payee-depositor's account with bank was overdrawn when withdrawal was allowed would not result in bank's loss of its holder in due course status. *Commerce Bank of Univ. City v. EDCO Fin. Servs.*, 379 F. Supp. 293 (E.D. Mo. 1974), *aff'd*, 503 F.2d 1047 (8th Cir. Mo. 1975).

That its depositor's account is low in funds, or even overdrawn, does not constitute notice to a collecting bank of an infirmity in the underlying transaction or instrument, and is not evidence of bad faith chargeable to it at the time it permitted withdrawals against the deposited check. *Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n*, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

25. — Instrument so irregular as to give notice of defense.

Assignee of note did not take instrument in good faith within meaning of UCC § 3-302(1)(b), and thus was subject to

defenses of fraud and failure of consideration that were applicable to assignor, where evidence showed that (1) although note had face value of \$3,000, assignor discounted it to assignee for \$500, of which \$244 was interest; (2) note was taken by assignee without recourse; and (3) other circumstances existed from which knowledge of improper manner in which assignor had conducted business transaction with defendant maker could be imputed to assignee. *Security Cent. Nat'l Bank v. Williams*, 52 Ohio App. 2d 175, 368 N.E.2d 1264 (1976).

Bank, as holder of promissory note executed pursuant to contract between payee of note and its corporate maker for sale of barley, was not holder in due course under UCC § 3-302(1) where bank was informed by president of corporate maker, prior to purchase of note, that payee had not yet performed contract, and where instrument was so irregular as to give notice of claim or defense under UCC § 3-304(1)(a); bank was therefore not entitled to cut off maker's underlying contract defense. *First Nat'l Bank v. Otto Huber & Sons*, 394 F. Supp. 1284 (D.S.D. 1975).

Fact that note is purchased for amount less than face value, or that unusually large discount is accepted, is not of itself sufficient to charge purchaser with notice of existing equities, unless consideration is merely nominal. *United States Fin. Co. v. Jones*, 285 Ala. 105, 229 So. 2d 495 (1969).

The payee of a promissory note who has knowledge that a transaction between note's maker and another included a grossly excessive cash sales price is not a holder in due course if the pretended sale was intended to cloak a usurious transaction. *Mutual Home Dealers Corp. v. Alves*, 23 A.D.2d 791 (2d Dep't 1965).

26. — Knowledge of irregularity of underlying transaction.

Assignee of note given for purchase of land in interstate transaction was not holder in due course where facts known to assignee at time of assignment, i.e., apparent multiple violations of Interstate Land Sales Act (15 USCS 1703(b)), should have alerted assignee to possible irregularities in making of note. *Stewart v.*

Thornton, 116 Ariz. 107, 568 P.2d 414 (1977).

Where assignee of note knew of assignor's operations re underlying transaction, such knowledge might be considered by court on remand in determining whether assignee was acting in good faith so as to qualify as holder in due course. Kennard v. Reliance, Inc., 257 Md. 654, 264 A.2d 832 (1970).

If note is alleged and proven usurious on its face, result would be to show that holder was not holder in due course. Gray v. American Bank, 122 Ga. App. 442, 177 S.E.2d 207 (1970).

Holder in due course was entitled to recover full amount of check that was negotiated to holder as payment on existing indebtedness owed by payee to holder in good faith and without notice of maker's defense of want of consideration, even though holder may have acquired knowledge of maker's defense prior to depositing check. Kemp Motor Sales, Inc. v. Statham, 120 Ga. App. 515, 171 S.E.2d 389 (1969).

As the drawer of a trade acceptance is the other party to the underlying transaction it is apparent that he cannot be a holder in due course because he necessarily has knowledge of defenses arising from his breach of the contract. Program Aids Co. v. W. R. Bean & Son, Inc., 4 U.C.C. Rep. Serv. 210 (1967, NY Sup).

27. —Knowledge of agent or employee.

Where the agent of a payee corporation was also the corporation's president, general manager, and sole stockholder and had full knowledge of all the facts surrounding the debt owed by the payor to the corporation, such knowledge was imputed to the corporation and precluded it from being entitled to the status of a holder in due course. Dobbs-Maynard Co. v. Jumper, 388 So. 2d 879 (Miss. 1980).

Bank which received check from secretary of debtor corporation as payment for two notes that secretary believed to be corporation's obligations was not holder in due course of such check under UCC § 3-302(1) where bank officer, who received check, knew that one of the two notes was personal obligation of debtor corporation's

president. Frye v. F & M Bank, 561 S.W.2d 392 (Mo. Ct. App. 1977).

Where bank took cashier's check from one of its tellers in payment of debt due from teller and where there was evidence from which it could be inferred that assistant cashier of bank took check with knowledge that personal check used by teller to purchase cashier's check was drawn on insufficient funds, bank took cashier's check with notice of its fraudulent procurement and in bad faith, and, thus, did not achieve status of holder in due course. Mid-Continent Nat'l Bank v. Bank of Independence, 523 S.W.2d 569 (Mo. Ct. App. 1975).

Where agent with authority to gather and transmit information and to prepare drafts and obtain indorsements on them became aware, while acting in its capacity as plaintiff's agent, of special purpose for which bank indorsed draft, plaintiff was charged with notice that bank indorsed draft for special purpose, and could not therefore be holder in due course but took draft subject to bank's defense which could properly be asserted by parol evidence. American Underwriting Corp. v. Rhode Island Hosp. Trust Co., 111 R.I. 415, 303 A.2d 121 (1973).

Although the makers of notes had been induced to borrow money from the plaintiff bank by fraudulent representations of a bank officer, where those representations were not chargeable to the bank, the bank took the instruments as a holder in due course, subject only to the defense of fraud as to the nature of the instrument. City Nat'l Bank v. Vanderboom, 290 F. Supp. 592 (W.D. Ark. 1968), aff'd, 422 F.2d 221 (8th Cir. Ark. 1970), cert. denied, 399 U.S. 905, 90 S. Ct. 2196, 26 L. Ed. 2d 560 (1970).

The fact that a bank financing the sales of a vendor supplied the vendor with printed forms does not make the vendor the agent of the bank so as to impute to the bank the knowledge of the vendor as to defenses of the maker. Waterbury Sav. Bank v. Jaroszewski, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

28. —Past due instrument.

The purchaser of a note with knowledge of a default in the making of payments does not qualify as a holder in due course

under UCC § 3-302(1) and is thus subject, under UCC § 3-306, to any defenses that the maker has against the payee, including the defense of waiver. *Matter of Marriage of Rutherford* (Civ. App. 1978) 573 S.W.2d 299.

One who takes assignment of note at time when it was past due and was on notice of such fact by virtue of terms of note, is not holder in due course. *Wenke v. Norton*, 120 Ga. App. 70, 169 S.E.2d 663 (1969).

A person who takes a note with notice that it is overdue is not a holder in due course, and a holder who obtains his title from a holder in due course cannot enforce the instrument when he was party to some fraud or illegality affecting it. *Brown v. Scales*, 109 Ga. App. 138, 135 S.E.2d 525 (1964).

29. Effect of failure to make inquiry.

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. *National Bank v. Refrigerated*

Trans. Co., 147 Ga. App. 240, 248 S.E.2d 496 (1978).

The fact that a holder does not inquire as to whether the underlying contract has been performed does not prevent him from being a holder in due course. *Waterbury Sav. Bank v. Jaroszewski*, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

The standard of notice contemplated by subsection (1)(c) of the instant section is actual notice and not merely reasonable grounds for belief, and the purchaser of a negotiable note given by a home owner to an aluminum siding company would not be affected by evidence that the purchaser was aware of complaints against the siding company by previous customers nor by evidence of knowledge of a defense acquired after the note had been purchased. *Universal C.I.T. Credit Corp. v. Ingel*, 347 Mass. 119, 196 N.E.2d 847 (1964).

30. —Failure in circumstances calling for further inquiry.

In declaratory action to determine rights of holder of promissory note, where (1) maker of note on May 23, 1971 signed contract to purchase lot, received deed to lot, and executed mortgage on lot and note in certain sum payable to named person, which note was substantially discounted and immediately sold to plaintiff; (2) makes rescinded the voidable sales contract two days later, as permitted by federal Interstate Land Sales Full Disclosure Act (15 USCS § 1703(b)), because of his failure to receive property report on lot as of time of signing contract of sale; and (3) maker contended that plaintiff holder had had notice within meaning of UCC § 3-304(1)(b) that maker's obligation under such contract was voidable, plaintiff holder was not holder in due course under UCC § 3-302(1)(c) because (1) plaintiff's purchase of note for much less than its full value should have alerted him to possible defense against maker's liability; (2) note was also purchased by plaintiff within the two-day period in which maker could rescind the voidable sales contract; (3) by examining such contract, which was in possession of seller of note, plaintiff could have ascertained that maker of note had not inspected the lot purchased or received a property report thereon, as required by federal law; and (4) under cir-

cumstances of case, trial court could reasonably infer bad faith on part of plaintiff in refusing to investigate when facts known to him indicated irregularity respecting such note. *Stewart v. Thornton*, 116 Ariz. 107, 568 P.2d 414 (1977).

Notice under UCC § 3-302(1)(c) and UCC § 3-304(1)(b) requires some inquiry by purchaser of note where purchaser has actual knowledge of facts that should alert him to possible irregularities concerning such note. Protection afforded holder in due course cannot be used to shield one who simply refuses to investigate when facts known to him suggest an irregularity concerning commercial paper that he purchases. *Stewart v. Thornton*, 116 Ariz. 107, 568 P.2d 414 (1977).

One who seeks protection as a holder in due course must have dealt fairly and honestly in acquiring the instrument as to the rights of prior parties, and where circumstances are such as to justify the conclusion that the failure to make inquiry arose from the suspicion that inquiry would disclose a vice or defect in the title, the person is not a holder in due course. *Norman v. World Wide Distribs., Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963).

Where the evidence showed that the payee of certain notes operated a referral plan which was a fraudulent scheme based on an operation similar to the chain letter racket, and that the holder, which had paid \$831 for a \$1,079.40 note payable three days after date, knew enough about the referral plan to require it to make further inquiry, the holder, having made no inquiry, held as though it had knowledge of all that the inquiry would have revealed, and was not a holder in due course. *Norman v. World Wide Distribs., Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963).

31. Payee as holder in due course, generally.

A holder through a holder in due course has all the rights of a holder in due course. *Brock v. Adams*, 79 N.M. 17, 439 P.2d 234 (1968).

When there is no valid defense against the payee, the fact that he is only a holder and not a holder in due course is immate-

rial. *Brock v. Adams*, 79 N.M. 17, 439 P.2d 234 (1968).

A payee may be a holder in due course. *Waterbury Sav. Bank v. Jaroszewski*, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

Indorsee who surrendered possession of dishonored checks to his indorser cannot be regarded as a "holder" of the instruments. *Gluge v. Robinson*, 204 Pa. Super. 404, 204 A.2d 279 (1964).

There is no doubt that under the Uniform Commercial Code, the payee of a series of promissory notes may be a holder in due course. *Mellen v. Gora*, 70 York Leg. Rec. 1 (Pa. 1956).

32. —Particular applications.

Bank issuing letter of credit may be enjoined against making payment upon demand under UCC § 5-114 where there is "fraud in transaction" and party presenting draft is beneficiary or some other party who is not holder in due course under UCC § 3-302. *United Technologies Corp. v. Citibank*, 469 F. Supp. 473 (S.D.N.Y. 1979).

Payee of cashier's check upon which issuing bank had attempted to stop payment for lack of consideration was entitled to recover amount of check from issuer; recovery based not on payee's status as holder in due course, but on nature of cashier's check as being accepted for payment when issued, within the meaning of UCC § 4-303(a). *Able & Assocs. v. Orchard Hill Farms, Inc.*, 77 Ill. App. 3d 375, 395 N.E.2d 1138 (1st Dist. 1979).

Where delivery of check was conditioned on its acceptance as settlement of note held by payee, and where payee did not deposit check for 11 months, proffered settlement was not accepted within reasonable time and check in question was subject to defense based on its conditional delivery and good against any person not holder in due course under UCC § 3-306(3); payee was not holder in due course under UCC § 3-302 in that his own conversation with plaintiff preceding delivery of check, together with notation on check, were ample evidence that payee had actual notice of drawer's defense. *Losson v. Whitson*, 535 S.W.2d 406 (Tex. Civ. App. 1976).

Payee of four checks was holder in due course and was entitled to recover from

drawer of checks under UCC §§ 3-302-3-305 where checks were given to payee in payment for grain shipments by owner of feed and grocery business located on drawer's property, under arrangement whereby drawer furnished money to store owner to buy feed and was given proceeds from resale of grain and right to purchase grain at cost, and where payee had been given approximately 70 checks signed by drawer as payment for grain shipments over past two years. *S & C Transp. Co. v. McAlister*, 528 P.2d 1140 (Okla. Ct. App. 1974).

Where holder acquired series of notes from payee, became holder in due course thereof, and accelerated balance due after maker defaulted, but, after discussions between maker, payee, and holder, holder accepted payment partly in cash and partly by way of new note, payable to payee and indorsed over to holder, holder was not holder in due course with respect to new note and was subject to any claims or defenses against payee of which holder had knowledge prior to accepting new note; course of conduct surrounding issuance of new note did not constitute renewal of existing notes, but rather resulted in partial payment and novation with respect to balance due; holder in due course status under old notes disappeared with extinguishment of total debt represented thereby and holder's status with respect to new note was determined by circumstances existing at time it received delivery of new note. *Lazere Fin. Corp. v. Crystal Mart, Inc.*, 78 Misc. 2d 379 (1974).

Where (1) bank check was delivered to payee by drawer's agent with drawer's consent and knowledge, (2) check itself contained no restrictions or designations as to its use, and (3) payee, stock brokerage firm, had no trading account with, or indebtedness to, drawer, payee took check without notice of drawer's claims, payee became holder in due course of instrument, and was entitled to summary judgment in action by drawer. *Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 296 Minn. 130, 207 N.W.2d 282 (1973).

Plaintiff had notice of defense on note so as to preclude holder in due course status where plaintiff participated in underlying

financing arrangement under which notes of which plaintiff was payee were assigned to defendant which executed mortgage to secure note so that plaintiff could receive money from mortgagee and plaintiff ultimately paid mortgagee and obtained assignment of notes and mortgage. *Coplan Pipe & Supply Co. v. Ben-Frieda Corp.*, 256 So. 2d 218 (Fla. App. 1972).

Where the defendant executed a promissory note on February 10, 1964 and subsequently on April 15, 1964 incorporated his construction business, plaintiff who was the holder, but not a holder in due course, of the note was subject to the defense of novation, and proof of that defense was not precluded by the parol evidence rule or the Statute of Frauds. *Miles v. Houghtaling*, 32 A.D.2d 714 (3d Dep't 1969).

The Code does not displace a statute which declares that the transferee of the buyer's note given as part of a credit sale transaction shall not have the protection from defenses of a holder in due course. *Casey v. Philadelphia Auto Sales Co.*, 428 Pa. 155, 236 A.2d 800 (1968).

Where insurer, after agreeing to pay in full plaintiff buyer's claim that a certain shipment of goods had been damaged in transit, took possession of the goods and sold them at auction to defendant which executed three promissory notes to plaintiff in partial payment therefor, plaintiff, who had no notice of any fact indicating that chicanery had been practiced upon defendant in connection with the sale, was a holder in due course of the notes and entitled to recover thereon despite defendant's claim of fraudulent substitution of goods. *Saale v. Interstate Steel Co.*, 27 A.D.2d 1 (1st Dep't 1966), *aff'd*, 19 N.Y.2d 933, 281 N.Y.S.2d 340, 228 N.E.2d 397 (1967).

The payee of a promissory note who has knowledge that a transaction between note's maker and another included a grossly excessive cash sales price is not a holder in due course if the pretended sale was intended to cloak a usurious transaction. *Mutual Home Dealers Corp. v. Alves*, 23 A.D.2d 791 (2d Dep't 1965).

33. Purchaser at judicial sale.

One with the rights of a holder in due course of a promissory note, who has not

otherwise lost such rights, does not diminish his status by purchasing the note later at a judicial sale, although he may not by virtue of such purchase alone become a due course holder. *Finance Co. of Am. v. Wilson*, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

34. Acquisition in taking over estate.

Status of holder in due course cannot be acquired simply by virtue of taking over as administratrix of decedent's estate, since representative of estate is not purchaser for value before maturity without notice and hence can acquire no greater rights than those possessed by decedent during lifetime. *Rago v. Cosmopolitan Nat'l Bank*, 89 Ill. App. 2d 12, 232 N.E.2d 88 (1st Dist. 1967).

35. Bulk transactions.

Under UCC § 3-302(3)(c), Federal Deposit Insurance Corp. (FDIC), on making bulk purchase of part of assets of bank closed by commissioner of banking, was not holder in due course of promissory note included in such purchase, since such a transaction does not possess the characteristics of a sale for value, in good faith, and without notice of any defense of note's maker to liability thereon (observing that Official Comment 3 to 3-302(3)(c) states that such subsection has particular application to purchase by one bank of a substantial part of the commercial paper held by another bank which is threatened with insolvency and seeks to liquidate its assets). *Henkin, Inc. v. Berea Bank & Trust Co.*, 566 S.W.2d 420 (Ky. Ct. App. 1978).

When there has been a bulk transfer incident to the liquidation of a going enterprise, or a transfer of a business of which certain promissory notes in issue represent part of the assets transferred, or a transfer by way of gift, then the transferee acquires no more protected interest than the payee had; but when, in the course of an ongoing business interest there is a substantial transfer of notes as a matter of regular commercial dealing, the purchaser is not put on notice that the paper transferred is not fully and freely negotiable. *Pugatch v. David's Jewelers*, 53 Misc. 2d 327 (1967).

The fact that a holder has financed the vendor's sales in some 500 to 600 transac-

tions and had heard of 3 to 4 complaints of customers is immaterial both because the percentage is so small and also because the character of a holder is affected only by his knowledge with respect to the instrument in question and not other transactions. *Waterbury Sav. Bank v. Jaroszewski*, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

The plaintiff's purchase of four accounts of the face value of \$1187.25 for \$635 from a paint dealer constituted a bulk transaction not in the regular course of business of the transferor, and plaintiff did not thereby become a holder in due course of defendant's trade acceptance which was included in the purchase; and where the proof showed that the defendant did not receive the goods for which the trade acceptance was executed there was a failure of consideration which barred plaintiff's recovery. *Credit Indus. Corp. v. DiNanno*, 29 Mass. App. Dec. 40 (1964).

36. Purchaser of limited interest.

Holder of limited interest in instrument is not confined to one with collateral security interest therein as opposed to equity ownership; purchaser of partial interest in promissory note is holder of to extent of interest purchased. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108 (S.D.N.Y. 1978), remanded, 607 F.2d 994 (2d Cir. N.Y. 1979).

In bank's suit on promissory note, fact that bank was copayee of note together with corporation form which bank purchased note for valuable consideration did not, under UCC § 3-302(2), destroy bank's status as holder in due course of such note. *Ricks v. Bank of Dixie*, 352 So. 2d 798 (Miss. 1977).

The pledgee of promissory notes to secure a debt is the purchaser of a limited interest under § 3-302(4), and not the holder of a limited assignment under § 3-202(3). *Wood v. Willman*, 423 P.2d 82 (Wyo. 1967).

A pledgee of notes is a purchaser of a limited interest and a holder in due course only to the extent of the interest purchased, but he could enforce the notes over defenses only to the extent of his interest, and defenses good against the pledgor remained available insofar as the

pledgor retained an interest in the notes. *Wood v. Willman*, 423 P.2d 82 (Wyo. 1967).

When there has been a bulk transfer incident to the liquidation of a going enterprise, or a transfer of a business of which certain promissory notes in issue represent part of the assets transferred, or a transfer by way of gift, then the transferee acquires no more protected interest than the payee had; but when, in the course of an ongoing business interest there is a substantial transfer of notes as a matter of regular commercial dealing, the purchaser is not put on notice that the paper transferred is not fully and freely negotiable. *Pugatch v. David's Jewelers*, 53 Misc. 2d 327 (1967).

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37. Evidence and burden of proof.

In suit by guardian of three minors against bank for accepting, by assignment, four certificates of deposit owned by minors as collateral for bank's loan to guardian and guardian's husband individually and then appropriating proceeds of certificates to its own use, bank could not successfully claim that it was holder in due course under UCC § 3-302(1)(c) where it was unable to show that it had had no notice of any claim by any person to such certificates. *First Nat'l Bank v. Rapides Bank & Trust Co.*, 145 Ga. App. 514, 244 S.E.2d 51 (1978), overruled on other grounds, 228 Ga. App. 893, 495 S.E.2d 296 (1997).

In action by holder, not in due course, against maker of promissory note, parole evidence was admissible to show that maker was induced to sign note by false and fraudulent representations of original payee. *Berry v. Abilene Sav. Ass'n*, 513

S.W.2d 872 (Tex. Civ. App. 1974), writ ref'd n.r.e., (Nov. 27, 1974).

In action by payee bank against maker of note, summary judgment was erroneously granted where maker introduced affidavit stating that bank had agreed that renewals on note were with condition that maker would be relieved of liability if sale of corporation was not finalized, raising issue of fraud in the inducement under UCC §§ 3-302, 3-306(2), and 3-408. *Viracola v. Dallas Int'l Bank*, 508 S.W.2d 472 (Tex. Civ. App. 1974), ref. n.r.e. (July 17, 1974).

Evidence supported conclusion that plaintiff was "beneficial owner" of cashier's check as well as holder in due course, where although he was neither payee nor endorsee of cashier's check or personal check which was consideration for cashier's check, he had paid insurance company payee of both checks full amount of notes issued to insurance company by drawer of personal check and surrendered notes to drawer of personal check, and he requested that cashier's check be made payable to insurance company for deposit only to bank whereupon cashier's check was immediately deposited in plaintiff's agency account. *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572 (Tex. 1973).

Bank to which promissory note was negotiated has not met the burden of establishing that it is a holder in due course to the extent entitling it to summary judgment where there remains, among others, the question of the identity of the person who altered the maturity date from 5 days to 45 days after date. *Unadilla Nat'l Bank v. McQueer*, 27 A.D.2d 778 (3d Dep't 1967).

A bank which took a promissory note given for the installation of 12 jalousie windows was a holder in due course even though it failed to inquire of either the payee or the maker as to the satisfactory completion of the contract, where no evidence was adduced to show that the bank's failure to make such inquiry was a divergence from common banking or commercial practice. *First Nat'l Bank v. Anderson*, 7 Pa. D. & C.2d 661 (1956).

The defendant must show what knowledge the plaintiff had in order to establish

that the plaintiff is not a holder in due course [although note that this is inconsistent with the provision that when a defense is shown to exist the burden is on the plaintiff to establish that he has the rights of a holder in due course. § 3-307(3)]. *Potter Bank & Trust Co. v. Henneforth*, 74 Montg. County L. Rep. 420 (Pa. 1959).

38. Issues for determination by jury.

Question whether holder of note was holder in due course was one of fact to be determined by trier of facts. *Vernon v. Yanks*, 303 So. 2d 375 (Fla. App. 1974).

In an action upon a check issued in payment for carpeting and floor tile installed by plaintiff in defendant's residence, where the defendant counter-claimed for breach of warranty based upon work not encompassed by the check, it was obvious that plaintiff was not a holder in due course and the jury should have been permitted to consider defenses to the check based upon the original transaction. *Mansion Carpets, Inc. v. Marinoff*, 24 A.D.2d 947 (1st Dep't 1965).

Ordinarily, the question whether one is a holder in due course under the requirements of this section is largely one of fact which, together with the credibility of those seeking to establish due course status, is for the jury. *Budget Charge Accounts, Inc. v. Mullaney*, 187 Pa. Super. 190, 144 A.2d 438 (1958).

Where there was a jury question whether a note was negotiated for the purpose of cutting off a defense of fraud in the inception, thus affecting the good faith of the holder, who claimed the status of a holder in due course, there was no error in opening a judgment entered by confession on the note. *Budget Charge Accounts, Inc. v. Mullaney*, 187 Pa. Super. 190, 144 A.2d 438 (1958).

A jury question regarding the good faith of a holder of a series of promissory notes was raised when the defendant alleged in his answer that the holder was present during and participated in the business transactions which were the source of the notes, that the holder personally signed one of the agreements executed during the transactions, and that the holder had prior knowledge of the infirmities inherent in the notes; consequently, the plaintiff-holder's motion for judgment on the

pleadings would be denied. *Mellen v. Gora*, 70 York Leg. Rec. 1 (Pa. 1956).

39. Miscellaneous defenses.

In suit by purchaser of promissory note to recover thereon, where note was executed in favor of bank by defendants husband and wife as comakers together with defendant husband's partner and partner's wife to consolidate partnership's outstanding notes; where defendant's partner and partner's wife, who were not parties to suit, executed mortgage to bank on two parcels of realty owned by them as security for such note; where first parcel was subject to prior mortgage of third party and judgment of foreclosure had been entered thereon; where plaintiff at suggestion of partner's wife became sole owner of first parcel by redeeming it and having it conveyed to her by means of a "straw" transaction; where plaintiff found buyer for first parcel, buyer's title search discovered bank's mortgage thereon and note for which such mortgage was given, plaintiff purchased note in order to convey marketable title to buyer, note was indorsed by bank to plaintiff, mortgage on first parcel was released and discharged, mortgage on second parcel was assigned to plaintiff, and plaintiff sold first parcel for substantial profit, (1) under UCC § 3-302, plaintiff was holder in due course of note in suit and could recover thereon unless defendants could establish defense to note; (2) only defense raised by defendants was alleged satisfaction of such note on theory that plaintiff had been made whole by virtue of her resale of collateral property (first parcel); and (3) such defense failed since defendants, although benefiting from proceeds of note to extent of their interest in partnership, had never had any title or interest in the collateral property (first parcel), were not subjected in any way to double liability on note, and their liability thereon would be completely discharged under UCC § 3-603 by paying note (stating that any further dispute about liability in the case would have to be settled in separate action). *Ryan v. Stearns*, 135 Vt. 385, 376 A.2d 728 (1977), but see *Licursi v. Sweeney*, 156 Vt. 418, 594 A.2d 396 (1991).

Where (1) first bank, which had loaned debtor \$20,000 and accepted as collateral

nonnegotiable certificate of deposit that first bank had previously issued to debtor, inadvertently delivered renewal certificate to debtor, (2) debtor, instead of returning renewal certificate to first bank, used it as collateral for loan from second bank and gave second bank security interest in renewal certificate that second bank perfected by possession under UCC § 9-304(1), and (3) on debtor's default on both loans, second bank presented renewal certificate to first bank, which dishonored it, court held (1) that second bank was not holder in due course under UCC §§ 3-302(1) and 3-805 because renewal certificate was nonnegotiable under UCC § 3-104(1)(d), (2) that as a result, second bank was mere assignee of renewal certificate and certificate under assignments statute was subject to first bank's right of setoff, (3) that exclusion of right of setoff from Article 9 protection means that claimant of right of setoff (first bank) against collateral (renewal certificate) is not barred from enforcing such right merely because another creditor (second bank) has perfected security interest in collateral by taking possession thereof, since right of setoff is separate from priority provisions of Article 9, and (4) that as a result, second bank held debtor's renewal certificate subject to any defenses of first bank, which "defenses" included first bank's right of setoff. *Bank of Crystal Springs v. First Nat'l Bank*, 427 So. 2d 968 (Miss. 1983).

Holder in due course of negotiable note secured by mortgage takes mortgage subject to only those defenses which could be raised by mortgagor against note itself. *Colburn v. Mid-State Homes, Inc.*, 289 Ala. 255, 266 So. 2d 865 (1972).

If note is alleged and proven usurious on its face, result would be to show that holder was not holder in due course. *Gray v. American Bank*, 122 Ga. App. 442, 177 S.E.2d 207 (1970).

III. DECISIONS UNDER FORMER UCC § 75-3-305.

40. In general.

In action under UCC § 3-413(2) against drawer of dishonored check, where (1) drawer wrote check on his account at drawee bank, payable to contractor for building a house, (2) payee deposited

check in his account at plaintiff depository bank, (3) plaintiff cashed check, covered overdrafts on payee's account, credited main part of check's proceeds to such account, and paid payee remainder in cash, (4) after plaintiff had cashed check, drawer filed stop-payment order on it, resulting in its dishonor, and (5) plaintiff, despite its normal practice of withholding credit on a check until five days after its deposit, waived such waiting period as to check in suit because it believed drawer to be responsible person and because it had also obtained verification from drawee bank that check was good at that time, court held (1) that plaintiff was holder in due course under UCC § 3-302(1)(b) and (c), since at time it cashed check, it had no notice of any defenses thereto and also no reason to believe that drawer would not honor it, (2) that in such circumstances, plaintiff's extension of immediate credit on the check did not manifest bad faith, since the Uniform Commercial Code, although not requiring a depository bank to give immediate credit on a check, encourages such practice by granting the bank rights against drawer of check on which immediate credit is extended, and (3) that since plaintiff was holder in due course, it therefore, under UCC § 3-305(2), took check in suit free from all but a limited number of defenses to it. *Frantz v. First Nat'l Bank*, 584 P.2d 1125 (Alaska 1978).

Under UCC §§ 3-305 and 3-306, agreement that any renewal note would be endorsed by all original endorers, if proved, would make note unenforceable against guarantors, where delivery was conditional upon the procurement of all such endorsements. *Long Island Trust Co. v. International Inst. for Packaging Educ., Ltd.*, 38 N.Y.2d 493, 344 N.E.2d 377 (1976).

When an oral agreement is not binding it cannot be raised as a defense to an action on a note. *Sholom & Zuckerbrot Queens Leasing Corp. v. Forate Realty Corp.*, 29 A.D.2d 571 (2d Dep't 1967).

Acceptor's asserted defense of breach of contract is unavailable against the holder in due course of negotiable trade acceptance. *Federal Factors, Inc. v. Wellbanke*, 241 Ark. 44, 406 S.W.2d 712 (1966).

Makers of promissory notes possessing both the knowledge and opportunity to

ascertain their provisions cannot procure the cancellation of the instruments when they have passed into the hands of a holder in due course. *Burchett v. Allied Concord Fin. Corp.*, 74 N.M. 575, 396 P.2d 186 (1964).

The test of a defense under paragraph (c) of subdivision (1) of this section is that the party must have had no reasonable opportunity to obtain knowledge; and in determining what is a reasonable opportunity all relevant factors are to be taken into account, including the age and sex of the party, his intelligence, education, and business experience, his ability to read or understand English, the representations made to him and his reason for relying on them or have confidence in the person making them, the presence or absence of any third person who might read or explain the instrument to him, and the apparent necessity, or lack of it for acting without delay. *Reading Trust Co. v. Hutchison*, 35 Pa. D. & C.2d 790 (1964).

41. Claims to instrument by others.

Where a bank, which under UCC § 3-202(1) was holder of note delivered to it with necessary endorsements of both copayees, took such note (1) "for value" under UCC §§ 3-302(1)(a) and 3-303(a) because it had taken it as collateral for loan to note's copayees, and (2) "in good faith" under UCC § 3-302(1)(b) and "without notice" under UCC § 3-302(1)(c) of any claims against note's copayees, court held (1) that bank was holder in due course of such note under UCC § 3-302(1), (2) that under UCC § 3-305(1), bank took note free from all claims to it by any person, and (3) that bank therefore was entitled to priority of payment over judgment creditor of note's copayees in situation where, prior to copayees' transfer of note to bank, judgment creditor of copayees had served writ of garnishment on maker of note. *Bricks Unlimited, Inc. v. Agee*, 672 F.2d 1255 (5th Cir. 1982).

Although bank that issued cashier's check to individual who subsequently became bankrupt had no "defense" to instrument within meaning of UCC §§ 3-305(2) and 3-306(c), based on fact that bankrupt had guaranteed certain notes held by bank, this did not preclude bank from setting-off guaranty obligations of bank-

rupt against amount of cashier's check in action by receiver of bankrupt's estate to collect on cashier's check. *In re Johnson*, 552 F.2d 1072 (4th Cir. Va. 1977).

42. Defenses of party to instrument with whom holder has not dealt.

Under UCC § 3-305(2), a holder in due course takes the instrument subject to all defenses of any party with whom he has dealt. *Brannon v. Langston*, 375 So. 2d 231 (Miss. 1979).

Third party who deals with agent exercising special authority to execute instrument by and in name of principal deals, within contemplation of UCC § 3-305(2), with principal himself. *Estate of Lucas v. Whiteley*, 550 S.W.2d 767 (Tex. Civ. App. 1977), *ref. n.r.e.* (Oct. 5, 1977).

Payees of drafts issued by title company were holders in due course of drafts and were entitled to enforce them against title company, notwithstanding drafts were issued through escrow to payees as creditors of person who funded escrow with forged certified check, where there was no evidence to indicate that payees were not bona fide creditors or that they ought to have been suspicious of title company draft; nor were payees subject to personal defenses under UCC § 3-305(2) on grounds that payees dealt with title company since payees did not participate in immediate transaction by which title company gave out its draft, that is, exchange of forged cashier's check for draft. *Chicago Title & Trust Co. v. Walsh*, 34 Ill. App. 3d 458, 340 N.E.2d 106 (1st Dist. 1975).

43. Want or failure of consideration.

Bank which took note for value in good faith, and without notice of any defenses that maker might have was holder in due course under UCC § 3-302(1) and, under UCC § 3-305(2), took instrument free from maker's defense of lack of consideration. *Worthey v. First State Bank*, 573 S.W.2d 279 (Tex. Civ. App. Waco 1978).

Under UCC § 3-305(2) and § 3-408, lack of consideration and fraud in the inducement are not good defenses against a holder in due course. However, under UCC § 3-307(3), once a defense other than lack of consideration is raised, holder has burden of proving that he is holder in

due course in all respects (action on promissory note, executed in real estate sale transaction, in which makers pleaded affirmative defenses of lack of consideration and fraud in the inducement and also counterclaimed for damages for such fraud). *Kreutz v. Wolff*, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Payee of check drawn on account of defendant company for labor and materials allegedly furnished to defendant by payee, which check was dishonored by drawee bank for insufficient funds, was not entitled to summary judgment in action to recover on check where defendant's defense was that such labor and materials were actually furnished to another company with similar name which also had same person as its president. Plaintiff payee, who was not holder in due course, was subject under UCC § 3-305(2) to any defense that defendant might make, since he had dealt with defendant; and although fact that defendant's defense was made in affidavit by person who was president of both companies might make such defense appear to be evasive, defense still created factual issue that was central to issue sued on, since there would be no consideration to support check if defendant had never dealt with plaintiff for purchase of such labor and materials. *Davis Acoustical Corp. v. Matzen Constr., Inc.*, 57 A.D.2d 1018 (3d Dep't 1977).

In action by United States to enforce payment of money orders delivered to United States as payee to satisfy taxpayer's tax liability, against bank that issued money orders, United States was holder in due course and, thus, was not subject to defense of failure of consideration where bank issued money orders against check which had not cleared, where money orders were delivered to taxpayer who, although they were intended to be used to meet taxpayer's payroll, delivered them to United States to satisfy his tax liability, and where purchaser of money orders subsequently stopped payment on his check. *United States v. Second Nat'l Bank*, 502 F.2d 535 (5th Cir. Fla. 1974), cert. denied, 421 U.S. 912, 95 S. Ct. 1567, 43 L. Ed. 2d 777 (1975).

In transaction whereby sole shareholder of small corporation sold all his

shares of stock to third person and corporation participated in transaction with purchaser as comaker of promissory note and written security agreement relating to corporate shares and various physical assets of corporation, corporation's execution of promissory note and security agreement was supported by sufficient consideration since seller, as part of sale transaction, agreed to refrain from competition with corporation, granted corporation option to purchase building in which business was conducted, and promised to remain on corporation's board of directors. *Miller's Shoes & Clothing v. Hawkins Furn. & Appliances, Inc.*, 300 Minn. 460, 221 N.W.2d 113, 71 A.L.R.3d 629 (1974).

Where the defendant dealt with the holder in due course, the holder in due course is subject to the defenses that the consideration he was to give had failed, as it is only a failure of consideration with respect to a third person which is a limited defense under the Code. *Brotherton v. McWaters*, 438 P.2d 1 (Okla. 1968).

When the holder in due course is the indorsee of the defendant indorser, the indorser may raise against the holder in due course the defense of absence or lack of consideration because a defendant may always raise any defense which he has when sued by his indorsee which defense he has against such indorsee. *Brotherton v. McWaters*, 438 P.2d 1 (Okla. 1968).

Failure of consideration cannot be raised against a holder in due course. *National State Bank v. Kleinberg*, 4 U.C.C. Rep. Serv. 100 (1967, NY Sup); *New York Plumbers Specialties Co. v. Valco Homes, Inc.*, 4 U.C.C. Rep. Serv. 587 (1967, NY Sup).

The defense of an unsatisfied condition upon which the paper was delivered is not a defense available against a holder in due course. *National State Bank v. Kleinberg*, 4 U.C.C. Rep. Serv. 100 (1967, NY Sup).

Where the buyer's note did not recite the consideration for which it was given, it may be shown that he was the purchaser under a freezer and food contract and that the details of the transaction were such that it was reasonable to conclude that the freezer aspect and the food aspect of the transaction were not severable so that a defense of failure of consideration as to

either aspect could be raised by the buyer-maker against an ordinary holder of his note. *Continental Supermarket Food Serv., Inc. v. Soboski*, 210 Pa. Super. 304, 232 A.2d 216 (1967).

Under the Code the lack of consideration is now a matter of defense as contrasted with the former NIL under which a presumption arose that an instrument was given for consideration. *Minner v. Childs*, 116 Ga. App. 272, 157 S.E.2d 50 (1967).

A buyer may in the execution of a retail instalment contract waive, as against an assignee, any defenses except those enumerated in §§ 3-305(2) and 9-206(2), and as against the assignee of such a contract the buyer's alleged defenses of failure of consideration and subsequent promise and failure to repair the automobile which was the subject of the contract having been specifically waived in the instrument itself are unavailing. *First Nat'l Bank v. Husted*, 57 Ill. App. 2d 227, 205 N.E.2d 780 (2d Dist. 1965).

The test of a defense under paragraph (c) of subdivision (1) of this section is that the party must have had no reasonable opportunity to obtain knowledge; and in determining what is a reasonable opportunity all relevant factors are to be taken into account, including the age and sex of the party, his intelligence, education, and business experience, his ability to read or understand English, the representations made to him and his reason for relying on them or have confidence in the person making them, the presence or absence of any third person who might read or explain the instrument to him, and the apparent necessity, or lack of it for acting without delay. *Reading Trust Co. v. Hutchison*, 35 Pa. D. & C.2d 790 (1964).

44. Incapacity of party.

Under UCC § 3-305(2)(b), estate of mental incompetent could avoid liability on promissory note where (1) incompetent's name had been affixed to note pursuant to power of attorney signed by incompetent during his incompetency and (2) plaintiff holders of note had dealt, although in good faith, with incompetent. *Estate of Lucas v. Whiteley*, 550 S.W.2d 767 (Tex. Civ. App. 1977), ref. n.r.e. (Oct. 5, 1977).

Testimony of physical distress, debility or pain will not support inference of mental incapacity unless so severe as to render person unable to comprehend nature of his act and its consequences. *Katski v. Boehm*, 249 Md. 568, 241 A.2d 129 (1968).

45. Duress.

Under Uniform Commercial Code, defense of duress enjoys an even higher status than defense of lack of consideration. This is because under UCC § 3-305(2)(b), if effect of duress is to make obligation void, defense is not cut off, even by holder in due course (holding that party suing on note, who was not holder in due course, was subject to defense of duress as defense available in action on simple contract). *Quazzo v. Quazzo*, 136 Vt. 107, 386 A.2d 638 (1978).

In action by homeowner whose promissory note and mortgage were assigned to defendant by contractor and who was threatened with foreclosure when he refused to make further payments until job was completed, constitutional attack on defendant's rights as holder in due course under UCC § 3-305 on ground that statute denied hearing to debtors on underlying validity and acceptable performance of initial contractual obligations was rejected. *Hardy v. Gissendaner*, 369 F. Supp. 481 (M.D. Ala. 1974), aff'd, 508 F.2d 1207 (5th Cir. Ala. 1975).

46. Illegality of transaction.

Drawer of check given to pay gambling debt that was legal where incurred was not liable on check since gambling debts owed to a "for-profit" gambling business were unenforceable in forum state and, even if plaintiff-casino was holder in due course, under UCC § 3-305(2) it did not take instrument free of defenses of party to instrument with whom it had dealt. *Condado Aruba Caribbean Hotel v. Tickel*, 39 Colo. App. 51, 561 P.2d 23 (1977).

Regardless of whether payee's misrepresentations were sufficient to render him guilty of theft by deception, defenses under UCC § 3-305 of illegality and fraudulent misrepresentation were unavailable against bank, as holder-in-due-course of check, where drawer entered into home improvement contract with and gave check to payee upon payee's false repre-

sentation that he had already purchased materials, where bank cashed check that same day, and where drawer subsequently stopped payment after discovering that no materials had been purchased. *Citizens Nat'l Bank v. Brazil*, 141 Ga. App. 388, 233 S.E.2d 482 (1977).

Defense that promissory note executed by defendant for purchase of carpet was illegal in that seller of carpet obtained note in violation of injunction not to engage in certain selling procedures was personal defense and, under UCC § 3-305(2)(b), not available against holder in due course who had no knowledge or notice of injunction. *New Jersey Mtg. & Inv. Corp. v. Berenyi*, 140 N.J. Super. 406, 356 A.2d 421 (App. Div. 1976).

Seller of tires who accepted therefor indorsed payroll check made out to another did not incur injury or damage by accepting check since accepting party was holder in due course, having given value, in good faith and without notice of any claim to instrument on part of any person; theft is not defense against such holder in due course. *Watkins v. Sheriff of Clark County*, 85 Nev. 246, 453 P.2d 611 (1969).

Under an Arkansas statute making contracts entered into in that state by an unregistered foreign corporation unenforceable, promissory notes executed by a resident to an unregistered foreign corporation as payee in connection with the purchase of merchandise were void ab initio, and the bank to which the notes were assigned was not a holder in due course, and the maker was not liable thereon. *Pacific Nat'l Bank v. Hernreich*, 240 Ark. 114, 398 S.W.2d 221 (1966).

A note signed as part of an illegal contract transaction, is tainted with illegality, and unenforceable, and an assignee of the note takes it subject to whatever defenses the maker would have against the payee. *Valley Bank & Trust Co. v. Sciartelli*, 38 Mass. App. Dec. 141 (1967).

47. Misrepresentation or fraud, generally.

Fraud in the essence, or fraud in the factum, is effective as a defense against a holder in due course under this section. *First Nat'l Bank v. Anderson*, 7 Pa. D. & C.2d 661 (1956).

48. —Standards for determination.

Test of the defense of misrepresentation authorized by UCC § 3-305(2)(c) is whether there was excusable ignorance of the contents of the writing signed. The party signing it must not only have been ignorant of its contents, but must also have had no reasonable opportunity to obtain knowledge thereof. In determining what is a reasonable opportunity to obtain knowledge; all relevant factors must be taken into account, including the age and sex of the party signing; his intelligence, education, and business experience; his ability to read or to understand English; the representations made to him and his reason for relying on them or having confidence in the person who made them; the presence or absence of any third person who might have read or explained to the instrument to him, or any other possibility of obtaining independent information; and the apparent necessity, or lack of necessity, for acting without delay. Unless the misrepresentation meets this test, the defense is cut off by a holder in due course. *Ricks v. Bank of Dixie*, 352 So. 2d 798 (Miss. 1977).

Where bank purchased for valuable consideration note payable to bank and transferor of note as copayees, note was properly negotiated, and bank became holder of note in due course, trial court did not err in granting peremptory instruction for bank in bank's suit on note where maker's defense of misrepresentation under UCC § 3-305(2)(c) was supported only by evidence which showed that although maker was experienced businessman with college education, he failed to use ordinary care when he signed note without reading it on assumption that it was mere verification of terms of purchase order. In such case, maker's claim of misrepresentation had no legal substance. *Ricks v. Bank of Dixie*, 352 So. 2d 798 (Miss. 1977).

In determining whether fraud has been practiced in the inception of a note, a number of factors should be taken into account, including the age and sex of the maker, his intelligence, education and business experience, his ability to read or understand English, representations made to him and his reason to rely on them or have confidence in the person

making them, the presence or absence of any third party who might read or explain it to him, and the apparent necessity or lack of it for acting without delay. *First Nat'l Bank v. Anderson*, 7 Pa. D. & C.2d 661 (1956).

Where the three makers of a promissory note signed it in turn, without reading it or having it read, or seeking information from others present regarding it, and the payee's agent did not refuse to allow the makers to do any of these things, they could not, in relying on a defense of fraud in the inception, assert that they failed to understand the contract which they signed, even though one of the makers had little formal education and another found the print too fine for her to read, and the payee's agent was talking during the execution of the note. *First Nat'l Bank v. Anderson*, 7 Pa. D. & C.2d 661 (1956).

49. —Misrepresentation as to nature of instrument.

The fact that the maker of a note may not have known that he was signing a note because he failed to read it does not constitute fraud as to the nature of the instrument particularly where the instrument was clearly titled. *Waterbury Sav. Bank v. Jaroszewski*, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

Provisions in this section under which lack of consideration and fraud may not be availed of against a holder in due course replace §§ 54, 94, and 96 of the former Negotiable Instruments Law, under which the "fraud" which the maker of an instrument could raise by way of defense even against a holder in due course was only fraud in the essence or "in the factum", as, for example, where the maker signs a negotiable instrument in belief that it was some other document, not where he was induced to sign by misrepresentation as to fact of liability to the payee. *Meadow Brook Nat'l Bank v. Rogers*, 44 Misc. 2d 250 (1964).

The concept of fraud as to the nature of the instrument involves an element of tort which requires an examination into the precise manner and mode in which the party was deceived and his actual knowledge at the time of the signing. *Banccredit, Inc. v. Bethea*, 68 N.J. Super. 62, 172 A.2d 10 (App. Div. 1961).

In *New Jersey Mortg. & Invest. Co. v. Dorsey* (1960) 60 NJ Super 299, 158 A2d 712, *aff'd* 33 NJ 448, 165 A2d 297, the court stated with respect to the prior law that the defense of fraud as to the nature of an instrument is based upon the concept that there is no contract because of the fraud; but the court qualified this by saying "provided the maker was not negligent in failing to ascertain the actual character of the instrument," and, after citing of cases, "compare UCC § 3-305(2)(c), *Id* comment 7." *New Jersey Mtg. & Inv. Co. v. Dorsey*, 60 N.J. Super. 299, 158 A.2d 712 (1960), *aff'd*, 33 N.J. 448, 165 A.2d 297 (1960).

The fact that a seller of roofing materials induced the purchaser to execute trade acceptances in payment thereof upon the representation that they were in the nature of a note which would be put through a bank did not constitute a defense to the purchaser, who had cancelled the order for the materials, as against a holder in due course of such trade acceptances, since the circumstances did not show that the maker was induced to sign the acceptances by misrepresentations with neither knowledge nor a reasonable opportunity to obtain knowledge of their character or essential terms. *Equitable Disct. Corp. v. Fischer*, 12 Pa. D. & C.2d 326 (1957).

50. —Misrepresentation as to other matters.

Where guarantor of promissory note attempts to assert defense of fraud in inducement, rights of purchasers of limited interest in note cannot be defeated on ground that they breached duty to inquire and thus failed to act in good faith because circumstances of which holders had knowledge did not rise to level indicating that failure to inquire revealed deliberate desire to evade knowledge. *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 452 F. Supp. 1108 (S.D.N.Y. 1978), *remanded*, 607 F.2d 994 (2d Cir. N.Y. 1979).

Fraud in the inducement is an insufficient defense to a waiver of defenses provision in an assignment clause (Uniform Commercial Code, § 9-206, subd [1]) since fraudulent inducement is not a defense "of a type which may be asserted against a holder in due course", in that

fraud in the inducement renders an obligation voidable, but not void, and is also not an available misrepresentation defense (Uniform Commercial Code, § 3-305, subd [2], pars [b], [c]); however, plaintiff bank, the assignee of an equipment lease and guarantee executed by defendants as part of a franchise agreement with the assignor, a muffler franchisor, is not entitled to summary judgment to recover the balance due and owing under the lease and remains vulnerable to defendants' claim of fraud in the inducement at this juncture since it failed to submit any proof sufficient to meet its burden of establishing that it took the assignment in good faith and without notice of any claims or defenses; defendants' allegations that the assignor entered into the lease and franchise agreements with the express purpose of fleecing the defendants and that plaintiff had notice of the assignor's fraudulent conduct raise a triable issue of fact as to notice sufficient to defeat plaintiff's motion for summary judgment. *Chase Manhattan Bank v. Finger Lakes Motors, Inc.*, 102 Misc. 2d 48 (1979).

Defense of misrepresentation authorized by UCC § 3-305(2)(c) is a limited defense and may be asserted against a holder in due course only if a party was induced to sign an instrument because of misrepresentation that is coupled with fact that party signing instrument had neither knowledge of its character or essential terms, nor reasonable opportunity to obtain such knowledge. UCC § 3-305(2)(c) recognizes the defense of "real" or "essential" fraud, which is sometimes called "fraud in the essence" or "fraud in the factum," as being effective against a holder in due course. The defense extends to an instrument that is signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms. *Ricks v. Bank of Dixie*, 352 So. 2d 798 (Miss. 1977).

Where bank, as holder in due course, sued on note against maker and indorsers, defense that indorsers induced maker to sign note by misrepresentation was not available against bank as holder in due course pursuant to UCC § 3-305(2). *Myers v. Bank of Prattville*, 341 So. 2d 726 (Ala. 1977).

Regardless of whether payee's misrepresentations were sufficient to render him guilty of theft by deception, defenses under UCC § 3-305 of illegality and fraudulent misrepresentation were unavailable against bank, as holder-in-due-course of check, where drawer entered into home improvement contract with and gave check to payee upon payee's false representation that he had already purchased materials, where bank cashed check that same day, and where drawer subsequently stopped payment after discovering that no materials had been purchased. *Citizens Nat'l Bank v. Brazil*, 141 Ga. App. 388, 233 S.E.2d 482 (1977).

Payees of drafts issued by title company were holders in due course of drafts and were entitled to enforce them against title company, notwithstanding drafts were issued through escrow to payees as creditors of person who funded escrow with forged certified check, where there was no evidence to indicate that payees were not bona fide creditors or that they ought to have been suspicious of title company draft; nor were payees subject to personal defenses under UCC § 3-305(2) on grounds that payees dealt with title company since payees did not participate in immediate transaction by which title company gave out its draft, that is, exchange of forged cashier's check for draft. *Chicago Title & Trust Co. v. Walsh*, 34 Ill. App. 3d 458, 340 N.E.2d 106 (1st Dist. 1975).

Assignee of promissory note was holder in due course but was not entitled to summary judgment against individual defendants on their purported guarantee of notes, because defense of fraud in inducement had been raised and defendant had pleaded facts tending to establish that defense. *Pioneer Credit Corp. v. Bon Bon Cleaners Corp.*, 38 A.D.2d 743 (2d Dep't 1972).

The statement of a check's drawer that she was induced to execute the check to payee by his knowingly false statement is not a defense to its payment when the instrument is in the hands of a holder in due course. *Meadow Brook Nat'l Bank v. Rogers*, 44 Misc. 2d 250 (1964).

Under the Georgia rule, fraud in procurement as a defense is confined to fraud of the holder and this view probably ap-

plies under the Code. *Moore v. Southern Dist. Co.*, 107 Ga. App. 868, 132 S.E.2d 101 (1963).

The Code extends the concept of fraud as to the nature of the instrument to include an instrument signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms. *Bancredit, Inc. v. Bethea*, 68 N.J. Super. 62, 172 A.2d 10 (App. Div. 1961).

51. Procedural matters.

Where maker of promissory note raised defense of fraud in the inducement, holder had burden of showing that it was holder in due course, but having satisfied such burden, it was not subject to such defense. *Federal Nat'l Mtg. Ass'n v. Gregory*, 426 F. Supp. 282 (E.D. Wis. 1977).

Rights available to holder in due course against maker of notes provided by terms of UCC § 3-305 are enforced only after suit is filed and due notice is given to maker; thus, such rights do not deprive maker of hearing, but contemplate invocation only after opportunity is offered maker for hearing, thus providing ample due process. Fact that makers are barred from interposing certain defenses against holder in due course does not amount to denial of due process since makers are not foreclosed from pursuing their claims for damages or any other relief to which they are entitled against individual with whom they contracted. *Hardy v. Gissendaner*, 508 F.2d 1207 (5th Cir. Ala. 1975).

Assignee of promissory notes is not entitled to summary judgment against individual guarantors on their purported guarantee of the notes, because the defense of fraud in the inducement has been raised and guarantors have pleaded facts tending to establish that defense which is available against holder in due course. *Pioneer Credit Corp. v. Bon Bon Cleaners Corp.*, 38 A.D.2d 743 (2d Dep't 1972).

Evidence raised fact questions as to whether note had been secured from makers by misrepresentation; held, makers were entitled to jury trial where their defense was false and fraudulent inducement in signing note. *Kearney v. Commerce Inv. Co.*, 262 A.2d 804 (App. 1970).

On motion for summary judgment, "belief" that holder of note had knowledge of circumstances surrounding maker's fi-

nancial troubles and incomplete performance was insufficient to show that defense exists within meaning of Code § 3-307(3). *Factors & Note Buyers, Inc. v. Green Lane, Inc.*, 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

It is unnecessary for the plaintiff to plead the facts showing consideration for the check on which he sues but there is not prohibition against the plaintiff so pleading or from adding such averments by amendment to his complaint. *Minner v. Childs*, 116 Ga. App. 272, 157 S.E.2d 50 (1967).

52. Miscellaneous claims or defenses.

Where owner of house gave note to builder, following substantial completion of construction, upon assumption that work would be completed and that improperly constructed items would be corrected, and builder indorsed note to bank as security for loan, bank's rights as holder in due course were not cut off by statute making subsequent holders subject to all defenses of consumer, or on theory of "close connectedness." *Randolph Nat'l Bank v. Vail*, 131 Vt. 390, 308 A.2d 588 (1973).

IV. DECISIONS UNDER FORMER UCC § 75-3-306.

53. In general.

The purchaser of a note with knowledge of a default in the making of payments does not qualify as a holder in due course under UCC § 3-302(1) and is thus subject, under UCC § 3-306, to any defenses that the maker has against the payee, including the defense of waiver. *Rutherford v. Rutherford*, 573 S.W.2d 299 (Tex. Civ. App. 1978).

Although bank that issued cashier's check to individual who subsequently became bankrupt had no "defense" to instrument within meaning of UCC §§ 3-305(2) and 3-306(c), based on fact that bankrupt had guaranteed certain notes held by bank, this did not preclude bank from setting-off guaranty obligations of bankrupt against amount of cashier's check in action by receiver of bankrupt's estate to collect on cashier's check. *In re Johnson*, 552 F.2d 1072 (4th Cir. Va. 1977).

Where holder, who bought note from Federal Deposit Insurance Corporation as

liquidating agent of bank pursuant to court decree permitting sale of commercial paper held by bank, failed to sustain contention that bank was holder in due course of such note and that he as bank's transferee had acquired such status, claim of defendant maker against payee for misrepresentations made after note's execution, which allegedly caused maker to sustain loss in excess of balance due under note, raised genuine issues of material fact that, under UCC § 3-306(a) and (b), barred recovery by plaintiff. *Perry v. Schlaikjer*, 5 Mass. App. Ct. 866, 367 N.E.2d 863 (1977).

Where bank negligently failed to perfect its security interest in growing corn crop by omitting description of real estate as required by UCC § 9-402, thereby causing said collateral to be subordinated to interest of third party, this constituted an unjustifiable impairment of such collateral and served to discharge accommodation party from liability to extent of such impairment of collateral under UCC § 3-306. *First Sec. Bank & Trust Co. v. Voelker* (In re Estate of Voelker), 252 N.W.2d 400 (Iowa 1977).

Written agreement by parties to promissory note executed contemporaneously with note in question which merely recited that corporate maker was attempting to develop foreign source of crude oil for import into United States and, for services rendered to corporation, individuals who were payees of note would be entitled to receive fee of 1 per cent per barrel from expected sale of crude oil, standing alone, did not alter or modify promissory note. *Texas Export Dev. Corp. v. Schleder*, 519 S.W.2d 134 (Tex. Civ. App. 1974).

Even if defendant's contention that the holder of a promissory note made by defendant was not a holder in due course, where it was found there were no valid claims or defenses to the note, the provision of UCC § 3-306 would in no way require that the holder be limited to only the consideration given by it for the note, and not the amount found to be due to the payees. *Brock v. Adams*, 79 N.M. 17, 439 P.2d 234 (1968).

54. Particular defenses.

A general partner of a limited partnership breaches its fiduciary duty and vio-

lates section 98 (subd [1], par [d]) of the Partnership Law, which provides that a general partner shall have no authority to possess partnership property, or assign his rights in specific partnership property, without the written consent or ratification by all the limited partners, where it indorses and sells negotiable notes to a bank that were given to it as a capital contribution by the limited partners of the limited partnership, these notes to become due in the future, and deposits the proceeds of the sale in its own corporate account; the silence of the limited partners upon their discovery of the sale does not constitute ratification of the general partner's act where there is nothing to show that the limited partners had any reason to suspect that the bank held the notes other than for an indebtedness of the limited partnership in furtherance of its business. *Chemical Bank v. Haskell*, 68 A.D.2d 347 (4th Dep't 1979), rev'd on other grounds, 51 N.Y.2d 85, 432 N.Y.S.2d 478, 411 N.E.2d 1339 (1980), reargument denied, 51 N.Y.2d 1009 (1980).

In bank's action to recover on promissory notes, where evidence revealed (1) that notes had been executed by defendant members of limited partnership to partnership itself, which had been formed to sell apartment projects, and (2) that corporate developer of project, which was sole general partner and managing agent of the limited partnership, had indorsed notes to itself in its corporate capacity, without required written consent or ratification of all of the limited partners, and has sold notes at discount to plaintiff, (1) plaintiff under UCC § 3-304(2) was not holder of notes in due course, since it knew that transferor had negotiated them to plaintiff without authority for transferor's sole benefit, (2) unauthorized indorsement of notes by limited partnership was wholly inoperative under UCC § 3-404(1) against both partnership itself and its members, and (3) even though partnership was not party defendant to action, in essence it was before the court, in the person of the defendant partners, within meaning of UCC § 3-306(d), since such partners were asserting their own rights and not rights of third person. *Chemical Bank v. Ashenburg*, 94 Misc. 2d 64 (1978).

In action by payee of bank money order issued by defendant bank for bank's refusal (on maker's stop-payment order) to honor instrument when payee presented it for payment, although bank asserted that payee was not holder in due course of instrument and thus was subject under UCC § 3-306(c) to defense of nondelivery, circumstantial evidence in case was sufficient for jury to conclude that maker had delivered instrument to payee's agent, since maker never explained how payee or his agent had obtained possession of instrument. *Saad v. South Side Bank*, 62 Ill. App. 3d 493, 379 N.E.2d 46 (1st Dist. 1978).

Under UCC § 9-306(2) secured party had right to require debtors to turn over to secured party for application on note proceeds of insurance check issued for damages to machinery rather than allowing debtors to use proceeds to repair machinery. *Northside Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E.2d 267 (1976), review denied, 289 N.C. 615, 223 S.E.2d 392 (1976).

Assignee for benefit of creditors was not holder in due course of promissory notes made payable to order of assignor; accordingly, under UCC § 3-306 assignee took instruments subject to affirmative defenses, including counterclaim that notes were based on contract between assignor and makers which former breached causing makers to suffer damages. *Kaufman v. Sbarro of Sunrise Mall, Inc.*, 47 A.D.2d 734 (1st Dep't 1975).

In a cause of action based on a commercial draft, inasmuch as no negotiation, assignment, or other transfer of the draft has taken place, all personal and real defenses available against the other two causes of action based upon the underlying agreement are available here as well. *Impex Metals Corp. v. Oremet Chem. Corp.*, 333 F. Supp. 771 (S.D.N.Y. 1971).

Where holder acquired series of notes from payee, became holder in due course thereof, and accelerated balance due after maker defaulted, but, after discussions between maker, payee, and holder, holder accepted payment partly in cash and partly by way of new note, payable to payee and indorsed over to holder, holder was not holder in due course with respect

to new note and was subject to any claims or defenses against payee of which holder had knowledge prior to accepting new note; course of conduct surrounding issuance of new note did not constitute renewal of existing notes, but rather resulted in partial payment and novation with respect to balance due; holder in due course status under old notes disappeared with extinguishment of total debt represented thereby and holder's status with respect to new note was determined by circumstances existing at time it received delivery of new note. *Lazere Fin. Corp. v. Crystal Mart, Inc.*, 78 Misc.2d 379 (1974).

The fact that there is a discharge of a party to an original note does not require concluding that accommodation parties thereon are discharged because the liability of the accommodation party may be preserved under UCC § 3-306(1)(a). *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

55. —Defenses available in simple contract.

The purchaser of a note with knowledge of a default in the making of payments does not qualify as a holder in due course under UCC § 3-302(1) and is thus subject, under UCC § 3-306, to any defenses that the maker has against the payee, including the defense of waiver. *Rutherford v. Rutherford*, 573 S.W.2d 299 (Tex. Civ. App. 1978).

Holder who is not holder in due course has much narrower rights than holder in due course and takes instrument, under UCC § 3-306(b) and § 3-408, subject to all defenses of any party which would be available in action on simple contract, including specifically the defenses of lack and failure of consideration. *Kreutz v. Wolff*, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Where defenses are raised against note, burden under UCC § 3-307 is on plaintiff to show that he is holder in due course in order to effectively cut off such defenses. If plaintiff fails to sustain his burden, his action is subject under UCC § 3-306(b) to all defenses that would be available on simple contract, as long as such defenses are in some way connected with debt sued on or transaction under which it arose.

Seamans v. Miller, 142 Ga. App. 147, 235 S.E.2d 542 (1977).

In action by real estate broker against clients to recover on promissory note given as commission from sale of property, clients had available all defenses which would be available in action on simple contract, including failure of consideration, since broker was payee of note and was not holder in due course. *Duggins v. Simons*, 517 S.W.2d 82 (Mo. 1974).

Bank was not absolutely obligated by UCC § 4-303 to honor its own cashier's check when presented by payee who was not holder in due course and was allegedly party to scheme to defraud bank, but was entitled under UCC §§ 3-306 and 3-408 to present defenses which would be available on simple contract including lack of consideration or fraud. *TPO, Inc. v. FDIC*, 487 F.2d 131 (3d Cir. N.J. 1973).

A holder who is not a holder in due course is subject to all defenses available in an action on a simple contract. *Wyatt v. Mount Airy Cem.*, 209 Pa. Super. 250, 224 A.2d 787 (1966).

56. —Want or failure of consideration.

In action by payee against maker of promissory note, maker was entitled under UCC § 3-306(c) and UCC § 3-408 to show by parol evidence that consideration for note had failed allegedly because of payee's failure to fulfill obligations under business agreement with maker (reversing summary judgment for payee because material issue of fact existed as to alleged failure of consideration for note). *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978).

Although plaintiffs, unless they had rights of holder in due course, took instrument subject to defense of want of consideration under UCC §§ 3-306(c) and 3-408, plaintiffs were entitled to recover on instrument under UCC § 3-307(2) where signatures were admitted and where defendant failed to establish defense of want of consideration. *Smith v. Gentilotti*, 371 Mass. 839, 359 N.E.2d 953 (1977).

In action by bank against maker to recover on note, where maker executed note and security agreement in connection with purchase of construction equipment and where equipment dealer assigned

note to bank but failed to deliver equipment, bank was not holder in due course under UCC § 3-302 and thus its claim on note was subject to defense of failure of consideration under UCC § 3-306; under evidence that bank failed to advise maker of note of its acquisition of note and security agreement, that it placed payment coupon book in hands of dealer and received all monthly payments from dealer, that close working relationship existed between bank and dealer and dealer was clothed with authority to collect and forward all payments due on transaction, and that agency and authority were further shown to exist by bank's authorizing return of machinery to dealer and terminating of balances due on purchase money paper, bank did not, under UCC § 3-307(3), sustain its burden of proving that it was holder in due course and under facts and circumstances known to and participated in by bank in connection with transaction, it could not be said that bank did not have reason to know that defense of failure of consideration existed. *Kaw Valley State Bank & Trust Co. v. Riddle*, 219 Kan. 550, 549 P.2d 927 (1976).

Where bank issued \$150,000 certificate of deposit to payee under mistaken impression that \$150,000 had been deposited in correspondent bank when, in fact, money was not deposited, bank was entitled to rescind certificate of deposit transaction on ground of failure of consideration; since payee gave no value for certificate, payee was not holder in due course under UCC §§ 3-302 and 3-303 and, thus, under UCC § 3-306(c) payee was subject to defense of want or failure of consideration. *Amos Flight Operations, Inc. v. Thunderbird Bank*, 112 Ariz. 263, 540 P.2d 1244 (1975).

Savings certificates, issued by savings and loan association, which were not payable to order or to bearer were not negotiable instruments under UCC § 3-104; since they were not negotiable, under UCC § 3-805, purchasers of such certificates were not holders in due course and, thus, under UCC § 3-306 such purchasers took certificates subject to defense of failure or want of consideration. *Jones v. United Sav. & Loan Ass'n*, 515 S.W.2d 869 (Mo. Ct. App. 1974).

In transaction whereby sole shareholder of small corporation sold all his shares of stock to third person and corporation participated in transaction with purchaser as comaker of promissory note and written security agreement relating to corporate shares and various physical assets of corporation, corporation's execution of promissory note and security agreement was supported by sufficient consideration since seller, as part of sale transaction, agreed to refrain from competition with corporation, granted corporation option to purchase building in which business was conducted, and promised to remain on corporation's board of directors. *Miller's Shoes & Clothing v. Hawkins Furn. & Appliances, Inc.*, 300 Minn. 460, 221 N.W.2d 113, 71 A.L.R.3d 629 (1974).

Where bank paid \$10,000 to railroad on same day it took promissory note for that amount from defendant, and defendant received notice of that payment and thereafter acknowledged his obligation to bank when he paid bank \$1,000 and signed, along with his wife, second renewal note upon which suit was brought, trial court did not err in finding that defense of want of consideration was not established. *Unruh v. Nevada Nat'l Bank*, 88 Nev. 427, 498 P.2d 1349 (1972).

A note given by maker to payee for damage to the latter's truck which contained the notation that "it is agreed that this note is conditional and does not settle out any claim or demand payee has against the maker" was without consideration. *Deems v. Wilson*, 114 Ga. App. 341, 151 S.E.2d 230 (1966).

57. —Nonperformance of condition precedent.

In action on check that plaintiff received from person to whom maker had negotiated it, and as to which plaintiff alleged that it was holder in due course, defense that maker and person to whom maker gave check had agreed that check would not be deposited until such person received authorization from maker, if established, would constitute valid defense under UCC § 3-306(c) to plaintiff's claim if plaintiff should fail to prove that it was holder in due course. *American State Bank v. Richendifer*, 36 Or. App. 199, 584 P.2d 323 (1978).

Where delivery of check was conditioned on its acceptance as settlement of note held by payee, and where payee did not deposit check for 11 months, proffered settlement was not accepted within reasonable time and check in question was subject to defense based on its conditional delivery and good against any person not holder in due course under UCC § 3-306(3); payee was not holder in due course under UCC § 3-302 in that his own conversation with plaintiff preceding delivery of check, together with notation on check, were ample evidence that payee had actual notice of drawer's defense. *Losson v. Whitson*, 535 S.W.2d 406 (Tex. Civ. App. 1976).

Under UCC §§ 3-305 and 3-306, agreement that any renewal note would be endorsed by all original endorsers, if proved, would make note unenforceable against guarantors, where delivery was conditional upon the procurement of all such endorsements. *Long Island Trust Co. v. International Inst. for Packaging Educ., Ltd.*, 38 N.Y.2d 493, 344 N.E.2d 377 (1976).

Parol testimony is admissible as between immediate parties to negotiable instrument to prove that note although regular on its face, was delivered on condition that it be used only to provide working capital for a named corporation and then only in event that four other persons advanced like amount, and that condition precedent was not complied with. *Kelley v. Carson*, 120 Ga. App. 450, 171 S.E.2d 150 (1969).

Under § 3-401 of the Uniform Commercial Code, no person is liable on an instrument unless his signature appears thereon, and under § 3-306(c), except as to a holder in due course, no person is liable thereon unless there has been a delivery of instrument, and practically the same rule with reference to execution and delivery was in effect under the former Illinois Negotiable Instruments Law. *Neboshek v. Berzani*, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

58. —Breach of fiduciary duty.

A general partner of a limited partnership breaches its fiduciary duty and violates section 98 (subd [1], par [d]) of the Partnership Law, which provides that a

general partner shall have no authority to possess partnership property, or assign his rights in specific partnership property, without the written consent or ratification by all the limited partners, where it indorses and sells negotiable notes to a bank that were given to it as a capital contribution by the limited partners of the limited partnership, these notes to become due in the future, and deposits the proceeds of the sale in its own corporate account; the silence of the limited partners upon their discovery of the sale does not constitute ratification of the general partner's act where there is nothing to show that the limited partners had any reason to suspect that the bank held the notes other than for an indebtedness of the limited partnership in furtherance of its business. *Chemical Bank v. Haskell*, 68 A.D.2d 347 (4th Dep't 1979), rev'd on other grounds, 51 N.Y.2d 85, 432 N.Y.S.2d 478, 411 N.E.2d 1339 (1980), reargument denied, 51 N.Y.2d 1009 (1980).

Defendants, the limited partners in a partnership formed by the corporate developer of an apartment house project to syndicate the sale of the project, who executed personal promissory notes to the partnership as part of the purchase price for their shares in the partnership of which the corporate developer was the sole general partner and managing agent, may raise as a defense against plaintiff bank in an action on the notes the breach of fiduciary duty by the general partner, which, after first approaching plaintiff bank for a corporate loan, indorsed the notes from the partnership to itself in its corporate capacity and then to plaintiff without the written consent or ratification of all the limited partners in violation of section 98 of the Partnership Law, since plaintiff, by purchasing the notes at a discount with knowledge that the notes were negotiated for the individual purposes of the general partner in breach of its fiduciary duty, is not entitled to the rights of a holder in due course (Uniform Commercial Code, § 3-304, subd [2]). The defense of breach of fiduciary duty belongs to defendants as limited partners and makers of the notes and not to the partnership since defendants, who have each been damaged by the breach of the fidu-

ciary duty and stand to lose part of their interest in the partnership assets, are asserting their own rights and not the "claim of any third person". *Chemical Bank v. Ashenburg*, 94 Misc.2d 64 (1978).

Bank which permitted new president and sole stockholder of corporation to cash checks drawn payable to corporation, in derogation of corporate resolution on file with bank which only authorized officers to endorse checks for deposit, and collection, was not a holder in due course, and was liable to creditors of bankrupt corporation for total amount of checks which it permitted sole stockholder to cash rather than deposit to corporation's account. *Maley v. East Side Bank*, 361 F.2d 393 (7th Cir. Ill. 1966).

59. —Claims of third persons.

In action on note given in payment for land, where (1) note was signed by both vendees and made payable to vendor, who died thereafter, (2) vendor's wife, individually and as executrix of vendor's estate, transferred note to plaintiff, and (3) defendant vendees contended since vendor's will did not authorize executrix to sell estate's assets, her transfer of note affected only her individual half interest therein, other half interest in note was still owned by vendor's estate, and plaintiff therefore was not entitled to judgment for full amount of note, court held that judgment awarding plaintiff full amount of note was proper under (1) UCC § 3-307(2), dealing with recovery by holder on instrument as to which signatures have been established, in absence of any defense to such recovery, and (2) UCC § 3-306(d), providing that claim of third person to an instrument is not available as a defense to party liable thereon unless such third person defends action for party liable. *Cowhouse Dairy, Inc. v. Agristor Credit Corp.*, 566 S.W.2d 339 (Tex. Civ. App. 1978).

In action by holder of promissory note to recover payment from maker, maker could not assert defense that holder as trustee of trust estate acquired notes from trust estate in violation of statute; under UCC § 3-306(d), maker could not defend on basis of holder's alleged violation of his fiduciary duty to beneficiary. Furthermore, maker's payment of debt, even

though made with knowledge of holder's wrongful acquisition of notes, would discharge maker's liability thereon under UCC § 3-603(1). *Harvey v. Casebeer*, 531 S.W.2d 206 (Tex. Civ. App. 1975).

Where bank has issued draft for value, delivers it to one who remits it to putative creditor, and thereafter, at remitter's request, stops payment and refunds consideration, this may constitute defense to action on instrument by payee, provided remitter has valid claim to instrument and provided he defends action on behalf of bank, urging such claim. *Fulton Nat'l Bank v. Delco Corp.*, 128 Ga. App. 16, 195 S.E.2d 455 (1973).

60. —Setoff.

Bank which took four notes from debtor which were executed to debtor by third party, under collateral assignment signed by debtor who did not indorse notes themselves, as collateral for note executed by debtor to bank was mere assignee of such notes and not holder or holder in due course thereof; collateral assignment gave bank right to sue on notes, subject under UCC § 3-306(a) to all defenses and equities to which notes were subject while in debtor's hands; and in suit by bank against third party who executed and transferred notes to debtor, third party could introduce evidence of alleged offsets to notes based on unpaid judgment obtained by third party against debtor. *Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719 (Tex. Civ. App. 1977), writ *ref'd n.r.e.*, (Sept. 27, 1977).

Although Uniform Commercial Code does not define "defense" as term is used in UCC § 3-306(b), § 3-306(b) makes available defense of setoff in action by transferee of negotiable instrument unless transferee is holder in due course. *Community Bank v. Ell*, 278 Or. 417, 564 P.2d 685 (1977), *reh'g denied*, 279 Or. 245, 566 P.2d 903 (1977).

Where depository bank, as holder of check which defendant drew in favor of bank's depositor and then stopped payment thereon, brought suit on drawer's contract under UCC § 3-413(2), "defenses" which drawer was entitled to assert under UCC § 3-306(b) included only those defenses connected with instrument itself, and did not include setoff based on

separate and distinct transactions between drawer and original payee. *Bank of Wyandotte v. Woodrow*, 394 F. Supp. 550 (W.D. Mo. 1975).

Depository bank which took bill of exchange without depositor's indorsement was not holder; bank did not become holder in due course by adding indorsement after notice of dishonor, and was subject to defense of payor's right of set off against payee. *United Overseas Bank v. Veneers, Inc.*, 375 F. Supp. 596 (D. Md. 1973).

Where employer gives employee a note for gross wages, the employer was entitled to setoff against the payee's claim on the note the amount that should have been deducted for federal withholding taxes. *Lukens v. Goit*, 430 P.2d 607 (Wyo. 1967).

61. —Fraud or illegality.

In action by Federal Deposit Insurance Corporation (FDIC), as owner-holder of note purchased from bank for which FDIC was receiver, to recover on such note from defendant maker, (1) defendant under UCC § 3-306(d) could not assert FDIC's allegedly illegal acquisition of note as defense, since only the bank in receivership or such bank's shareholders had standing to assert such defense, and (2) if defendant satisfied note by payment to FDIC, he would not risk double liability on note in event bank's sale of note to FDIC should be set aside, but would be discharged from liability under UCC § 3-603(1), (applying South Carolina law; also holding that oral agreement to extend time for paying note was unenforceable under non-UCC statute of frauds). *FDIC v. Moore*, 448 F. Supp. 493 (D.C.S.C. 1978).

Under an exception to the parol evidence rule, extrinsic evidence may be admitted to show fraud in the inducement of a the written sales contract. UCC § 3-306(b) makes this rule applicable to an action on a promissory note where the holder of the note is not a holder in due course. However, if a negotiable instrument is clear and express in its terms, it cannot be varied by parol agreements or representations by the payee that the maker or a surety will not be liable on the instrument, since such representations do not constitute fraud in the inducement

(observing that some sort of trick, artifice, or device must have been employed by the payee, in addition to his representation that the maker would not be liable, to constitute fraud in the inducement of the instrument). *Town N. Nat'l Bank v. Broaddus*, 569 S.W.2d 489 (Tex. 1978).

Where bank loaned \$25,000 to officer of corporation that was heavily indebted to bank and could not borrow such money itself, and where officer's note to bank for such sum, which was used by corporation, was executed allegedly because of fraudulent assurances by bank official that bank would not hold maker of note personally liable thereon but would instead look to corporation for payment, summary judgment on note in favor of bank would be reversed because defendant maker alleged sufficient facts to show (1) that bank was not holder in due course of such note under UCC § 3-302(1)(b), and (2) that bank therefore under UCC § 3-306(b) took note subject to all defenses of maker that would be available in action on simple contract, including defense of fraud in inducement. *Thompson v. First Nat'l Bank & Trust Co.*, 142 Ga. App. 174, 235 S.E.2d 582 (1977), rev'd on other grounds, 240 Ga. 494, 241 S.E.2d 253 (1978).

In action by payee bank against maker of note, summary judgment was erroneously granted where maker introduced affidavit stating that bank had agreed that renewals on note were with condition that maker would be relieved of liability if sale of corporation was not finalized, raising issue of fraud in the inducement under UCC §§ 3-302, 3-306(2), and 3-408. *Viracola v. Dallas Int'l Bank*, 508 S.W.2d 472 (Tex. Civ. App. 1974), ref. n.r.e. (July 17, 1974).

A person who takes a note with notice that it is overdue is not a holder in due course and a holder who obtains his title from a holder in due course cannot enforce the instrument when he was a party to some fraud or illegality affecting it. *Brown v. Scales*, 109 Ga. App. 138, 135 S.E.2d 525 (1964).

62. Procedural matters.

In action by payee-bank on promissory note which was unconditional on its face, parol evidence could not be used to inject

conditions on obligations which were not apparent from face of note, and there was no merit to makers' contention that their agreement with payee bank, to transfer note to newly-formed corporation, was admissible as evidence that note was delivered for special purpose. *Tatum v. Bank of Cumming*, 135 Ga. App. 675, 218 S.E.2d 677 (1975).

Where holder has made prima facie case showing his right to payment under UCC § 3-306, holder is entitled to temporary injunction to keep funds, located in Illinois and represented by a nonnegotiable certificate of deposit from passing to out-of-state assignee. *D. Nelsen & Sons v. General Am. Dev. Corp.*, 6 Ill. App. 3d 6, 284 N.E.2d 478 (1st Dist. 1972).

Although want or failure of consideration may be raised as a defense in an action upon a negotiable instrument against any person not having the rights of a holder in due course, it must be pleaded as an affirmative defense and may not be raised under a general denial. *Rochester Iron & Metal Co. v. Capellupo*, 62 Misc. 2d 264 (1969).

The allegation of the defense of failure of consideration in an answer filed, by the maker of the note to an action thereon by a transferee, casts the burden on the plaintiff of establishing that he or some person under whom he claimed was in all respects a holder in due course, and raised a general issue of material fact. *Pitillo v. Demetry*, 112 Ga. App. 643, 145 S.E.2d 792 (1965).

V. DECISIONS UNDER FORMER UCC § 75-3-302.

63. In general.

The maker's defenses to the payment of a promissory note to the effect that the tractor, the purchase price of which was represented by the promissory note, was defective and was returned to the seller for repairs and thereafter seized in a suit filed against the seller by a finance company, were unavailable against the plaintiff bank which was a holder in due course of the paper. *First Nat'l Bank v. Marcinkowska*, 279 F. Supp. 251 (N.D. Miss. 1967).

Whether or not one is a holder in due course does not depend upon his diligence

or negligence. *Securities Inv. Co. v. Cohen*, 241 Miss. 549, 131 So. 2d 439 (1961).

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. *Garnett v. Associates Dist. Corp.*, 233 Miss. 849, 103 So. 2d 368 (1958).

Where an employee indorsed a check payable to his order, without any restriction or limitation, and subsequently lost the check and a stop payment was ordered by the bank, plaintiff who cashed the check and received the full amount in good faith, was entitled to the amount as against the employee who failed to restrict an indorsement. *American Book Co. v. White Sys. of Jackson*, 223 Miss. 510, 78 So. 2d 582 (1955).

Where a check was genuine and was duly indorsed in blank by the payee named therein, and the check was negotiable even though in possession of a person not entitled thereto, an innocent purchaser for value becomes a holder in due course. *Bruce v. State*, 217 Miss. 368, 64 So. 2d 332 (1953).

Every holder is deemed prima facie to be a holder in due course subject to limitation that if negotiator's title was defective, the holder must prove that he, or his predecessor in title, acquired the title as holder in due course. *Credit Indus. Co. v. Adams County Lumber & Supply Co.*, 215 Miss. 282, 60 So. 2d 790 (1952).

Checks do not become the property of the payee until there has been a valid delivery to it or to its agent or servant authorized to accept it, or something equivalent to delivery and acceptance, and therefore, where checks were delivered to the payee's agent, who was not authorized to accept them on behalf of the payee, the agent was accountable therefor to the maker, and could not be convicted of embezzlement from the payee upon his failure to deliver the checks to it. *Reese v. State*, 192 Miss. 147, 5 So. 2d 236 (1941).

Where title of one negotiating note was defective, holder had burden of proving

they were holders in due course. *Cassedy v. Wells, Jones, Wells & Lipscomb*, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

There was no bad faith imputable to purchaser of trust deed and note because purchaser saw affidavit by makers that there was no infirmity. *Guaranty Inv. & Loan Co. v. Stevens*, 161 Miss. 473, 137 So. 335 (1931).

Where one negotiating loan charged usurious commission, purchaser of notes and trust deed and its assigned held to be holders in due course. *Guaranty Inv. & Loan Co. v. Stevens*, 161 Miss. 473, 137 So. 335 (1931).

One acquiring demand note for value without notice in reasonable time after execution held holder in due course. *Wilson v. Stark*, 146 Miss. 498, 112 So. 390 (1927).

That consideration of note is executory contract does not prevent one being holder in due course. *Smith v. Ellis*, 142 Miss. 444, 107 So. 669 (1926).

64. Decisions under Code 1942 § 57.

The delivery of a note to one of two or more payees will operate as a delivery to all. *Vaughn v. Vaughn*, 238 Miss. 342, 118 So. 2d 620 (1960).

Where buyer of automobile signed conditional sale contract with blank spaces, expecting seller's salesman to fill in the blanks, he thereby made seller his agent, so that balance stated in the contract was binding on buyer where contract was in hands of a bona fide purchaser for value which took the instrument in due course without notice. *Universal Credit Co. v. Moore*, 173 Miss. 740, 163 So. 142 (1935).

Payee's negotiation of instrument in violation of agreement with payer no defense as against innocent purchaser for value without notice. *Currie-McGraw Co. v. Friedman*, 135 Miss. 701, 100 So. 273 (1924).

65. Decisions under Code 1942 § 101.

Where holders in due course at the time of purchasing trade acceptances had no notice or knowledge of any dispute between the defendant and the sellers of merchandise, and made no promise to carry out any agreement that might have been made between such sellers and de-

fendant, either prior to the purchase of the trade acceptances or prior to the receipt of promissory notes, which were a renewal of the indebtednesses represented by the trade acceptances, defendant's defense that the trade acceptances

had been given in reliance upon seller's promissory representation fraudulently made without intention of carrying them out could not prevail. *Salitan v. Ford*, 231 Miss. 616, 97 So. 2d 232 (1957).

RESEARCH REFERENCES

ALR. What constitutes taking instrument in good faith, and without notice of infirmities or defenses, to support holder-in-due-course status, under UCC § 3-302. 36 A.L.R.4th 212.

Applicability of waiver or estoppel to preclude claim of nonconformance of documents as ground for dishonor of presentment under letter of credit under UCC § 5-114. 53 A.L.R.5th 667.

Am Jur. 6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Forms 3:291 et seq. (what constitutes holder in due course).

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December 1979.

§ 75-3-303. Value and consideration.

(a) An instrument is issued or transferred for value if:

(1) The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;

(2) The transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;

(3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

(4) The instrument is issued or transferred in exchange for a negotiable instrument; or

(5) The instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

(b) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a), the instrument is also issued for consideration.

SOURCES: Former § 75-3-303: Codes, 1942, § 41A:3-303; Laws, 1966, ch. 316, § 3-303; Laws, 1992, ch. 420, § 29, eff from and after January 1, 1993.

JUDICIAL DECISIONS

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I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-303.

11. In general.

Bank which issued a cashier's check to replace a personal check took the personal check in good faith and for value and was thus holder in due course under UCC §§ 3-302 and 3-303 where bank manager ascertained validity of check by telephone call to drawer's bank prior to drawer's placement of stop payment order on check. *Manufacturers & Traders Trust Co. v. Murphy*, 369 F. Supp. 11 (W.D. Pa. 1974), *aff'd*, 517 F.2d 1398 (3d Cir. Pa. 1975).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. *Hall v. Security Planning Serv., Inc.*, 371 F. Supp. 7 (D. Ariz. 1974).

A bank accepting a negotiated instrument in satisfaction of an antecedent debt is a holder for value and in due course. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. Okla. 1964).

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it has a security interest in the item and thereupon becomes a holder in due course of the check. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

The Code was also cited in a pre-code decision that a bank was not a holder in due course upon merely crediting the depositor's account. *Bankers Trust Co. v. Nagler*, 16 A.D.2d 477 (1st Dep't 1962).

Under both the Negotiable Instruments Law and the Uniform Commercial Code a bank which received a deposit of two checks and paid checks drawn by the depositor on the total amount of these checks was a holder for value of the two deposited checks, notwithstanding the fact that they were deposited with the usual bank deposit slip reciting that the item was received by the bank for collection only. *Universal C.I.T. Credit Corp. v. Guaranty Bank & Trust Co.*, 161 F. Supp. 790 (D. Mass. 1958).

12. Performance of agreed consideration.

Where trade acceptances were given to attorneys as a retainer for services to be performed by the attorneys, and unknown to the attorneys the trade acceptances had

been obtained by fraud, which however, was not such as to constitute a defense against holders in due course under §§ 3-305(2)(c) and 3-306(b) of the instant chapter, and where prior to taking the acceptances the attorneys had rendered some services but there was no evidence as to their value, it was held that the “agreed consideration” under the instant section for the acceptances was the performance of legal services, that under § 3-307(3) once a defense to the instruments was shown to exist, the burden was on the attorneys to show that they were holders in due course, that the attorneys had failed to show the extent to which the agreed consideration had been performed and therefore that they had not shown to what extent they took for value under the instant section, the result being that they had not shown themselves to be holders in due course under § 3-302 of the instant chapter. *Korzenik v. Supreme Radio, Inc.*, 347 Mass. 309, 197 N.E.2d 702 (1964).

Where trade acceptances were transferred to attorneys as a retainer for services to be performed by the attorneys, the fact that one of the attorneys had paid to co-counsel part of the money he collected on the assigned items was not evidence that he had made an irrevocable commitment to a third person within the meaning of the instant section. *Korzenik v. Supreme Radio, Inc.*, 347 Mass. 309, 197 N.E.2d 702 (1964).

13. Credit as value.

Bank's giving provisional credit for check it deposited in account of bank's customer does not constitute parting with value for check under UCC § 3-303. *Marine Midland Bank-New York v. Graybar Elec. Co.*, 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

Whether bank took note in payment of outstanding loan or as collateral for issuance of loan was immaterial with respect to bank's status as holder in due course since holder who takes negotiable instrument as collateral for loan takes for value within UCC § 3-303(a) and may thereby be holder in due course. *Millman v. State Nat'l Bank*, 323 A.2d 723 (D.C. 1974).

Where individual testified that greeting service owed him a large sum which he had invested in the business, that certain

debentures were assigned to him as payment or security for this debt, and that after making the assignment he paid off some corporate obligations and placed some money in the corporation's account which was used to pay salaries, there was sufficient evidence to show that assignment was for value within UCC § 3-303. *Martin Mgt. Corp. v. Farner*, 124 Ga. App. 552, 184 S.E.2d 597 (1971).

Value has been given where full amount of credit given for drafts has been withdrawn. *F & M Nat'l Bank v. Boardwalk Nat'l Bank*, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

Value was given for full amount of credit extended, whether or not withdrawals were actually made. *Washington Trust Co. v. Fatone*, 104 R.I. 426, 244 A.2d 848 (1968), appeal denied, appeal dismissed, 106 R.I. 168, 256 A.2d 490 (1969).

The Code adopts the better and majority view that the mere giving of credit without more is not the giving of value. *Atkinson v. Englewood State Bank*, 141 Colo. 436, 348 P.2d 702 (1960).

14. Payment of, or security for, antecedent claim.

Bank gave value for full amount of check at time that it accepted deposit, where bank and depositor had entered security agreement giving bank floating lien on depositor's chattel paper and where check represented part of proceeds of depositor's conditional sales contract and where bank had made prior loan to depositor in expectation of deposit of check at issue. *Bowling Green, Inc. v. State St. Bank & Trust Co.*, 425 F.2d 81 (1st Cir. Mass. 1970), but see, *Maine Family Fed. Credit Union v. Sun Life Assurance Co.*, 727 A.2d 335 (Me. 1999).

Where a bank, which under UCC § 3-202(1) was holder of note delivered to it with necessary endorsements of both copayees, took such note (1) “for value” under UCC §§ 3-302(1)(a) and 3-303(a) because it had taken it as collateral for loan to note's copayees, and (2) “in good faith” under UCC § 3-302(1)(b) and “without notice” under UCC § 3-302(1)(c) of any claims against note's copayees, court held (1) that bank was holder in due course of such note under UCC § 3-

302(1), (2) that under UCC § 3-305(1), bank took note free from all claims to it by any person, and (3) that bank therefore was entitled to priority of payment over judgment creditor of note's copayees in situation where, prior to copayees' transfer of note to bank, judgment creditor of copayees had served writ of garnishment on maker of note. *Bricks Unlimited, Inc. v. Agee*, 672 F.2d 1255 (5th Cir. 1982).

An award of summary judgment in favor of plaintiff is affirmed where defendant insurer delivered to its insured a draft drawn on itself and payable through its bank in an attempt to honor its apparent obligation under an automobile theft policy, which draft was payable also to plaintiff due to plaintiff's security interest in the insured vehicle, and plaintiff deposited the draft in its bank account after the insured indorsed the check over to plaintiff thereby extinguishing plaintiff's security interest in the vehicle, following which defendant stopped payment on the draft upon learning that its insured's claim was fraudulent, at which time plaintiff's account was debited with the amount of the dishonored draft and plaintiff demanded of the defendant payment of the draft. Since the check was drawn by the drawer on itself as drawee, payable through its bank, the bank was not authorized to pay the draft, but was merely designated as a collecting bank to present the draft to the drawer-drawee for payment (Uniform Commercial Code, § 3-120), and because the draft was not drawn without recourse, and there was no drawee other than defendant itself who accepted responsibility for it, defendant remained liable thereon (Uniform Commercial Code, § 3-413, subd [2]); although the draft was principally issued to the insured, plaintiff's name was added as payee only to protect its duly filed security interest in the insured vehicle, and upon issuance of the draft defendant acknowledged its insured's claim that the vehicle had been stolen, thus entitling plaintiff to rely upon that representation and to accept the draft as a holder in due course in payment and release of its lien on the vehicle, constituting the giving of value for the draft (Uniform Commercial Code, § 3-302, subd [1]; § 3-303, subds [b], [c]);

after defendant stopped payment on the draft it remained liable on it to plaintiff as a holder in due course. *GMAC v. General Accident Fire & Life Assurance Corp.*, 67 A.D.2d 316 (4th Dep't 1979).

In action by plaintiff bank against defendant bank for wrongfully stopping payment on \$10,000 money order issued by defendant which named plaintiff as payee, where evidence showed (1) that defendant had issued money order at instance of seller of irrigation system, which wished to present buyer's check for \$10,000 to defendant while buyer still had sufficient funds in his account with defendant, (2) that at time defendant issued money order, it did not know that buyer had placed stop-payment order on check buyer had given to seller, (3) that seller's agent became aware of such stop order after defendant had issued money order in suit, (4) that seller's agent, on giving money order to plaintiff, asked plaintiff to apply it to loan made by plaintiff to seller, (5) that plaintiff complied with such request, made the necessary credit entries on its loan ledger, and put money order into usual channels for collection, (6) that money order was thereafter returned to plaintiff marked "payment stopped," and (7) that plaintiff thereafter reversed credit entries made with respect to loan to seller and returned principal balance of loan to its original amount, court held (1) that defendant's right both to assert defense of failure of consideration (based on buyer's stopping payment on buyer's check) and to stop payment on money order issued by it depended on whether plaintiff was holder in due course of such money order; (2) that plaintiff was not holder in due course because it had given no "value" for money order within meaning of UCC § 3-303(b), dealing with payment of antecedent claims; (3) that such failure to give value was shown by plaintiff's reversal of provisional credit entries made with respect to loan to seller; (4) that defendant was therefore entitled to stop payment on money order; and (5) that defense of failure of consideration was available to defendant on remand of case to trial court. *State Bank v. American Nat'l Bank*, 266 N.W.2d 496, 97 A.L.R.3d 706 (Minn. 1978).

Although antecedent claim may constitute value under UCC § 3-303(b), where no antecedent claim existed, holder of note (1) did not take instrument for value, (2) was not holder in due course under UCC § 3-302(1)(a), and (3) held note subject to defense of lack of consideration. *Quazzo v. Quazzo*, 136 Vt. 107, 386 A.2d 638 (1978).

Where creditor bank, on date loan was due and after being informed by debtor that debtor would default, set off credit balances in debtor's accounts against amount of debt; where remittance check of debtor's customer, pursuant to prior agreement between debtor and bank, was taken by bank from debtor's post-office lockbox and indorsed and deposited in debtor's account; where after depositing such check, bank then exercised alleged right of setoff against it; and where customer then issued stop-payment order on check and bank sued customer for payment thereof, alleging that it had acquired holder-in-due-course status as to such check and that its right to receive payment was not affected by debtor's alleged failure to discharge contractual obligations to customer, (1) bank acted prematurely in setting off deposits in debtor's account on date loan was due; (2) although such premature setoff arguably became operative on following day, it did not determine issue as to whether bank was entitled to payment on check; (3) bank was mere holder of check under UCC § 1-201(20) and not holder in due course under UCC § 3-302(1), since it did not give value for check under UCC § 3-303(b) and UCC § 4-208(1); (4) failure to give value stemmed from fact that bank, after customer issued stop-payment order on check, reversed its provisional credit of check to debtor's account and thus reinstated that part of debtor's obligation against which such credit was set off; and (5) since bank did not give value for check and thus was not holder in due course, it could not recover on check. *Marine Midland Bank-New York v. Graybar Elec. Co.*, 41 N.Y.2d 703, 363 N.E.2d 1139, 97 A.L.R.3d 1104 (1977).

Endorsee of check on which payment had been stopped for failure of consideration was not entitled to recover value of

check where endorsee, who merely agreed to attempt to collect check and to apply collected funds, if any, to payee's account, did not accept check in payment of payee's antecedent debt and was not holder for value under UCC § 3-303. *Wilson Supply Co. v. West Artesia Transmission Co.*, 505 S.W.2d 312 (Tex. Civ. App. 1974), *ref. n.r.e.*, 511 S.W.2d 261 (Tex. 1974).

Where corporation assigned note to government as security for payment of tax liens, government was holder in due course under UCC § 3-303(b). *Coventry Care, Inc. v. United States*, 366 F. Supp. 497 (W.D. Pa. 1973).

Bank which accepted a cashier's check in payment of an antecedent debt would have been a holder in due course where it acted in good faith and without notice that the debtor had committed a fraud in securing the money represented by the check. *Nicklaus v. Peoples Bank & Trust Co.*, 258 F. Supp. 482 (E.D. Ark. 1965), *aff'd*, 369 F.2d 683 (8th Cir. Ark. 1966).

A holder takes commercial paper for value to the extent that he acquires a security interest therein or takes it as security for an antecedent claim; and is a holder in due course where he takes the paper for value, in good faith, and without notice that it is overdue, has been dishonored, or is subject to the claim or defense of another person. *Finance Co. of Am. v. Wilson*, 115 Ga. App. 280, 154 S.E.2d 459 (1967).

A bank accepting a negotiated instrument in satisfaction of an antecedent debt is a holder for value and in due course. *Citizens Bank v. National Bank of Commerce*, 334 F.2d 257 (10th Cir. Okla. 1964).

A bank which accepts a check from the payee for deposit, credits his account with the amount thereof and permits him to withdraw the full proceeds of the check prior to notice of its dishonor has given value for the check to the extent that it has a security interest in the item and thereupon becomes a holder in due course of the check. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

15. —Antecedent claim as to partial amount.

Bank gave value for full amount of check at time that it accepted deposit,

where bank and depositor had entered security agreement giving bank floating lien on depositor's chattel paper and where check represented part of proceeds of depositor's conditional sales contract and where bank had made prior loan to depositor in expectation of deposit of check at issue. *Bowling Green, Inc. v. State St. Bank & Trust Co.*, 425 F.2d 81 (1st Cir. Mass. 1970), but see, *Maine Family Fed. Credit Union v. Sun Life Assurance Co.*, 727 A.2d 335 (Me. 1999).

Depository bank took check "for value", at least to extent of \$5,024.85, amount which it took in payment of antecedent debt where depositor had overdraft in that amount. *Bowling Green, Inc. v. State St. Bank & Trust Co.*, 307 F. Supp. 648 (D. Mass. 1969), *aff'd*, 425 F.2d 81 (1st Cir. Mass. 1970), but see, *Maine Family Fed. Credit Union v. Sun Life Assurance Co.*, 727 A.2d 335 (Me. 1999).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; (3) where bank endorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank; and (4) where bank also gave owner its check, payable to corporation, for remaining proceeds of cashier's checks and owner endorsed and deposited such check in corporation's account, bank gave value under UCC § 3-303 for cashier's checks and thus became holder in due course as to such checks so as not to be liable to buyer for fraud and conversion in sale transaction because (1) application of proceeds of cashier's checks to satisfy corporation's liability to bank on notes constituted taking for value under payment of "antecedent claim" provision in UCC § 3-303(b); (2) giving owner check, payable to corporation, for remaining proceeds of cashier's

checks constituted taking for value under UCC § 3-303(c); and (3) bank's assignment to buyer, pursuant to owner's instructions, of bank's security interest in corporation's assets constituted taking for value under performance of "agreed consideration" provision in UCC § 3-303(a). In such case, since bank was not party to sale contract but merely applied proceeds of cashier's checks pursuant to instructions of corporation's owner and in compliance with UCC § 3-303, buyer's remedy in contract for failure of consideration in sale transaction would lie only against owner. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

A bank gives value for a note when it reduces the debt owed it by the amount of the note. *Franklin Nat'l Bank v. Sidney Gotowner, Inc.*, 4 U.C.C. Rep. Serv. 953 (1967, NY Sup.).

16. Irrevocable commitment to third person.

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; (3) where bank endorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank; and (4) where bank also gave owner its check, payable to corporation, for remaining proceeds of cashier's checks and owner endorsed and deposited such check in corporation's account, bank gave value under UCC § 3-303 for cashier's checks and thus became holder in due course as to such checks so as not to be liable to buyer for fraud and conversion in sale transaction because (1) application of proceeds of cashier's checks to satisfy corporation's liability to bank on notes constituted taking for value under payment of "antecedent claim" provision in UCC § 3-303(b); (2) giving owner check, payable to corpo-

ration, for remaining proceeds of cashier's checks constituted taking for value under UCC § 3-303(c); and (3) bank's assignment to buyer, pursuant to owner's instructions, of bank's security interest in corporation's assets constituted taking for value under performance of "agreed consideration" provision in UCC § 3-303(a). In such case, since bank was not party to sale contract but merely applied proceeds of cashier's checks pursuant to instructions of corporation's owner and in compliance with UCC § 3-303, buyer's remedy in contract for failure of consideration in sale transaction would lie only against owner. *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

Corporation that promised to give 25 per cent interest in prospective business venture in return for \$20,000 note did not make irrevocable commitment; thus, it did not give value as required by UCC § 3-303, and failed to prove that it was holder in due course, entitled to priority over government's lien on note for unpaid taxes; agreement to give 25 per cent interest in prospective business venture was so vague and nebulous as to be unenforceable and, in any event, was merely executory contract which corporation could have refused to perform because of failure of consideration, i.e., because government's rights to note had intervened by virtue of its liens and levies and notes were therefore worthless. *Coventry Care, Inc. v. United States*, 366 F. Supp. 497 (W.D. Pa. 1973).

Payee takes for value by making irrevocable payment of consideration to third person at direction of maker. *Ashburn Bank v. Childress*, 120 Ga. App. 632, 171 S.E.2d 768 (1969).

Where seller, in consideration of receipt of cashier's checks aggregating \$600,000, made actual physical delivery of certificates evidencing all of his stock in a corporation in escrow to be delivered to the purchaser when the seller had been relieved of his bank guarantees without anything further to be done on his part, the transfer was irrevocable for the only remaining act to complete delivery was solely within the power of the purchaser; and such delivery in escrow constituted an "irrevocable commitment" as provided in

clause (c) of § 3-303, and the seller had taken the cashier's checks for value and was a "holder in due course." *Crest Fin. Co. v. First State Bank*, 37 Ill. 2d 243, 226 N.E.2d 369 (1967).

III. DECISIONS UNDER FORMER UCC § 75-3-408.

17. In general.

There is no want of consideration, as distinguished from value, within meaning of UCC § 3-408 when consideration moves before maturity to party accommodated, even though accommodation maker receives no consideration for executing instrument. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 60 Misc. 2d 499 (1969).

To sustain defense of no consideration against holder, drawer must show that he received nothing in return for note he had promised to pay or that there are circumstances in which consideration is not required to support this promise, e.g., note given in payment of or as security for some antecedent obligation. *Srochi v. Kamensky*, 118 Ga. App. 182, 162 S.E.2d 889 (1968).

18. Availability of defense.

Holder who is not holder in due course has much narrower rights than holder in due course and takes instrument, under UCC § 3-306(b) and § 3-408, subject to all defenses of any party which would be available in action on simple contract, including specifically the defenses of lack and failure of consideration. *Kreutz v. Wolff*, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Under UCC § 3-305(2) and § 3-408, lack of consideration and fraud in the inducement are not good defenses against a holder in due course. However, under UCC § 3-307(3), once a defense other than lack of consideration is raised, holder has burden of proving that he is holder in due course in all respects (action on promissory note, executed in real estate sale transaction, in which makers pleaded affirmative defenses of lack of consideration and fraud in the inducement and also counterclaimed for damages for such fraud). *Kreutz v. Wolff*, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Document purporting to transfer and assign promissory note which was never

attached to note did not serve as effective endorsement of note under UCC § 3-202(2); since note was not issued or endorsed to assignee, assignee was not holder of note as defined in UCC § 1-201(20) and, not being holder, assignee could not possibly be holder in due course and assignment of note was therefore subject to defense of failure of consideration. *Billas v. Dwyer*, 140 Ga. App. 774, 232 S.E.2d 102 (1976).

Bank was not absolutely obligated by UCC § 4-303 to honor its own cashier's check when presented by payee who was not holder in due course and was allegedly party to scheme to defraud bank, but was entitled under UCC §§ 3-306 and 3-408 to present defenses which would be available on simple contract including lack of consideration or fraud. *TPO, Inc. v. FDIC*, 487 F.2d 131 (3d Cir. N.J. 1973).

It is immaterial that consideration moves from or to a third party, since to prove failure of consideration under UCC § 3-408, defendants must show that the obligation cannot be enforced against them. *Behrens v. Apessos*, 39 Mich. App. 426, 197 N.W.2d 886 (1972).

In a suit on a note given for purchase of personal property, a claim of breach of warranty is equivalent to a plea of failure of consideration, and such defense is allowed, as against one who is not a holder in due course, on the principle that consideration of a note to open to inquiry as far as the promise to pay depends upon its existence. *Northern Plumbing Supply, Inc. v. Gates*, 196 N.W.2d 70 (N.D. 1972).

Where there is a suit on a note and it appears that there was consideration to a corporation and thus to the defendant directors who endorsed the note, the fact that the consideration was furnished by one other than the promisee would not prevent the promisee from maintaining suit on such a note. *Edgar v. Edgar Casket Co.*, 125 Ga. App. 389, 187 S.E.2d 925 (1972).

Failure of consideration on contract is defense to suit on promissory note executed under terms of contract. *Farmers Coop. Ass'n v. Garrison*, 248 Ark. 948, 454 S.W.2d 644 (1970).

Defense of want or failure of consideration is available to indorser of instru-

ment as well as to drawer. *Brotherton v. McWaters*, 438 P.2d 1 (Okla. 1968).

An indorser may raise the defense of failure of consideration and that defense is not limited to a drawer or to a person stopping payment on a check. *Brotherton v. McWaters*, 438 P.2d 1 (Okla. 1968).

19. —Against holder in due course.

Where the defendant dealt with the holder in due course, the holder in due course is subject to the defense that the consideration he was to give had failed, as it is only a failure of consideration with respect to a third person which is a limited defense under the Code. *Brotherton v. McWaters*, 438 P.2d 1 (Okla. 1968).

20. Adequacy of consideration.

Consideration within meaning of UCC § 3-408 may consist of some benefit to one party or some detriment to the other party (holding that note which consolidated two prior obligations was supported by sufficient consideration). *Edmiston v. J.C.G.-Medallion, Inc.*, 570 S.W.2d 306 (Mo. Ct. App. 1978).

Where (1) debtor-owner of two corporations borrowed funds from bank, executed personal notes evidencing such loans, and funneled loan proceeds into his two corporations, (2) bank subsequently had such corporations execute notes and security agreements to bank covering total amount of money loaned to debtor and also had debtor sign two personal notes that were identical in amount to corporate notes and were due on same date, and (3) bank additionally had debtor and debtor's wife execute personal guaranties of corporate notes, trial court properly held that under UCC § 3-408, corporate notes and security agreements were supported by sufficient consideration, and that such consideration was debtor's antecedent personal debts to bank. However, since there was no evidence that signature of debtor's wife had been a prerequisite to bank's extension of credit to debtor or to debtor's two corporations, and also no evidence that wife had been comaker of any of debtor's prior personal notes that debtor had given to bank, wife's personal guaranty of notes executed by debtor's corporations in favor of bank was void for lack of consideration. *H. Watson Dev. Co. v. Bank & Trust Co.*,

58 Ill. App. 3d 423, 374 N.E.2d 767 (1st Dist. 1978).

Where agreement between seller of stock and buyer stipulated that escrow and collection agent would relinquish proportionate share of stock following each monthly payment, where buyer executed promissory note secured by pledge of stock, and where buyer unilaterally stopped payments, seller was entitled to recover for balance of note as buyer failed to establish defense of want of consideration under UCC § 3-408 by virtue of nondelivery of stock. *Wallace v. Ralph Pillow Motors, Inc.*, 344 So. 2d 949 (Fla. App. 1977).

Although plaintiffs, unless they had rights of holder in due course, took instrument subject to defense of want of consideration under UCC §§ 3-306(c) and 3-408, plaintiffs were entitled to recover on instrument under UCC § 3-307(2) where signatures were admitted and where defendant failed to establish defense of want of consideration. *Smith v. Gentilotti*, 371 Mass. 839, 359 N.E.2d 953 (1977).

In transaction whereby sole shareholder of small corporation sold all his shares of stock to third person and corporation participated in transaction with purchaser as comaker of promissory note and written security agreement relating to corporate shares and various physical assets of corporation, corporation's execution of promissory note and security agreement was supported by sufficient consideration since seller, as part of sale transaction, agreed to refrain from competition with corporation, granted corporation option to purchase building in which business was conducted, and promised to remain on corporation's board of directors. *Miller's Shoes & Clothing v. Hawkins Furn. & Appliances, Inc.*, 300 Minn. 460, 221 N.W.2d 113, 71 A.L.R.3d 629 (1974).

Promissory note executed by shareholder to partially satisfy overdraft of corporation was supported by consideration under UCC §§ 3-307(2) and 3-408 despite contentions that note was signed at request of bank to protect it from bank examiners and until another loan could be obtained from Small Business Administration. *Farmer v. Peoples Am. Bank*, 132 Ga. App. 751, 209 S.E.2d 80 (1974).

Under UCC § 3-408, any consideration which would be sufficient to uphold an ordinary contract would be sufficient consideration to validate a promissory note, and this includes any detriment to payee, such as his failure to benefit from sale of property at reduced rate, so long as unclouded and unaffected by fraud or mistake. *Hallowell v. Turner*, 94 Idaho 718, 496 P.2d 955 (1972).

Under UCC any consideration which would be sufficient to uphold ordinary contract would be sufficient consideration to validate promissory note. *Hallowell v. Turner*, 94 Idaho 718, 496 P.2d 955 (1972).

An agreement to release a third party from liability is a valid consideration for the obligation incurred by the parties securing the release within UCC § 3-408. *Blake-Cadillac Oldsmobile, Inc. v. Cackovic*, 54 Pa. D. & C.2d 160 (1971).

Check was drawn upon escrow account; held, transfer of funds resulting therefrom constituted adequate consideration for issuance of cashier's check. *Pennsylvania v. Curtiss Nat'l Bank*, 427 F.2d 395 (5th Cir. Fla. 1970).

There is no want of consideration, as distinguished from value, within meaning of UCC § 3-408 when consideration moves before maturity to party accommodated, even though accommodation maker receives no consideration for executing instrument. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 60 Misc. 2d 499 (1969).

A promissory note is supported by consideration when given in payment for prior substantial legal services and the agreement of the payee to refrain from seeking payment against enterprise assets, which act of refraining would reduce the amounts which the makers of the note would have been required to contribute. *Miller v. Simoni*, 4 U.C.C. Rep. Serv. 1171 (1968, NY Sup).

Rescission of an option agreement covering only the interest of husband in land owned by both husband and wife amounted to a full legal consideration supporting wife's obligation as co-maker of a promissory note. *Haygood v. Stevenson Co.*, 114 Ga. App. 335, 151 S.E.2d 462 (1966).

21. —Failure of consideration.

Note executed by manager of used car agency was supported by sufficient consid-

eration under UCC § 3-408, and not solely by manager's moral obligation to pay, where payees, in return for manager's promise to pay \$7657, agreed to assume and discharge indebtedness of \$8500 at bank, which represented sale by manager of automobiles out of trust. *Alexander v. DeLacruz*, 545 P.2d 518 (Utah 1976).

Where mortgagor executed promissory note for \$8,000 on October 18, but mortgagee did not advance funds and, instead, mortgagee and mortgagor went to bank on October 24 and bank loaned mortgagee \$8,000 on his personal, unsecured note, which mortgagor cosigned, October 18 note was unenforceable for failure of consideration under UCC § 3-408, notwithstanding mortgagor received proceeds of October 24 note and mortgagee repaid note; since mortgagor's signature obligated him as maker to pay bank's note according to its tenor under UCC § 3-413, regardless of any understanding between mortgagee and mortgagor, execution of second note resulted in abandonment of October 18 note as instrument through which indebtedness between parties should be memorialized and repayment enforced. *Anderson v. County Properties, Inc.*, 14 Wash. App. 502, 543 P.2d 653 (1975).

If maker signed note at payee's behest so that payee could show bookkeeping loss, and not in satisfaction of indebtedness arising out of real estate transaction, there was no consideration for note and this would be complete and meritorious defense under UCC § 3-408 to suit on note by payee. *Ritchey v. Mars*, 227 Pa. Super. 33, 324 A.2d 513 (1974).

Where a demand note is given to induce forbearance the note is not supported by consideration since the note is immediately due and does not bind the payee to forbear for any period of time. *Flintkote Co. v. Grimes*, 281 Ala. 707, 208 So. 2d 87 (1968).

A note given by maker to payee for damage to the latter's truck which contained the notation that "it is agreed that this note is conditional and does not settle out any claim or demand payee has against the maker", was without consideration. *Deems v. Wilson*, 114 Ga. App. 341, 151 S.E.2d 230 (1966).

Defense denying both that there was any consideration for the note originally and that the plaintiff was a holder in due course was meritorious. *Neboshek v. Berzani*, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

In suit on promissory note executed by defendant to cover balance due plaintiff on automobile repair bill, fact that some of repair parts used were defective does not constitute defense to note on ground of fraud, but at most defendant is entitled to defend because of an alleged failure of consideration of note to extent only of credit due on account of defective condition of repair part and is entitled in no event to deduction for more than cost of new parts and value of labor for installing same. *Douglas v. Warren*, 44 So. 2d 853 (Miss. 1950).

22. Antecedent obligation, generally.

An accommodation endorsement made by a decedent on a negotiable instrument which represented a consolidation and renewal of two outstanding notes owed by his son was valid since, as security for an antecedent obligation, no consideration was necessary under this section. *Wilson v. Planters Bank*, 383 So. 2d 1089 (Miss. 1980).

Widow who executed note to bank renewing earlier notes which were given to extinguish her deceased husband's indebtedness to bank could not avoid liability on renewal note on ground that there was no consideration therefor, since UCC § 3-408 declares that no consideration is necessary for instrument given in payment of antecedent obligation. *First Nat'l Bank v. Carver*, 375 So. 2d 1198 (Miss. 1979).

Where amount of unpaid promissory notes represented a loan, such amount, under UCC § 3-408, constituted obligation owed by makers which existed when notes were executed and thus supplied requisite consideration for notes. *Cantonwine v. Fehling*, 582 P.2d 592 (Wyo. 1978).

Under UCC § 3-408, note given to payee to discharge antecedent obligation did not require consideration. *Cleveland v. Pleasuretime Dev. Corp.*, 143 Ga. App. 518, 239 S.E.2d 203 (1977).

Promissory note which set forth fact showing it was given for no other consid-

eration but kindness and affection was unenforceable. "Particular kindness" bestowed upon decedent maker by payee of note did not constitute antecedent obligation within meaning of UCC § 3-408, since payee was nephew of decedent maker and law presumed gratuitous any services rendered, absent proof of contract to pay for such services. In re Estate of Wetmore, 36 Ill. App. 3d 96, 343 N.E.2d 224 (5th Dist. 1976).

Note given in connection with settlement of contract dispute was enforceable against makers notwithstanding claim that there was failure of consideration by reason of payee's refusal to honor warranty provision of settlement contract; note was given in payment of and as security for antecedent obligation and, thus, no consideration was necessary under UCC § 3-408, and consideration was given since settlement of disputed claim was sufficient to render entire contract binding. Doyal v. Ben O'Callaghan Co., 132 Ga. App. 336, 208 S.E.2d 136 (1974).

UCC § 3-408 changes previous Tennessee rule in providing that new consideration is not required for a note given in payment of or as security for the antecedent debt of a third party. Musulin v. Woodtek, Inc., 260 Or. 576, 491 P.2d 1173 (1971).

UCC § 3-408 consideration requirement is satisfied by "an antecedent debt of any kind" including the antecedent debt of a third party. Musulin v. Woodtek, Inc., 260 Or. 576, 491 P.2d 1173 (1971).

Want of or failure of consideration is no defense where notes and mortgages were given for antecedent obligation. Northwestern Nat'l Bank v. Steinbeck, 179 N.W.2d 471 (Iowa 1970).

Renewal obligation must be supported by valuable consideration other than original obligation itself in order to bind party who was not obligor upon original instrument; pre-existing debt is sufficient consideration, by itself, to support renewal thereof by obligor upon original debt. Capital City Bank v. Baker, 59 Tenn. App. 477, 442 S.W.2d 259 (1969).

No consideration is necessary for an instrument given in payment of or as security for an antecedent obligation of any parent. Katski v. Boehm, 249 Md. 568, 241 A.2d 129 (1968).

No consideration is necessary for an instrument given in payment of or as security for an antecedent obligation. Hamilton Watch Emp. Fed. Credit Union v. Retallack, 61 Lanc. L. Rev. 159 (Pa. 1967).

An antecedent debt is adequate consideration for a promissory note. Coal Operators Cas. Co. v. Johnson, 213 F. Supp. 146 (E.D. Ky. 1963).

23. —Payment of obligation.

Where makers executed note for \$60,000, but received only \$10,000 and remaining \$50,000 was never advanced, and where makers subsequently executed note for \$10,000 and payee returned original note, no consideration beyond antecedent debt of \$10,000 was necessary to enforceability of \$10,000 note; furthermore, even if additional consideration was necessary, it could be found in return of original note to makers. Pacific Coast Capital Corp. v. Research to Reality, Inc., 57 Mich. App. 75, 225 N.W.2d 177 (1974).

No consideration was necessary for renewal note given in payment of or as security for antecedent obligation, and it was immaterial that at time renewal note was given maker was insolvent and unable to pay obligation at its maturity. State Bank v. Owens, 31 Colo. App. 351, 502 P.2d 965 (1972).

24. Security for obligation.

Under UCC § 3-408, payee's failure to extinguish pre-existing debts did not prevent payee from enforcing promissory notes which were executed to induce payee to extend further credit and to forbear immediate collection of pre-existing debts. GE Co. v. Construction Assocs., 426 F. Supp. 986 (E.D. Mo. 1977).

Under UCC § 3-408, note given to bank by investor incorporation was not required to be supported by consideration where purpose of note was to prevent bank from instituting foreclosure proceedings against corporation, which was in default on antecedent obligation owed to bank (rejecting investor's contention that because he did not receive amount for which note was executed, there was no consideration for note and therefore no liability thereon). Mock v. First City Nat'l Bank, 352 So. 2d 1112 (Ala. 1977).

Under UCC § 3-408 consideration was not required for second note where second note and trust deed were given to secure payment of first note. *Tracy Collins Bank & Trust Co. v. Seiger*, 546 P.2d 237 (Utah 1976).

Under UCC § 3-408, execution of note to secure the antecedent or existing indebtedness of another needs no consideration, and where father made gift of property to son, son's subsequent note and trust deed to father to secure father's indebtedness on property, were valid as accommodation without a showing of consideration. *Kitzer v. Kitzer*, 20 Ill. App. 3d 54, 312 N.E.2d 699 (2d Dist. 1974).

In action by guarantor of renewal and extension promissory notes against maker, maker's defense of want or failure of consideration was untenable because, under UCC § 3-408, no consideration was necessary for extension of antecedent obligation. *Blake v. Coates*, 292 Ala. 351, 294 So. 2d 433 (1974).

Want of consideration was no defense to action on note indorsed by officer of corporate maker, where note represented security for previously existing obligation of corporation. *Lumbermen Assocs. v. Palmer*, 344 F. Supp. 1129 (E.D. Pa. 1972), aff'd, 485 F.2d 680 (3d Cir. Pa. 1973).

Maker gave note as security for antecedent obligation of corporation in which he had invested; held, no consideration was necessary to establish valid obligation between maker and payee. *A.M. Castle & Co. v. Bagley*, 24 Utah 2d 136, 467 P.2d 408 (1970).

25. Validity of obligation.

Professional legal services rendered for benefit of third party for which note was executed by maker in consideration thereof constituted valid antecedent debt under UCC § 3-408 upon which payee could successfully sue maker as if payee were holder in due course. *Austrian, Lance & Stewart, P.C. v. Hastings Properties, Inc.*, 87 Misc. 2d 25 (1976).

Where wife of maker of 2 notes signed both notes as co-maker 30 days after notes were executed, at time when all transactions surrounding execution of notes had been completed and there was no factual change between parties except addition of her signature, wife was accommodation

maker under UCC § 3-415 and was liable to holders who took notes for value, notwithstanding they were not holders in due course and there was no consideration for wife's signature, since under UCC § 3-408 no consideration was necessary to make her liable as accommodation party. *Cissna Park State Bank v. Johnson*, 21 Ill. App. 3d 445, 315 N.E.2d 675 (4th Dist. 1974).

Where lessee and sub-lessee executed release of sub-lease and, as part of the consideration for such release, sub-lessee executed promissory note payable to lessee, fact that note was executed one week after release did not raise defense of failure or want of consideration; under UCC § 3-408 no consideration is necessary for instrument or obligation thereon given in payment of or as security for antecedent obligation of any kind. *Smith v. Rothstein*, 131 Ga. App. 632, 206 S.E.2d 592 (1974).

A promissory note given after a discharge in bankruptcy to pay the discharged debt is binding. *Kay v. Golding*, 4 U.C.C. Rep. Serv. 1065 (1968, NY Sup.).

Although an accord and satisfaction wiped out an antecedent pecuniary obligation, a note given in exchange for a prior note in the same amount at a time when the collection of the debt was not legally enforceable, but with intent that the note itself constitute a legally enforceable obligation carried a presumption of consideration and was enforceable. *Waters v. Lanier*, 116 Ga. App. 471, 157 S.E.2d 796 (1967).

A note promising to pay an amount which has been discharged by bankruptcy "carries a presumption of consideration" and may be enforced. *Waters v. Lanier*, 116 Ga. App. 471, 157 S.E.2d 796 (1967).

26. Practice and procedure; pleadings.

In action by maker, who had apparently executed note in response to his employer's demand, to declare note unenforceable, maker sufficiently pleaded failure of consideration under UCC § 3-408, where he alleged that note was neither given for purpose of reducing some third person's debt to bank, nor for any other purpose than to prevent termination of his employment. *Gerber v. First Nat'l Bank*, 30 Ill. App. 3d 776, 332 N.E.2d 615, 79 A.L.R.3d 592 (1st Dist. 1975).

Defendants seeking to reopen judgment by confession on promissory note signed by them failed to allege sufficient facts to clearly show that they had defense to note based on lack of consideration under UCC § 3-307(2) where defendants were heirs of owner of automobile dealership who was indebted to plaintiff on prior promissory note, where defendants were actively managing automobile dealership after owner's death, and where defendants had paid interest owing on prior note up through date of renewal note they executed; under UCC § 3-408, note signed as security for antecedent claim or debt, even though signed by third party, needs no consideration, and defendants failed to demonstrate that note signed by them was not given as security for antecedent debt of deceased owner. *First Nat'l Bank v. Achilli*, 14 Ill. App. 3d 1, 301 N.E.2d 739 (2d Dist. 1973).

Although want or failure of consideration may be raised in action upon negotiable instrument against any person not having rights of holder in due course, this must be pleaded as affirmative defense and may not be raised under general denial. *Rochester Iron & Metal Co. v. Capellupo*, 62 Misc. 2d 264 (1969).

A trial was required and plaintiff should be required to file a reply where the defendant, under oath, denied that he had any knowledge as to how his signature got on the note sued on, denied delivery of the note, denied that there was any consideration for the note originally, and denied that the plaintiff was a holder in due course. *Neboshek v. Berzani*, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

27. —Burden of proof.

In action by hospital on promissory note signed by physician allegedly for advances made by hospital under oral agreement concerning physician's income, (1) despite conflicts in evidence as to meaning of agreement and conditions under which advances would have to be repaid, fact remained that defendant had signed note after conference with hospital's business manager concerning amount owed hospital for advances; (2) under UCC § 3-307(2), production of a note with defendant's signature established entitles a plaintiff to recover in the absence of any

defense to the instrument; (3) under UCC § 3-408, since consideration for a note given for an antecedent obligation is presumed, defendant had burden of showing lack of consideration for note sued on; and (4) in view of state of record on appeal, reviewing court could not conclude that trial court's judgment in favor of hospital was contrary to manifest weight of the evidence. *Northlake Community Hosp. v. Cadkin*, 55 Ill. App. 3d 344, 370 N.E.2d 1094 (1st Dist. 1977).

In action arising over promissory note executed by decedent and made payable to his sister, under UCC § 3-408 burden of proving no consideration was upon executor of Thaker's estate, and in absence of fraud or undue influence, it was assumed that decedent thought that face value of note was reasonable and adequate estimate of his obligation to payee. *Harned v. Dawson*, 505 S.W.2d 174 (Ky. 1974).

28. —Parol evidence.

In action by payee against maker of promissory note, maker was entitled under UCC § 3-306(c) and UCC § 3-408 to show by parol evidence that consideration for note had failed allegedly because of payee's failure to fulfill obligations under business agreement with maker (reversing summary judgment for payee because material issue of fact existed as to alleged failure of consideration for note). *Ralph Stachon & Assocs. v. Greenville Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978).

In action by payee against makers of promissory note, payee could not successfully contend that trial court's inappropriate charge to jury on failure of consideration was so prejudicial as to require new trial, even though record revealed that there was no evidence to support such charge, where charge was based on UCC § 3-408 and only testimony in case concerning consideration was that plaintiff had paid debt of defendants and had taken their note in return. Applying such evidence to the charge, jury could only have concluded that there was no failure of consideration. *Stembridge v. Simmons*, 143 Ga. App. 90, 237 S.E.2d 514 (1977).

Where creditor-payee was urged by defendant indorser to forebear from carrying out replevin against goods of debtor-

maker, and did so upon defendant's guarantee of payment and credit, creditor-payee was entitled to introduce parol evidence to establish intent of defendant in signing note, and to sue defendant directly and primarily on the notes not only as accommodation indorser-guarantor but also as de facto co-maker. *Jamaica Tobacco & Sales Corp. v. Ortner*, 70 Misc.2d 388 (1972).

Where the parol evidence rule bars proof of an alleged promise, that promise cannot be consideration to support a note. *Sonnichsen v. Streeter*, 4 Conn. Cir. Ct. 659, 239 A.2d 63 (1967).

Parol evidence is admissible not to alter the terms of an accord and satisfaction but to show what consideration was given for a note which was given as part of the accord and satisfaction. *Waters v. Lanier*, 116 Ga. App. 471, 157 S.E.2d 796 (1967).

29. —Instructions.

Trial judge did not err in refusing to give instruction on defense of partial failure of consideration, where maker of note failed to plead this defense, took position at trial that note was given for entirely different reason from that claimed by payee, and based his case on fraud and want of consideration. *Holm v. Woodworth*, 271 So. 2d 167 (Fla. App. 1972).

30. —Summary judgment.

In action by payee bank against maker of note, summary judgment was erroneously granted where maker introduced affidavit stating that bank had agreed that renewals on note were with condition that maker would be relieved of liability if sale of corporation was not finalized, raising issue of fraud in the inducement under UCC §§ 3-302, 3-306(2), and 3-408. *Viracola v. Dallas Int'l Bank*, 508 S.W.2d 472 (Tex. Civ. App. 1974), ref. n.r.e. (July 17, 1974).

Maker of note stated in affidavit that he was not indebted to payee at time of execution of note and that payee's records showing indebtedness were incomplete and incorrect; held, there was genuine issue of fact as to consideration so that payee was not entitled to summary judgment. *Preston & Fogarty, Inc. v. Morgan*, 120 Ga. App. 878, 172 S.E.2d 319 (1969).

Fact that assumption agreement with bank was under seal does not defeat debtor's right to plead and prove want of consideration; in such case, law presumes consideration and burden is upon debtor to prove otherwise; held, factual question as to whether evidence presented sustained defense precluded summary judgment. *Wenke v. Norton*, 120 Ga. App. 70, 169 S.E.2d 663 (1969).

31. —Waiver and estoppel.

Under Texas UCC, where inequities asserted by comaker of note arose prior to or in connection with antecedent note, comaker waived right to urge these matters by execution of renewal notes. *First Nat'l Bank v. Reglin*, 266 So. 2d 252 (La. App. 1972).

IV. DECISIONS UNDER FORMER STATUTES.

32. Decisions under Code 1942 § 65.

A note credited to the maker's account for goods purchased, and one given in renewal, are supported by a consideration. *Stribling Bros. Stribling Bros. Mach. Co. v. Girod Co.*, 239 Miss. 488, 124 So. 2d 289 (1960).

A debtor by admitting that he signed a promissory note assumed the burden of showing a lack or failure of consideration. *Bleuler v. Indian Co.*, 237 Miss. 574, 115 So. 2d 537 (1959).

Where the most that a debtor could have claimed was that his liability was doubtful, creditor's forbearance to sue was a sufficient consideration to support a promissory note. *Bleuler v. Indian Co.*, 237 Miss. 574, 115 So. 2d 537 (1959).

Burden of proving want of consideration was on person whose name appeared on note apparently as comaker. *Milstead v. Maples*, 180 Miss. 476, 177 So. 790 (1938).

33. Decisions under Code 1942 § 66.

A note credited to the maker's account for goods purchased, and one given in renewal, are supported by a consideration. *Stribling Bros. Stribling Bros. Mach. Co. v. Girod Co.*, 239 Miss. 488, 124 So. 2d 289 (1960).

Generally, an agreement or promise by the debtor or maker to pay interest to accrue in the future, during the time extended, or for a fixed time, and by which

he waives or relinquishes his right to discharge the debt before the expiration of the time specified, constitutes a sufficient consideration for an extension by the holder or payee. *Freeman v. Truitt*, 238 Miss. 623, 119 So. 2d 765 (1960).

An agreement indorsed on the back of a promissory note payable in full on a certain date, and signed by the maker, by the terms of which the maker agreed to pay the obligation in monthly instalments until the whole obligation plus interest had been paid, was based on sufficient consideration to bind both parties. *Freeman v. Truitt*, 238 Miss. 623, 119 So. 2d 765 (1960).

Note given by seller of business, after reacquiring it, for goods sold by his supplier to purchasers of business in ignorance of the change of ownership held supported by a sufficient consideration. *Bleuler v. Indian Co.*, 237 Miss. 574, 115 So. 2d 537 (1959).

Where the most that a debtor could have claimed was that his liability was doubtful, creditor's forbearance to sue was a sufficient consideration to support a promissory note. *Bleuler v. Indian Co.*, 237 Miss. 574, 115 So. 2d 537 (1959).

That principal gave agent credit for amount of third person's check to agent constituted consideration sufficient to render principal "holder for value." *Railway Express Agency v. Bank of Philadelphia*, 168 Miss. 279, 150 So. 525 (1933).

Bank which paid check on forged signature of its depositor should bear loss, as between bank and holder which, without knowledge of forgery, took check from its agent crediting agent's account therefor. *Railway Express Agency v. Bank of Philadelphia*, 168 Miss. 279, 150 So. 525 (1933).

Statute providing antecedent debt constitutes value held inapplicable, where trustee wrongfully canceled trust deed

and took trust deed payable to himself which he assigned as security for his pre-existing debts. *Eagle Lumber & Supply Co. v. De Weese*, 163 Miss. 602, 135 So. 490 (1931).

34. Decisions under Code 1942 § 67.

Where it was shown that the bank had no actual notice of a warranty and agreement and the breach thereof, the fact that there was stapled to the note, given for the purchase of farm equipment, at the time it was indorsed to the bank, a purchase order signed by the maker-purchaser in favor of the seller-payee on the reverse side of which there was a "warranty and agreement" did not put the bank upon notice as to such warranty and agreement or put it upon inquiry as to whether the warranty and agreement had been breached at the time of purchase, so that the bank as a holder in due course for value, and without notice, was entitled to recover against the maker even though the warranty had actually been breached. *Misso v. National Bank of Commerce*, 231 Miss. 249, 95 So. 2d 124 (1957).

That principal gave agent credit for amount of third person's check to agent constituted consideration sufficient to render principal "holder for value." *Railway Express Agency v. Bank of Philadelphia*, 168 Miss. 279, 150 So. 525 (1933).

Bank which paid check on forged signature of its depositor should bear loss, as between bank and holder which, without knowledge of forgery, took check from its agent crediting agent's account therefor. *Railway Express Agency v. Bank of Philadelphia*, 168 Miss. 279, 150 So. 525 (1933).

35. Decisions under Code 1942 § 69.

Partial failure of consideration is defense pro tanto. *Coulson v. Stevens*, 122 Miss. 797, 85 So. 83 (1920).

RESEARCH REFERENCES

ALR. When is instrument issued or transferred for "value" under UCC § 3-303. 77 A.L.R.5th 429.

Law Reviews. 1979 Mississippi Su-

preme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-304. Overdue instrument.

(a) An instrument payable on demand becomes overdue at the earliest of the following times:

- (1) On the day after the day demand for payment is duly made;
- (2) If the instrument is a check, ninety (90) days after its date; or
- (3) If the instrument is not a check, when the instrument has been outstanding for a period of time after its date which is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and usage of the trade.

(b) With respect to an instrument payable at a definite time the following rules apply:

(1) If the principal is payable in installments and a due date has not been accelerated, the instrument becomes overdue upon default under the instrument for nonpayment of an installment, and the instrument remains overdue until the default is cured.

(2) If the principal is not payable in installments and the due date has not been accelerated, the instrument becomes overdue on the day after the due date.

(3) If a due date with respect to principal has been accelerated, the instrument becomes overdue on the day after the accelerated due date.

(c) Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal.

SOURCES: Former § 75-3-304: Codes, 1942, § 41A:3-304; Laws, 1966, ch. 316, § 3-304; Laws, 1992, ch. 420, § 30, eff from and after January 1, 1993.

§ 75-3-305. Defenses and claims in recoupment.

(a) Except as stated in subsection (b), the right to enforce the obligation of a party to pay an instrument is subject to the following:

(1) A defense of the obligor based on (i) infancy of the obligor to the extent it is a defense to a simple contract, (ii) duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, (iii) fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms, or (iv) discharge of the obligor in insolvency proceedings;

(2) A defense of the obligor stated in another section of this chapter or a defense of the obligor that would be available if the person entitled to enforce the instrument were enforcing a right to payment under a simple contract; and

(3) A claim in recoupment of the obligor against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument; but the claim of the obligor may be asserted against a transferee of the instrument only to reduce the amount owing on the instrument at the time the action is brought.

(b) The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in subsection (a)(1), but is not subject to defenses of the obligor stated in subsection (a)(2) or claims in recoupment stated in subsection (a)(3) against a person other than the holder.

(c) Except as stated in subsection (d), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (Section 75-3-306) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument. An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.

(d) In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under subsection (a) that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity.

SOURCES: Former § 75-3-305: Codes, 1942, § 41A:3-305; Laws, 1966, ch. 316, § 3-305; Laws, 1992, ch. 420, § 31, eff from and after January 1, 1993.

RESEARCH REFERENCES

ALR. What constitutes “dealing” under UCC § 3-305(2), providing that holder in due course takes instrument free from all defenses of any party to instrument with whom holder has not dealt. 42 A.L.R.5th 137.

Duress, incapacity, illegality, or similar defense rendering obligation a nullity as affecting enforceability of negotiable instrument against holder in due course under UCC [rev] § 3-305(a)(1)(ii). 89 A.L.R.5th 577.

§ 75-3-306. Claims to an instrument.

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument.

SOURCES: Former § 75-3-306: Codes, 1942, § 41A:3-306; Laws, 1966, ch. 316, § 3-306; Laws, 1992, ch. 420, § 32, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

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11. In general.

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I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-304.

11. In general.

Negligence goes to notice requirements for being a holder in due course and not to good faith requirement. *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

In action by customer against bank for conversion, allegations in answer to (1) the authority of customer's employee to indorse tax payable to his corporate employer was limited to "the purpose of depositing the checks in plaintiff's bank account," and (2) that plaintiff was negligent in failing to supervise the activities of its employee and in permitting the particular occurrences, including the alleged unauthorized indorsement of the checks payable to the plaintiff, were insufficient and would be dismissed. *Rosenthal v. Manufacturers Hanover Trust Co.*, 30 A.D.2d 650 (1st Dep't 1968).

Actual knowledge by holder of discounted notes that payee had agreed with maker not to discount notes would not preclude holder from becoming holder in

due course, since knowledge was not notice of defense or claim against notes within Code § 3-304(4)(b) but merely notice of maker's possible cause of action against payee for breach of agreement not discount. *Factors & Note Buyers, Inc. v. Green Lane, Inc.*, 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

UCC § 3-304(1)(a) replaces the provision of the NIL requiring that an instrument be "complete and regular on its face". *National State Bank v. Kleinberg*, 4 U.C.C. Rep. Serv. 100 (1967, NY Sup).

12. Incomplete, forged, altered or irregular instruments.

Statements on certificates of deposit that they were payable "none months after date" and were to bear interest "at the rate of none per cent" did not constitute sufficient irregularity under UCC § 3-304(1)(a) to create genuine issue regarding holder's status as holder in due course, notwithstanding claim by issuer of certificates that these terms so deviated from custom or usage in banking industry as to constitute such irregularity, where issuer failed to establish existence of any such alleged custom or usage. *Western State Bank v. First Union Bank & Trust Co.*, 172 Ind. App. 321, 360 N.E.2d 254 (1977).

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (3) where bank indorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, bank under UCC § 3-304 was without notice of buyer's alleged defenses (fraud, conversion, and breach of contract) to liability on cashier's checks-and thus was holder in

due course as to such checks and not liable to buyer for fraud and conversion in sale transaction—because (1) bank's knowledge that contract of sale accompanied cashier's checks did not constitute notice of buyer's alleged defenses to such checks under "separate agreement" provision of UCC § 3-304(4)(b); (2) bank could reasonably assume that one note discharged by checks' proceeds, although signed by corporation's owner personally, was for benefit of corporation and that application of proceeds to discharge such note pursuant to owner's instructions did not constitute discharge of owner's personal debt, so as to give bank notice under UCC § 3-304(2) of buyer's defenses to liability on checks; and (3) fact that contract of sale was materially altered by striking bank's name from two copies thereof did not give bank notice of buyer's defenses under UCC § 3-304(1)(a), since term "instrument" in UCC § 3-304(1)(a) means "negotiable instrument" and not "contract of sale." *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

Affirmative defense to action against bank for conversion alleging that the authority of corporate employee to indorse checks payable to his corporate employer was limited to "the purpose of depositing the checks in plaintiff's bank account" was insufficient. *Rosenthal v. Manufacturers Hanover Trust Co.*, 30 A.D.2d 650 (1st Dep't 1968).

Where at the time a note was negotiated to a bank it was overdue as originally drafted, the bank might still claim the status of a holder in due course and enforce the note if it came to the bank in such a condition that the alteration of the maturity date was not noticeable. *Unadilla Nat'l Bank v. McQueer*, 27 A.D.2d 778 (3d Dep't 1967).

Bank to which promissory note was negotiated has not met the burden of establishing that it is a holder in due course to the extent entitling it to summary judgment where there remains, among others, the question of the identity of the person who altered the maturity date from 5 days to 45 days after date. *Unadilla Nat'l Bank v. McQueer*, 27 A.D.2d 778 (3d Dep't 1967).

Bank which permitted new president and sole stockholder of corporation to cash

checks drawn payable to corporation, in derogation of corporate resolution on file with bank which only authorized officers to endorse checks for deposit, and collection, was not a holder in due course, and was liable to creditors of bankrupt corporation for total amount of checks which it permitted sole stockholder to cash rather than deposit to corporation's account. *Maley v. East Side Bank*, 361 F.2d 393 (7th Cir. Ill. 1966).

13. Notice of voidability or discharge of obligation.

Assignee of note given for purchase of land in interstate transaction was not holder in due course where facts known to assignee at time of assignment, i.e., apparent multiple violations of Interstate Land Sales Act (15 USCS 1703(b)), should have alerted assignee to possible irregularities in making of note. *Stewart v. Thornton*, 116 Ariz. 107, 568 P.2d 414 (1977).

In declaratory action to determine rights of holder of promissory note, where (1) maker of note on May 23, 1971 signed contract to purchase lot, received deed to lot, and executed mortgage on lot and note in certain sum payable to named person, which note was substantially discounted and immediately sold to plaintiff; (2) maker rescinded the voidable sales contract two days later, as permitted by federal Interstate Land Sales Full Disclosure Act (15 USCS § 1703(b)), because of his failure to receive property report on lot as of time of signing contract of sale; and (3) maker contended that plaintiff holder had had notice within meaning of UCC § 3-304(1)(b) that maker's obligation under such contract was voidable, plaintiff holder was not holder in due course under UCC § 3-302(1)(c) because (1) plaintiff's purchase of note for much less than its full value should have alerted him to possible defense against maker's liability; (2) note was also purchased by plaintiff within the two-day period in which maker could rescind the voidable sales contract; (3) by examining such contract, which was in possession of seller of note, plaintiff could have ascertained that maker of note had not inspected the lot purchased or received a property report thereon, as required by federal law; and (4) under cir-

cumstances of case, trial court could reasonably infer bad faith on part of plaintiff in refusing to investigate when facts known to him indicated irregularity respecting such note. *Stewart v. Thornton*, 116 Ariz. 107, 568 P.2d 414 (1977).

14. Knowledge of negotiation by fiduciary in breach of duty.

Where (1) plaintiff corporation sent defendant bank executed form and corporate resolution listing plaintiff's accountant as authorized signer of checks against plaintiff's account, (2) plaintiff directed that bank statements and inquiries about account should be sent to accountant, (3) non-UCC banking law provided that notwithstanding UCC § 3-304 (dealing with purchaser's notice of claim to or defense against instrument), drawing of check by corporate agent against corporate account—either in corporation's name or in agent's name to himself as payee—and cashing of check or depositing it in agent's personal account should not constitute notice to bank of defense against or claim to check, provided that bank had on file corporation's authorization showing that agent was authorized to draw checks for limited or unlimited amount and that amount of check cashed or deposited did not exceed such amount, and (4) plaintiff's account between 1968 and 1972 signed many checks against corporation's account and thus converted large sums of money to his own use, court held in action to recover such sums on theory of negligence that clause in UCC § 4-103(1), providing that no agreement can disclaim bank's responsibility for its failure to exercise ordinary care, was not controlling since plaintiff, as permitted by UCC § 4-103(1), had agreed to standard by which defendant's responsibility as to checks drawn against plaintiff's account was to be measured when plaintiff filed signed authorization with bank concerning accountant's authority to draw checks, and checks drawn by accountant had not exceeded maximum limitation contained in such authorization. *Allen A. Funt Prods., Inc. v. Chemical Bank*, 63 A.D.2d 629 (1st Dep't 1978), *aff'd*, 47 N.Y.2d 741, 417 N.Y.S.2d 254, 390 N.E.2d 1178 (1979).

Defendants, the limited partners in a partnership formed by the corporate de-

veloper of an apartment house project to syndicate the sale of the project, who executed personal promissory notes to the partnership as part of the purchase price for their shares in the partnership of which the corporate developer was the sole general partner and managing agent, may raise as a defense against plaintiff bank in an action on the notes the breach of fiduciary duty by the general partner, which, after first approaching plaintiff bank for a corporate loan, indorsed the notes from the partnership to itself in its corporate capacity and then to plaintiff without the written consent or ratification of all the limited partners in violation of section 98 of the Partnership Law, since plaintiff, by purchasing the notes at a discount with knowledge that the notes were negotiated for the individual purposes of the general partner in breach of its fiduciary duty, is not entitled to the rights of a holder in due course (Uniform Commercial Code, § 3-304, subd [2]). The defense of breach of fiduciary duty belongs to defendants as limited partners and makers of the notes and not to the partnership since defendants, who have each been damaged by the breach of the fiduciary duty and stand to lose part of their interest in the partnership assets, are asserting their own rights and not the "claim of any third person". *Chemical Bank v. Ashenburg*, 94 Misc. 2d 64 (1978).

Bank which cashed check payable to order of "Swiss Baco Skyline, 2416 Holly Lane, Olympia, Wa 98501," where such check was indorsed by alleged converter who wrote "Swiss Baco Skyline" on back of check and signed his name thereafter, was liable as matter of law to payee of check for failing to act in accordance with reasonable commercial standards in accepting check, since bank was deemed to have had notice under UCC § 3-304(2) of claim against instrument because of its knowledge that indorser, although purporting to act in name of payee, actually negotiated check in exchange for personal certificate of deposit. *Swiss Baco Skyline Logging, Inc. v. Haliewicz*, 18 Wash. App. 21, 567 P.2d 1141 (1977).

Bank which was authorized depository of plaintiff company was liable for face amount of 17 third-party checks made

payable to plaintiff which were indorsed without authority by plaintiff's manager and deposited in manager's personal account, since bank under UCC § 3-304(2) had notice of plaintiff's claim against checks as payee thereof and thus could not claim benefits of holder-in-due-course status under UCC § 3-302(1). *Mott Grain Co. v. First Nat'l Bank & Trust Co.*, 259 N.W.2d 667 (N.D. 1977).

Where defendant bank received check from plaintiff's employee, drawn by plaintiff and made payable to defendant, applied check to discharge employee's personal indebtedness to defendant, and released collateral for loan to employee fact that information relating to employee's relationship with plaintiff was provided in financial statements given to merchants from whom bank purchased installment contract was insufficient to constitute "notice" to defendant of fiduciary relationship between employee and plaintiff, but, even if it were, under UCC § 3-304(4)(e), this was not sufficient knowledge to place defendant on "notice" of claim or defense to check. *Richardson Co. v. First Nat'l Bank*, 504 S.W.2d 812 (Tex. Civ. App. 1974), *ref. n.r.e.* (Apr. 3, 1974).

Where bookkeeper deposited third party checks payable to her employer in her personal bank account, defendant bank was not holder in due course, since it had notice of claim against instrument arising out of bookkeeper's acting for her own benefit, and since it was not a holder for value not having acquired the checks by authorized signature or indorsement. *Von Gohren v. Pacific Nat'l Bank*, 8 Wash. App. 245, 505 P.2d 467 (1973).

15. Overdue instrument.

In action by holder of note against maker who signed it as accommodation for payee: (1) fact that due date of first monthly installment was omitted did not make instrument incomplete in any "necessary respect" under UCC § 3-115(1) and instrument in which no time for payment was stated was payable on demand under UCC § 3-108; (2) holder's taking of note dated June 30, 1972, on July 14, 1972, was within "a reasonable length of time after its issue" under UCC § 3-304(3)(c); and (3) since note was not overdue when

holder took it, lack of consideration was no defense under UCC §§ 3-304(4)(c) and 3-415(2). *Gill v. Commonwealth Nat'l Bank*, 504 S.W.2d 521 (Tex. Civ. App. 1973), *writ ref'd n.r.e.*, (Apr. 3, 1974).

Taking of demand note dated June 30, 1972, on July 14, 1972, was within "reasonable length of time after its issue" under UCC § 3-304(3)(c) as matter of law. *Gill v. Commonwealth Nat'l Bank*, 504 S.W.2d 521 (Tex. Civ. App. 1973), *writ ref'd n.r.e.*, (Apr. 3, 1974).

Where, by terms of note, holder had reason to know, that note was past due when taken, holder of note was not holder in due course. *Srochi v. Kamensky*, 118 Ga. App. 182, 162 S.E.2d 889 (1968).

Bank to which promissory note was negotiated has not met the burden of establishing that it is a holder in due course to the extent entitling it to summary judgment where there remains, among others, the question of the identity of the person who altered the maturity date from 5 days to 45 days after date. *Unadilla Nat'l Bank v. McQueer*, 27 A.D.2d 778 (3d Dep't 1967).

A bank which for the second time accepted for deposit to the personal account of the officer of a corporation in receivership a long past due check payable to the corporation's order, at a time when the bank had knowledge of the receivership, could not be a holder in due course when the drawee bank again refused payment. *County Trust Co. v. Pascack Valley Bank & Trust Co.*, 93 N.J. Super. 252, 225 A.2d 605 (App. Div. 1966).

16. Knowledge that instrument is ante-dated or postdated.

Since UCC § 3-304 specifically provides that knowledge that an instrument is ante-dated or post-dated does not of itself give purchaser notice of defense or claim, knowledge on part of collecting bank that check it accepted for deposit was post-dated imposed no duty on bank to make any investigation to ascertain whether or not maker had any defenses which would have justified him in refusing to pay payee; thus, negligence of collecting bank in failing to make investigation to ascertain reason check was post-dated could not constitute defense to bank's cause of action against maker where bank ac-

cepted post-dated check for deposit and permitted its depositor to withdraw funds prior to collection of check, and where, when check was returned with stop payment notation, bank was unable to charge it back against its customer's account. *First Nat'l Bank v. McKay*, 521 S.W.2d 661 (Tex. Civ. App. 1975).

Where purchasers of trailer park gave vendors' agent check in acceptance of vendors' offer to sell, fact that check was postdated for one week did not make purchaser's acceptance a qualified acceptance. *How v. Fulkerson*, 22 Ariz. App. 467, 528 P.2d 853 (1974).

Knowledge that a check is postdated does not of itself give the purchaser notice of a defense or claim. *National Currency Exch., Inc. v. Perkins*, 52 Ill. App. 2d 215, 201 N.E.2d 668 (1st Dist. 1964).

17. Knowledge of collateral agreement.

In action for fraud and conversion in sale of corporation by buyer against owner-seller and bank holding security interest in corporation's assets, (1) where sale contract naming owner and bank as sellers was signed only by owner, although owner had promised buyer that bank would also be party to agreement; (2) where buyer gave owner two cashier's checks, made out to both corporation and bank as copayees, as agreed down payment for corporation's assets but received no bill of sale therefor; and (3) where bank indorsed such checks and, pursuant to owner's instructions, applied most of proceeds thereof to satisfy two notes on which corporation was liable to bank and gave owner check payable to corporation for remaining proceeds which owner deposited in corporation's account, bank under UCC § 3-304 was without notice of buyer's alleged defenses (fraud, conversion, and breach of contract) to liability on cashier's checks-and thus was holder in due course as to such checks and not liable to buyer for fraud and conversion in sale transaction-because (1) bank's knowledge that contract of sale accompanied cashier's checks did not constitute notice of buyer's alleged defenses to such checks under "separate agreement" provision of UCC § 3-304(4)(b); (2) bank could reasonably assume that one note discharged by

checks' proceeds, although signed by corporation's owner personally, was for benefit of corporation and that application of proceeds to discharge such note pursuant to owner's instructions did not constitute discharge of owner's personal debt, so as to give bank notice under UCC § 3-304(2) of buyer's defenses to liability on checks; and (3) fact that contract of sale was materially altered by striking bank's name from two copies thereof did not give bank notice of buyer's defenses under UCC § 3-304(1)(a), since term "instrument" in UCC § 3-304(1)(a) means "negotiable instrument" and not "contract of sale." *Leininger v. Anderson*, 255 N.W.2d 22 (Minn. 1977).

Assignee's knowledge that incomplete security agreement covering conditional sale had been completed was not notice of maker's defense on agreement unless assignee had notice of improper completion. *Steelman v. Associates Dist. Corp.*, 121 Ga. App. 649, 175 S.E.2d 62 (1970).

Actual knowledge by holder of discounted notes that payee had agreed with maker not to discount notes would not preclude holder from becoming holder in due course, since knowledge was not notice of defense or claim against notes within Code § 3-304(4)(b) but merely notice of maker's possible cause of action against payee for breach of agreement not discount. *Factors & Note Buyers, Inc. v. Green Lane, Inc.*, 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

18. Knowledge of completion of incomplete instrument.

Under UCC § 3-304(4)(f), knowledge by purchaser of instrument that there has been default in payment of any other instrument, except one of the same series, does not of itself give purchaser notice of any defense against, or claim to, instrument purchased; and under UCC § 3-304(4)(d), knowledge that incomplete instrument has been completed also does not create notice of such a defense or claim, unless purchaser had notice that completion was improper. *Central State Bank v. Kilroy*, 57 A.D.2d 940 (2d Dep't 1977).

Purchaser of conditional sales contract was holder in due course, even though he knew that possessor of contract had filled

in blanks therein after contract had been signed. *Cook v. Southern Credit Corp.*, 247 Ark. 981, 448 S.W.2d 634 (1970).

19. Duty to make inquiry.

Notice under UCC § 3-302(1)(c) and UCC § 3-304(1)(b) requires some inquiry by purchaser of note where purchaser has actual knowledge of facts that should alert him to possible irregularities concerning such note. Protection afforded holder in due course cannot be used to shield one who simply refuses to investigate when facts known to him suggest an irregularity concerning commercial paper that he purchases. *Stewart v. Thornton*, 116 Ariz. 107, 568 P.2d 414 (1977).

Where drawer gave third party his signed blank check with instructions to cash it for \$800 and give cash to hotel in payment of hotel bill, but third party made check out for full amount of bill, \$3046.03, and delivered it to hotel, fact that check was signed by person who was not party to transaction and that it was completed in different handwriting from that of person who signed check, did not impose any duty on hotel under UCC § 3-304(4)(d) to inquire as to third party's authority. *Saka v. Sahara-Nevada Corp.*, 92 Nev. 703, 558 P.2d 535 (1976).

With respect to Code definition of holder in due course as holder who takes instrument without "notice" of any defense against or claim to it on part of any person, failure to make inquiry about unknown fact may be negligence and lack of diligence, but it is not "notice" of what holder might discover. *Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 296 Minn. 130, 207 N.W.2d 282 (1973).

Where the acquirer of a negotiable instrument has no reason to know of anything improper, he is not required to inquire as to all prior transactions in order that he be deemed to have acted honestly and in good faith. *Jaeger & Branch, Inc. v. Pappas*, 20 Utah 2d 100, 433 P.2d 605 (1967).

20. Effect of time of notice.

In action by cashing bank to recover on check on which payment was subsequently stopped, where check was made payable to named payee as payment for

cattle-feeding contract between payee and drawer, another bank holding perfected security interests in all of payee's property called in secured loan to payee and directed payee to turn in all proceeds on payee's accounts receivable and not to pay any of payee's general creditors, payee cashed check in suit at still another bank and paid off certain general creditors, drawer of check stopped payment thereon at request of secured bank, and handwritten part of check stated that it was drawn for \$13,430 but check imprinter inadvertently entered "\$3,430" on check, cashing bank was holder in due course and entitled to recover under UCC § 3-302(1)(c) because (1) it had no notice under UCC § 1-201(25) of secured bank's claim to check's proceeds from mere publication in biweekly reporting service 17 months previously of secured bank's filing of security agreements on payee's property, even though cashing bank did subscribe to such reporting service; (2) check was negotiable on its face, since it was indorsed by payee and payee's indorsement was not restrictive; (3) statement by payee's wife to officer of cashing bank that check was being cashed to prevent secured bank from "grabbing it" occurred after check was cashed and thus was irrelevant under UCC § 3-304(6) to issue of notice; and (4) cashing bank took check in good faith under UCC § 3-302(1)(b), despite \$10,000 error on face of check, since cashing bank had contacted drawee bank to ascertain correct amount of check and to discover whether sufficient funds were on deposit to cover it. *McCook County Nat'l Bank v. Compton*, 558 F.2d 871 (8th Cir. S.D. 1977), cert. denied, 434 U.S. 905, 98 S. Ct. 302, 54 L. Ed. 2d 191 (1977).

The fact that the transferor-payee was insolvent is not notice of any defense, as against the contention that because the transferor was insolvent the transfer might give rise to a preference, or that the transferor would not be able to pay the note. *Franklin Nat'l Bank v. Sidney Gotowner, Inc.*, 4 U.C.C. Rep. Serv. 953 (1967, NY Sup.).

Notice, in order to prevent one from being bona fide holder under law merchant, or holder in due course under Commercial Code, means notice at time of

taking or at time instrument is negotiated, and not notice arising subsequently; time when value is given for instrument is decisive. *Sullivan v. United Dealers Corp.*, 486 S.W.2d 699 (Ky. 1972).

Where, after bank perfected security interest in company's accounts and their proceeds, company induced debtor to pay his account by giving promissory note for amount owed, and negotiated this note to defendant, defendant did not have actual notice of bank's security interest, was holder in due course, and had priority with respect to note and cash payment over bank's earlier perfected security interest. *Citizens Valley Bank v. Pacific Materials Co.*, 263 Or. 557, 503 P.2d 491 (1972).

Lender who claimed to be purchaser of note from broker was charged with notice of defense of usury, where usurious note for \$16,260 was purchased from broker for \$11,000. *Winter & Hirsch, Inc. v. Passarelli*, 122 Ill. App. 2d 372, 259 N.E.2d 312 (1st Dist. 1970).

The fact that subsequent to the paying of value the payee learns of a defense does not operate retroactively to destroy his character as a holder in due course. *Waterbury Sav. Bank v. Jaroszewski*, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

Under the provisions of subsec. (6), subsequent knowledge does not impair holder-in-due-course status. *Crest Fin. Co. v. First State Bank*, 37 Ill. 2d 243, 226 N.E.2d 369 (1967).

21. Miscellaneous circumstances as constituting notice.

Subcontractor's delivery of certificate of deposit to attorney, as alleged escrow agent, was not delivered to general contractor and thus general contractor did not perfect security interest in certificate prior to four months statutory period preceding subcontractor's bankruptcy where, inter alia, during time that certificate was in possession of attorney, interest was paid to subcontractor rather than general contractor, and where, although attorney was attorney to whom general contractor normally referred its legal matters, attorney also did some legal work for subcontractor. *Stein v. Rand Constr. Co.*, 400 F. Supp. 944 (S.D.N.Y. 1975).

Where the payee of a note gave the required notice of acceleration upon default, acceptance by the payee of late payments without the required interest, after notice of the acceleration, did not cure default and did not bar acceleration. *Colonie Block & Supply Co. v. D.H. Overmyer Co.*, 35 A.D.2d 897 (3d Dep't 1970).

Where the defendant executed a promissory note on February 10, 1964 and subsequently on April 15, 1964 incorporated his construction business, plaintiff who was the holder, but not a holder in due course, of the note was subject to the defense of novation, and proof of that defense was not precluded by the parol evidence rule or the Statute of Frauds. *Miles v. Houghtaling*, 32 A.D.2d 714 (3d Dep't 1969).

That its depositor's account is low in funds, or even overdrawn, does not constitute notice to a collecting bank of an infirmity in the underlying transaction or instrument, and is not evidence of bad faith chargeable to it at the time it permitted withdrawals against the deposited check. *Citizens Nat'l Bank v. Fort Lee Sav. & Loan Ass'n*, 89 N.J. Super. 43, 213 A.2d 315 (L. Div. 1965).

III. DECISIONS UNDER FORMER STATUTES.

22. Decisions under Code 1942 § 86.

Holder's positive testimony, together with presumption of indorsement before instrument was overdue, could not be overcome by appearance of ink indorsement on back of note. *Gibbons v. Longino & Reid*, 153 Miss. 749, 121 So. 490 (1929).

Burden on maker to overcome presumption that undated endorsement of negotiable note was made before maturity. *Union Station Trust Co. v. Bostick*, 133 Miss. 627, 98 So. 105 (1923).

23. Decisions under Code 1942 § 93.

Where the evidence is in dispute as to whether the holder of a note had notice of any infirmity in the instrument at the time of its acquisition, or had knowledge of facts which would amount to his acquiring it in bad faith, the issue was for the jury to decide. *Buntin v. Katz*, 252 Miss. 768, 173 So. 2d 659 (1965).

Where it was shown that the bank had no actual notice of a warranty and agreement and the breach thereof, the fact that there was stapled to the note, given for the purchase of farm equipment, at the time it was indorsed to the bank a purchase order signed by the maker-purchaser in favor of the seller-payee, on the reverse side of which there was a "warranty and agreement," did not put the bank upon notice as to such warranty and agreement or put it upon inquiry as to whether the warranty and agreement had been breached at the time of purchase, so that the bank as a holder in due course for value, and without notice, was entitled to recover against the maker even though the warranty had actually been breached. *Missou v. National Bank of Commerce*, 231 Miss. 249, 95 So. 2d 124 (1957).

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." *Moore v. Vaughn*, 167 Miss. 758, 150 So. 372 (1933).

Defense of fraud to other notes purchased from same payee was not notice to due course holder of invalidity of particular notes. *Lamar v. Security Fin. Co.*, 147 Miss. 658, 112 So. 577 (1927).

24. Decisions under Code 1942 § 96.

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. *Garnett v. Associates Disct. Corp.*, 233 Miss. 849, 103 So. 2d 368 (1958).

Fraudulent representations upon which a party may predicate any demand for relief must relate to past or presently existing facts, as facts, and cannot consist of promises except in some cases when a contractual promise is made with the present undisclosed intention of not performing it. *Salitan v. Horn*, 212 Miss. 794, 55 So. 2d 444 (1951).

Fraud is never presumed, but must be directly and specifically charged and

clearly proven. *Salitan v. Horn*, 212 Miss. 794, 55 So. 2d 444 (1951).

Negotiation of note by maker in violation of conditions and agreement of parties to note held breach of faith, rendering maker's title defective. *Cassedy v. Wells, Jones, Wells & Lipscomb*, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

Where title of one negotiating note was defective, holders had burden of proving they were holders in due course. *Cassedy v. Wells, Jones, Wells & Lipscomb*, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

25. Decisions under Code 1942 § 100.

The maker's defenses to the payment of a promissory note to the effect that the tractor, the purchase price of which was represented by the promissory note, was defective and was returned to the seller for repairs and thereafter seized in a suit filed against the seller by a finance company, were unavailable against the plaintiff bank which was a holder in due course of the paper. *First Nat'l Bank v. Marcinkowska*, 279 F. Supp. 251 (N.D. Miss. 1967).

In order to make a charge of fraud perpetrated upon the makers of a promissory note applicable to an assignee of the note's payee, and thereby defeat the assignee's right of recovery, it would be necessary to show that assignee participated in or had actual knowledge of the fraud. *Nash v. Homeowners Mtg. Corp.*, 194 So. 2d 211 (Miss. 1967).

The holder of a promissory note transferred by limited indorsement, which set forth the payee's warranty that the consideration for which the note was given had been performed, was entitled to recover against the makers, in the absence of proof of knowledge that the warranty statement was false. *Nash v. Homeowners Mtg. Corp.*, 194 So. 2d 211 (Miss. 1967).

Where the evidence is in dispute as to whether the holder of a note had notice of any infirmity in the instrument at the time of its acquisition, or had knowledge of facts which would amount to his acquiring it in bad faith, the issue was for the jury to decide. *Buntin v. Katz*, 252 Miss. 768, 173 So. 2d 659 (1965).

Whether or not one is a holder in due course does not depend upon his diligence

or negligence. *Securities Inv. Co. v. Cohen*, 241 Miss. 549, 131 So. 2d 439 (1961).

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. *Garnett v. Associates Dist. Corp.*, 233 Miss. 849, 103 So. 2d 368 (1958).

Where an employee indorsed a check payable to his order, without any restriction or limitation, and subsequently lost the check and a stop payment was ordered by the bank, plaintiff who cashed the check and received the full amount in good faith, was entitled to the amount as against the employee who failed to restrict an indorsement. *American Book Co. v. White Sys. of Jackson*, 223 Miss. 510, 78 So. 2d 582 (1955).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

While a bank is required at its peril to know the signature of its depositor, it is not required to know the signature of the payee named in a check of its depositor, who is unknown to the bank, and with whose signature it is not familiar and under no duty to become familiar. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed the check for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was

filed bank had not reimbursed its depositor. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

Where credit association was induced to make loan to property owner's brother on the latter's representation that he was owner of the property, which was used as security, and the association's agent informed a merchant of the loan and asked him to cash the loan check, which was issued in the name of the real owner of the property, the association, its agent and the merchant all believing that the name of the borrower was that appearing on the check, although he was known by a different name, the merchant, in cashing the check upon indorsement by the borrower in the name appearing on the check, was acting in good faith, and so was not chargeable under the statute relating to notice of infirmity in a negotiable instrument or of defect of title of the person negotiating it. *Hattiesburg Prod. Credit Ass'n v. McNair*, 193 Miss. 615, 10 So. 2d 97 (1942).

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." *Moore v. Vaughn*, 167 Miss. 758, 150 So. 372 (1933).

There was no bad faith imputable to purchaser of trust deed and note because purchaser saw affidavit by makers that there was no infirmity. *Guaranty Inv. & Loan Co. v. Stevens*, 161 Miss. 473, 137 So. 335 (1931).

No bad faith could be imputed to purchaser of note and trust deed because payee sold them without making profit. *Guaranty Inv. & Loan Co. v. Stevens*, 161 Miss. 473, 137 So. 335 (1931).

Where one negotiating loan charged usurious commission, purchaser of notes and trust deed and its assignee held to be holders in due course. *Guaranty Inv. & Loan Co. v. Stevens*, 161 Miss. 473, 137 So. 335 (1931).

Defenses existing between buyer of automobile on conditional sale and original seller, growing out of alleged defects as to car, were not available to buyer in action on the note by the holder, which had purchased it for value and without notice. *Commercial Credit Co. v. Summers*, 154 Miss. 501, 122 So. 541 (1929).

Evidence held not to show bad faith on part of one buying notes which had been altered after delivery. *Gibbons v. Longino & Reid*, 153 Miss. 749, 121 So. 490 (1929).

Purchaser's knowledge that stock for which note was executed was valueless at time of purchase held no defense. *McAngo v. Falls*, 145 Miss. 471, 110 So. 840 (1927).

Purchaser of trade acceptances not charged with notice of defects in title

because of margin indicating clipping from other paper. *Crane v. Guaranty Fin. Corp.*, 141 Miss. 692, 105 So. 485 (1925).

Maker of note bearing date of secular day is estopped as against innocent holder to show execution on Sunday. *Currie-McGraw Co. v. Friedman*, 135 Miss. 701, 100 So. 273 (1924).

§ 75-3-307. Notice of breach of fiduciary duty.

(a) In this section:

(1) "Fiduciary" means an agent, trustee, partner, corporate officer or director, or other representative owing a fiduciary duty with respect to an instrument.

(2) "Represented person" means the principal, beneficiary, partnership, corporation, or other person to whom the duty stated in paragraph (1) is owed.

(b) If (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:

(1) Notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person.

(2) In the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

(3) If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty.

(4) If an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is (i) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

SOURCES: Former § 75-3-307: Codes, 1942, § 41A:3-307; Laws, 1966, ch. 316, § 3-307; Laws, 1992, ch. 420, § 33, eff from and after January 1, 1993.

§ 75-3-308. Proof of signatures and status as holder in due course.

(a) In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature. If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under Section 75-3-402(a).

(b) If the validity of signatures is admitted or proved and there is compliance with subsection (a), a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under Section 75-3-301, unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course which are not subject to the defense or claim.

SOURCES: Laws, 1992, ch. 420, § 34, eff from and after January 1, 1993.

Cross References — Application of this section upon proof, by person seeking enforcement of instrument under subsection (a) of § 75-3-309, of terms of instrument and person's right to enforce it, see § 75-3-309.

JUDICIAL DECISIONS

**I. DECISIONS UNDER UNIFORM
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**I. DECISIONS UNDER UNIFORM
COMMERCIAL CODE.**

1.-10. [Reserved for future use].

**II. DECISIONS UNDER FORMER
UCC § 75-3-307.**

11. In general.

In action on note against corporation in which defendant contended that procedural rule-which provided that when a

claim is founded on written instrument that is set out at length in the pleading, instrument's execution is deemed confessed unless party charged with executing instrument specifically denies its execution—was not controlling by virtue of UCC § 3-307(1)(b) in case where signer of instrument has died, court held (1) that there was no merit in such contention because defendant was corporation and had not died, and (2) that UCC § 3-307(1) was also inapplicable because defendant did not specifically deny signature on note in its pleadings, as required by UCC § 3-307(1). *Hudspeth v. Tree Mart, Inc.*, 573 S.W.2d 697 (Mo. Ct. App. 1978).

Subsection (3) of this section is comparable to § 59 of the Uniform Negotiable Instruments Law (repealed § 82 of C 107, Annotated Laws of Massachusetts). *Elbar Realty, Inc. v. City Bank & Trust Co.*, 342 Mass. 262, 173 N.E.2d 256 (1961).

12. Applicability.

Under UCC § 3-307(2), the defendant has the burden of establishing any defenses to liability on the instrument. *American State Bank v. Richendifer*, 36 Or. App. 199, 584 P.2d 323 (1978).

Under UCC § 3-307(2), the burden of establishing, by a preponderance of the evidence, the defense of failure of consideration for an instrument is on the person asserting such defense. *Oak Trust & Sav. Bank v. Annerino*, 64 Ill. App. 3d 1030, 381 N.E.2d 1389 (1st Dist. 1978).

In action on promissory note given in payment of real estate brokerage commission, since contract sued on was that of the note and not the brokerage contract, action was for enforcement of note's obligations and thus was governed by UCC § 3-307(2), providing that when signatures are admitted or established, production of instrument entitles holder to recover on it unless defendant establishes defense. *Azar-Beard & Assocs. v. Wallace*, 146 Ga. App. 671, 247 S.E.2d 154 (1978).

Although shipment of old, unpadded, ripped and mildewed gloves, rather than new boxing gloves ordered by buyer from Pakistani seller, constituted "fraud in the transaction" within meaning of UCC § 5-114(2), Pakistani banks would be entitled to recover proceeds of drafts if they were holders in due course; even though UCC

§ 3-307 is contained in Article Three of Code dealing with negotiable instruments rather than letters of credit, its provisions would control, but "defense" referred to in § 3-307 would be deemed to include only those defenses available under UCC § 5-114(2), i.e., non-compliance of required documents, forged or fraudulent documents or fraud in the transaction; since defense of fraud in transaction was shown, burden shifted to Pakistani banks by operation of UCC § 3-307(3) to prove that they were holders in due course and took drafts without notice of seller's alleged fraud in accord with UCC § 3-302, and since Pakistani banks failed to satisfy burden of proving that they qualified in all respects as holders in due course they were not entitled to obtain payment of drafts. *United Bank, Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

Where the sole issue in an action brought upon a check was whether the signature of one or two of the corporate drawer's officers were required for validity, and the single signature appearing on the instrument, was admittedly an authorized signature, this section did not apply. *New Waterford Bank v. Morrison Buick, Inc.*, 38 Pa. D. & C.2d 371 (1965).

13. Requirement of specific denial.

In action by bank against guarantor of note, where answer of guarantor did not specifically deny signature on instrument, pursuant to UCC §§ 3-307(1) signature on note was admitted. *Lipton v. Southeast First Nat'l Bank*, 343 So. 2d 927 (Fla. App. 1977).

Under UCC § 3-307(1), specific denial of validity of signatures on promissory note was required to place due execution of instrument in issue. *Loveless v. Texas First Mtg. Reit*, 531 S.W.2d 870 (Tex. Civ. App. 1975).

Under UCC § 3-307, cognovit note which apparently was signed by secretary of corporation was prima facie valid and binding on corporation; thus, corporation was not entitled to relief from confessed judgment on note where in its motion, affidavit, and proposed answer there was no denial that secretary's signature was authorized nor did affidavit set forth facts

sufficient to support finding that signature was not authorized; as a result, corporation must be deemed to have admitted that signature of secretary was authorized. *Burkett v. Finger Lake Dev. Corp.*, 2 Ill. App. 3d 396, 336 N.E.2d 628 (5th Dist. 1975).

Under Code section providing that unless specifically denied in pleading each signature on instrument is admitted, defendant's general denial in action on promissory notes had legal effect of admitting their signatures on notes and payee's indorsement of notes to plaintiff bank. *Farmers & Merchants State Bank v. Mann*, 87 S.D. 90, 203 N.W.2d 173 (1973).

In an action on a promissory note, the signature of the maker, unless specifically denied in the pleadings, is deemed admitted under UCC § 3-307. *Wildfang Miller Motors, Inc. v. Rath*, 198 N.W.2d 210 (N.D. 1972).

In an action upon promissory notes in which the answer was a general denial that "the signature is genuine" and a demand for proof that "it" was, a ruling by the court that the denial was not a separate special demand did not harm the defendant where photocopies of the notes were admitted in evidence, thus bringing into operation the presumption of the validity of the signatures and requiring a finding for the plaintiff in the absence of evidence to the contrary, under subsections (1), (1)(b) and (2) of this section. *Union Nat'l Bank v. Cannato*, 350 Mass. 767, 214 N.E.2d 30 (1966).

14. Proof of genuine signature.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depository bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depository bank, and (4) depository bank then sued drawer-drawee for payment of draft, court held that depository bank was not entitled to recover because (1) under UCC § 3-201(1), depository bank had only rights of its transferor in draft, which were worthless because copayee whose signature had

been forged had lien on draft's entire proceeds, (2) depository bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depository bank could not negotiate draft or become holder or holder in due course thereof, and (4) depository bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. *Foremost Ins. Co. v. First City Sav. & Loan Ass'n*, 374 So. 2d 840 (Miss. 1979).

Issue of genuineness of signature on check was never raised as defense, and presumption that signature was genuine was not rebutted, where alleged indorser did not deny signing check or recovering proceeds. *Gonzalez v. Dumpson*, 46 A.D.2d 861 (1st Dep't 1974), appeal dismissed, 36 N.Y.2d 806 (1975).

Where genuineness of signature is put in issue and purported signer has died, party claiming under signature has burden of establishing signature as genuine; held, burden not satisfied where there is no proof at all that "Joseph Carr" on note was deceased "Joseph Carr", and name is hardly uncommon one. *In re Carr Estate*, 436 Pa. 47, 258 A.2d 628 (1969).

15. Presumption.

The State failed to overcome the presumption in favor of the genuineness of the signatures of the named payee on State issued unemployment checks (Uniform Commercial Code, § 3-307) where the State produced the hearsay testimony of the claims examiner for the State Department of Labor who interviewed the supposed payee, an individual not personally known to her, in connection with a claim of forgery, but failed to produce any of the documents signed by the named payee in the possession of the Department of Labor allegedly forming the basis of her comparison with the signatures on the checks, and, consequently, although the signatures on the checks and the signature on the interview form signed in the presence of the State's witness are different, they bear equal claims to authenticity and, therefore, do not constitute the re-

quired firsthand evidence of forgery necessary to overcome the presumption; comparison of signatures by the court was precluded by the State's failure to produce "any writing proved * * * to be the handwriting of the person claimed to have made the disputed writing" (CPLR 4536); the State did not exercise those opportunities for self-protection available to it by not possessing properly maintained records containing an authentic signature of the named payee with which to prove the forgery. *Freeman Check Cashing, Inc. v. State*, 97 Misc. 2d 819 (1979).

The statutory presumption in favor of the genuineness of a signature (Uniform Commercial Code, § 3-307) aiding the holder, who has the ultimate burden of establishing the effectiveness of a disputed signature, is overcome when some evidence is introduced tending to prove each and every element of forgery; the proof need not possess any particular degree of "substantiality", persuasiveness or weight, since such tests are essentially subjective. *Freeman Check Cashing, Inc. v. State*, 97 Misc. 2d 819 (1979).

UCC § 3-307(1) concerns defenses when validity of signature is in issue. Purpose of section is to give presumption of validity of signature to party suing as holder to collect on note or draft, and section cannot be used to burden unnecessarily party who is bringing conversion action resulting from payment of instrument over forged indorsement. *Petty v. First Nat'l Bank*, 50 Ohio App. 2d 365, 363 N.E.2d 599 (1976).

In conversion action by copayee of check against drawer and bank that paid check over plaintiff's allegedly forged indorsement, where plaintiff contended that his name had been signed to such check by attorney without plaintiff's authorization, and where such attorney admitted signing plaintiff's name but claimed that he had authority to do so, defense contention that since plaintiff was disputing validity of his indorsement, he had burden of overcoming presumption created by UCC § 3-307(1) that indorsement was genuine and authorized could not be sustained because (1) all parties conceded that plaintiff's signature was not genuine, and (2) defendants, who asserted that attorney was

authorized to sign plaintiff's name to check, had burden of proving such authority. *Petty v. First Nat'l Bank*, 50 Ohio App. 2d 365, 363 N.E.2d 599 (1976).

Under UCC § 3-307(1), where purported maker of note denied signature but introduced no evidence to support defense that signature was forged or unauthorized, presumption of validity of signature was not rebutted, and expert testimony is not required to support claim as trial judge, sitting as trier of fact, is entitled to make his own comparison of signatures and form his own opinion as to authenticity. *Jax v. Jax*, 73 Wis. 2d 572, 243 N.W.2d 831 (1976).

In action by bank to recover on promissory note, testimony by bank officer that he was present during taking of maker's deposition when maker denied that she signed note, even if properly admitted in evidence, was insufficient to overcome presumption of UCC § 3-307(1)(b) that her signature was genuine and, therefore, upon production of instrument, maker was liable to bank, absent any defense. *Virginia Nat'l Bank v. Holt*, 216 Va. 500, 219 S.E.2d 881 (1975).

In action on promissory notes purportedly bearing signatures of debtor, his wife, and his daughter, presumption that signature of daughter was genuine or authorized was sufficiently rebutted by denial by all defendants that signature on note was hers, along with her assertion that she was without knowledge of the transaction, and sample of her signature. *Esposito v. Fascione*, 111 R.I. 91, 299 A.2d 165 (1973).

In absence of showing that president of corporation lacked authority, actual or apparent, to bind organization, his signature on promissory note would be presumed to be authorized. *B & C Enters. v. Utter*, 88 Nev. 433, 498 P.2d 1327 (1972).

Statute presumes signature on negotiable instrument to be genuine or authorized. *Arnold v. Bostwick Banking Co.*, 121 Ga. App. 131, 173 S.E.2d 236 (1970), rev'd on other grounds, 227 Ga. 18, 178 S.E.2d 890 (1970), conformed to, 123 Ga. App. 189, 179 S.E.2d 780 (1971).

In an action by the holder of a promissory note made by defendants payable to "Greenlaw & Sons Roofing & Siding Co."

and indorsed "Greenlaw & Sons by George M. Greenlaw," where the defendant denied the genuineness of the indorsement but offered no evidence affecting the regularity of the indorsement, and where it did not appear that Greenlaw & Sons and Greenlaw & Son Roofing and Siding Co. were not the same company or that the indorsement by Greenlaw was in a name other than his own or under which he individually did business, there was nothing to counter the presumption of the indorsement's regularity existing under subsection (1)(b) of the instant section, the signature of Greenlaw was established under subsection (2) of the instant section, and the plaintiff as a holder within the meaning of § 1-201(20) of the instant chapter was entitled to recover. *Watertown Fed. Sav. & Loan Ass'n v. Spanks*, 346 Mass. 398, 193 N.E.2d 333 (1963).

16. Prima facie case for holder.

Where plaintiff payee's supporting affidavit in suit against maker and indorser of promissory note showed that there was no dispute as to genuineness of defendants' signatures, affidavit was not relied on to prove such signatures, plaintiff averred in affidavit that he saw defendants sign note, and defendants did not by counteraffidavit deny or question genuineness of their signatures, plaintiff's production of note as holder entitled it under UCC § 3-307(2) to recover on instrument. *First Progressive Bank v. Griffith*, 354 So. 2d 703 (La. App. 1978).

In action on note given in payment for land, where (1) note was signed by both vendees and made payable to vendor, who died thereafter, (2) vendor's wife, individually and as executrix of vendor's estate, transferred note to plaintiff, and (3) defendant vendees contended since vendor's will did not authorize executrix to sell estate's assets, her transfer of note affected only her individual half interest therein, other half interest in note was still owned by vendor's estate, and plaintiff therefore was not entitled to judgment for full amount of note, court held that judgment awarding plaintiff full amount of note was proper under (1) UCC § 3-307(2), dealing with recovery by holder on instrument as to which signatures have

been established, in absence of any defense to such recovery, and (2) UCC § 3-306(d), providing that claim of third person to an instrument is not available as a defense to party liable thereon unless such third person defends action for party liable. *Cowhouse Dairy, Inc. v. Agristor Credit Corp.*, 566 S.W.2d 339 (Tex. Civ. App. 1978).

In action by corporation and individual plaintiff, who were sole shareholders of such corporation, to recover on dishonored check made out to individual plaintiffs by one who represented defendant buyers of plaintiff corporation, where (1) plaintiffs, after being informed by defendants that check would not be honored, indorsed check to second corporation with notation, "for funds advanced," (2) second corporation indorsed check to bank for deposit only and sent check to bank for collection, (3) bank, after indorsing and sending check for collection, physically returned it after dishonor to second corporation, and (4) second corporation then physically returned it without indorsement to plaintiffs and assigned to plaintiffs all of second corporation's right, title, and interest therein, trial court properly held (1) that plaintiffs had standing to sue on check, even though they were not holders or transferees for value, since transfers specified in UCC § 3-201(1) are not limited to transfers for value, and (2) that since plaintiffs, although transferees without indorsement, proved transaction by which they had acquired check from holder, they therefore acquired rights of a holder and were entitled, on check's production, to presumption of entitlement to recovery under UCC § 3-307(2) because defendants did not establish defense to recovery. *Perry & Greer, Inc. v. Manning*, 282 Or. 25, 576 P.2d 791 (1978).

In suit to recover on certificate of deposit that was issued by defendant bank and assigned by holder to plaintiff, wherein defendant alleged that certificate had been purchased with proceeds of loan from defendant to insurance corporation and that when loan became a bad risk, defendant set off amount represented by certificate against such loan, court held that since defendant had failed to set forth specific facts that would place validity of

certificate's assignment in issue and had also failed to deny specifically validity of signature made in connection with such assignment, production of certificate entitled plaintiff under UCC § 3-307(2) to recover thereon (also holding that summary judgment was not precluded, since defendant had presented no issue of fact that concerned validity of certificate's assignment). *Old S. Life Ins. Co. v. Bank of N.C.*, 36 N.C. App. 18, 244 S.E.2d 264 (1978).

In action by hospital on promissory note signed by physician allegedly for advances made by hospital under oral agreement concerning physician's income, (1) despite conflicts in evidence as to meaning of agreement and conditions under which advances would have to be repaid, fact remained that defendant had signed note after conference with hospital's business manager concerning amount owed hospital for advances; (2) under UCC § 3-307(2), production of a note with defendant's signature established entitles a plaintiff to recover in the absence of any defense to the instrument; (3) under UCC § 3-408, since consideration for a note given for an antecedent obligation is presumed, defendant had burden of showing lack of consideration for note sued on; and (4) in view of state of record on appeal, reviewing court could not conclude that trial court's judgment in favor of hospital was contrary to manifest weight of the evidence. *Northlake Community Hosp. v. Cadkin*, 55 Ill. App. 3d 344, 370 N.E.2d 1094 (1st Dist. 1977).

Plaintiffs, suing on irrevocable letters of credit under UCC § 3-307, have burden of proving holder in due course status where defendant establishes defense of fraud as to signatures on drafts. *United Bank, Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

In action by bank to recover on two promissory notes, bank was entitled under UCC § 3-307 to summary judgment unless promisor otherwise properly established a defense, where bank established amounts due on notes and that it was owner and holder of notes, that notes were in default, and that defendant was maker of notes. *Hemphill v. Greater Houston*

Bank, 537 S.W.2d 124 (Tex. Civ. App. 1976).

Proof that defendant signed promissory note and that it was in possession of plaintiff constituted prima facie case that note had been duly executed and delivered, for valuable consideration, and that defendant was obligated to pay it. *Cannon v. Wright*, 531 P.2d 1290 (Utah 1975).

In action on promissory note where defendant raised no question as to genuineness of his signature, plaintiff's production of note and defendant's concession as to amount due entitled plaintiff to recover on it pursuant to UCC § 3-307(2). *Conran v. Yager*, 263 S.C. 417, 211 S.E.2d 228 (1975).

Plaintiff, in action on two promissory notes, was entitled to summary judgment where execution and delivery of notes was conceded and where answer did not specifically deny signatures; under such circumstances, signatures were admitted and holder of note was entitled to recover on them unless defendant established defense. *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975).

Production of note signed by defendant with his name only, neither naming party or parties for whom he was allegedly trustee nor showing that he signed in representative capacity, established plaintiff's prima facie right to recover thereon. *Jolly v. Egerton*, 132 Ga. App. 243, 207 S.E.2d 634 (1974).

In action on promissory note bank met its burden of proof under Code § 3-307(b) by establishing that bank was holder of note on which it sued, that defendant had signed note, that note became due and payable, and that defendant had not paid or offered to pay anything on note. *Hensley v. City Bank & Trust Co.*, 495 S.W.2d 282 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Sept. 19, 1973).

Where plaintiff had established prima facie case in action on demand note by producing note and proving signatures, summary judgment for plaintiff was proper where defendant failed to present facts in support of alleged defenses of lack of consideration, failure of consideration, and lack of delivery. *Loew v. Minasian*, 361 Mass. 390, 280 N.E.2d 688 (1972).

In action on check delivered by defendant to plaintiff but not paid when presented for payment, plaintiff's introduction in evidence of check, signed by defendant as maker and held by plaintiff, established prima facie case for plaintiff. *Helman v. Dixon*, 71 Misc. 2d 1057 (1972).

Where note was admitted into evidence establishing a prima facie case as to the signature and the authorization therefor, and where no defense was offered, production of the note entitled defendant to recover thereon and a directed verdict on the counterclaim was demanded. *Q.S. King Co. v. Minter*, 124 Ga. App. 517, 184 S.E.2d 594 (1971).

When the check on which payment has been stopped is introduced in evidence in the action against the drawer and the drawer's signature is not disputed, a prima facie case is made out that the plaintiff is a holder in due course and the drawer has the burden of establishing any defense. *Jaeger & Branch, Inc. v. Pappas*, 20 Utah 2d 100, 433 P.2d 605 (1967).

In an action by a holder upon a negotiable note against the maker in the Superior Court, where findings in favor of the holder in the District Court made out a prima facie case in favor of the holder under c 231, § 102C, the burden was on the maker, notwithstanding the provisions of subsec (3) of the instant section, to rebut the holder's prima facie case. *Universal C.I.T. Credit Corp. v. Ingel*, 347 Mass. 119, 196 N.E.2d 847 (1964).

17. Proof of defenses; in general.

In suit on promissory note for balance due on purchase of insurance, after signature on note had been admitted by defendants, they had under UCC § 3-307(2) burden of establishing any affirmative defense that they might have had to plaintiff's action, and trial did not err in awarding summary judgment against defendants on their failure to rebut prima facie case created against them by their admission of execution of note. *Orr v. Woodruff-Robinson, Inc.*, 142 Ga. App. 861, 237 S.E.2d 463 (1977).

Where defenses are raised against note, burden under UCC § 3-307 is on plaintiff to show that he is holder in due course in order to effectively cut off such defenses. If plaintiff fails to sustain his burden, his

action is subject under UCC § 3-306(b) to all defenses that would be available on simple contract, as long as such defenses are in some way connected with debt sued on or transaction under which it arose. *Seamans v. Miller*, 142 Ga. App. 147, 235 S.E.2d 542 (1977).

Under UCC § 3-307(2), where execution of note and mortgage was established by evidence of notary who drew them, burden of establishing defense was on defendant makers. *Adair v. Adair*, 192 Neb. 571, 222 N.W.2d 908 (1974).

Where the instruments were produced and the signatures admitted, UCC § 3-307 placed the burden upon defendant to prove its defenses. *Arkansas Real Estate Co. v. Heeb*, 251 Ark. 113, 471 S.W.2d 327 (1971).

The burden of proof is upon the defendant to establish a defense once the validity of his signature is established or admitted. *Gate City Furn. Co. v. Rumsey*, 115 Ga. App. 753, 156 S.E.2d 221 (1967).

In a suit upon a promissory note, when the maker by answer admits the execution of the note and pleads an affirmative defense as to the holder's right of recovery, the burden rests upon the maker to establish the allegations of his answer by preponderance or the evidence. *Persson v. McCormick*, 412 P.2d 619 (Okla. 1966).

Where, in a suit on a promissory note, the defendant, having admitted signing the instrument, offered no evidence either to establish a defense to the holder's right of recovery, or that the holder was not a holder in due course, the question as to whether holder was a holder in due course would not arise until the maker established a defense. *Persson v. McCormick*, 412 P.2d 619 (Okla. 1966).

18. —Fraud of misrepresentation.

Although shipment of old, unpadded, ripped and mildewed gloves, rather than new boxing gloves ordered by buyer from Pakistani seller, constituted "fraud in the transaction" within meaning of UCC § 5-114(2), Pakistani banks would be entitled to recover proceeds of drafts if they were holders in due course; even though UCC § 3-307 is contained in Article Three of Code dealing with negotiable instruments rather than letters of credit, its provisions would control, but "defense" referred to in

§ 3-307 would be deemed to include only those defenses available under UCC § 5-114(2), i.e., non-compliance of required documents, forged or fraudulent documents or fraud in the transaction; since defense of fraud in transaction was shown, burden shifted to Pakistani banks by operation of UCC § 3-307(3) to prove that they were holders in due course and took drafts without notice of seller's alleged fraud in accord with UCC § 3-302, and since Pakistani banks failed to satisfy burden of proving that they qualified in all respects as holders in due course they were not entitled to obtain payment of drafts. *United Bank, Ltd. v. Cambridge Sporting Goods Corp.*, 41 N.Y.2d 254, 360 N.E.2d 943 (1976), reargument denied, 41 N.Y.2d 901 (1977).

Plaintiff was entitled to recovery upon presentation of note, showing of present ownership and holding of note, and establishment of defendant's signature thereto, defendant having raised defenses of fraud and/or illegality, which must be raised affirmatively and could not, as here, be raised in affidavit opposing motion for summary judgment. *Anderson v. Industrial State Bank*, 478 S.W.2d 215 (Tex. Civ. App. 1972), writ ref'd n.r.e., (June 14, 1972).

Where testimony of two witnesses was in conflict as to completion of note at time of execution, plaintiff-payee was entitled to judgment, since burden was on defendant-maker to establish defense of unauthorized completion by preponderance of total evidence. *Newby v. Armour Agr. Chem. Co.*, 119 Ga. App. 650, 168 S.E.2d 652 (1969).

Where in action by depositor against bank to recover amount of check charged back against its account, the third party defendant drawer of the check rebutted the presumption of the genuineness of the signature of the payee and demonstrated that the warranty of the depositor as to that genuineness was breached, the depositor's complaint must be dismissed even though the charge back did not occur until 6 months after deposit and long after settlement, and there was no proof that payee's endorsement was a forgery. 622 West 113th St. Corp. v. Chemical Bank New York Trust Co., 52 Misc. 2d 444 (1966).

19. —Want or failure of consideration.

Where guarantor in action on written personal guaranty of loan failed to prove, as affirmative defenses, either failure of consideration or breach by lender of loan agreement by not lending borrower additional funds under such agreement, with allegedly resultant injuries to borrower, lender on production of guaranty instrument was entitled under UCC § 3-307(2) to recover thereon for sums actually loaned to borrower. *Crider v. First Nat'l Bank*, 144 Ga. App. 536, 241 S.E.2d 638 (1978).

Promissory note executed by shareholder to partially satisfy overdraft of corporation was supported by consideration under UCC §§ 3-307(2) and 3-408 despite contentions that note was signed at request of bank to protect it from bank examiners and until another loan could be obtained from Small Business Administration. *Farmer v. Peoples Am. Bank*, 132 Ga. App. 751, 209 S.E.2d 80 (1974).

Introduction of note in evidence established prima facie case against maker for face value of note, and burden of proof was on defendant maker to establish defense of lack of consideration. *Darden v. Harrison*, 495 S.W.2d 49 (Tex. Civ. App. 1973), rev'd, 17 Tex. Sup. Ct. J. 357, 511 S.W.2d 925 (Tex. 1974).

Once want of consideration is pleaded, there is still presumption that note is valid, and defendant has burden of proving his plea, so that where even evidence of defendant established that assignment of note was part of consideration for execution and delivery of second note, proof of total want of consideration was lacking. *Parker v. McGaha*, 291 Ala. 339, 280 So. 2d 769 (1973).

The burden of proving a defense of no consideration in a suit brought by the payee of a check returned to him by the drawee bank for insufficient funds rests on the drawer. *Buehrer v. Gates*, 411 S.W.2d 676 (Ky. 1967).

Where execution and default in performance are established, mere possession and production into evidence of note and trust deed entitles holder to prima facie basis for recovery thereon, with burden of preponderating on defense of failure of consideration shifted to nonholder. *Rago v.*

Cosmopolitan Nat'l Bank, 89 Ill. App. 2d 12, 232 N.E.2d 88 (1st Dist. 1967).

Payment is defense which must be affirmatively established by maker or payee, once instrument is produced by holder; burden of pleading and proving such defense cannot be sustained by filing of general denial. *Harrison v. Morias*, 141 Ind. App. 537, 230 N.E.2d 545 (1967).

Where the maker of a trade acceptance asserted the defense of no consideration in his answer, the burden was on the purchaser of the instrument to prove that it was a holder in due course. *Credit Indus. Corp. v. DiNanno*, 29 Mass. App. Dec. 40 (1964).

After having proved the execution and delivery of certain promissory notes by a decedent, claimants seeking recovery on the notes against the decedent's estate did not have to prove consideration, because the burden was then on the estate to prove a lack of consideration. However, when the claimants, after presenting their notes, went further and introduced testimony in anticipation of the defense of failure of consideration, they relieved the estate of the burden of proving lack or failure of consideration. *In re Calanno Estate*, 14 Pa. D. & C.2d 153, 8 Fiduc. Rep. 180 (1958).

Under Pennsylvania law the holder of a promissory note under seal, the execution of which by a decedent is proved, is entitled to recover under subdivision (2) of this section, and the defense of want of consideration is unavailable in an action on a sealed instrument. *In re Chadwick's Estate*, 44 Wash. C. R. 182 (1964).

20. —Miscellaneous defenses.

Asserted unawareness of nature and effect of signature is not defense against holder of instrument when signature is admitted or established. *Prudential Ins. Co. of Am. v. Bonney*, 299 F. Supp. 790 (W.D. Okla. 1969).

Where maker of note testified that he left blank note containing only his signature but no amount and no date with president of bank and said note was filled in and completed without authorization, burden shifted to payee to establish that it was holder in due course under UCC § 3-307. *Sea Hoss Marine Enters., Inc. v. Angleton Bank of Commerce*, 536 S.W.2d

592 (Tex. Civ. App. 1976), *ref. n.r.e.* (Sept. 29, 1976).

As a holder within the meaning of UCC § 1-201, subd 20, an escrow agent established a prima facie case on maker's dishonored check under UCC § 3-307 subd 2, and it was no defense either that escrow agent could not himself sue on the check, or that the principal had failed to perform under escrow agreement, where escrow agent had acknowledged receipt of cash, and could sue on check under CPLR § 1004 either as trustee of principal, or as promisee of a third party beneficiary contract, and where maker prevented principal's performance. *Helman v. Dixon*, 71 Misc. 2d 1057 (1972).

Defense pleaded by a defendant, consisting of a denial of delivery and a denial that the plaintiff was a holder in due course, was sufficient to place the burden of proof on the plaintiff. *Neboshek v. Berzani*, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

21. Due course as holder's defense.

Just as where a person who establishes holder in due course status is entitled to take free of personal defenses such as fraud, so too can a holder in due course who has already been paid assert his status as a defense under UCC § 3-307 in an action by the drawer to recover back the payment. *Nida v. Michael*, 34 Mich. App. 290, 191 N.W.2d 151 (1971).

22. —Burden of proving due course.

Where maker of promissory note raised defense of fraud in the inducement, holder had burden of showing that it was holder in due course, but, having satisfied such burden, it was not subject to such defense. *Federal Nat'l Mtg. Ass'n v. Gregory*, 426 F. Supp. 282 (E.D. Wis. 1977).

Under UCC § 3-305(2) and § 3-408, lack of consideration and fraud in the inducement are not good defenses against a holder in due course. However, under UCC § 3-307(3), once a defense other than lack of consideration is raised, holder has burden of proving that he is holder in due course in all respects (action on promissory note, executed in real estate sale transaction, in which makers pleaded affirmative defenses of lack of consideration and fraud in the inducement and also

counterclaimed for damages for such fraud). *Kreutz v. Wolff*, 560 S.W.2d 271 (Mo. Ct. App. 1977).

Where party who executed promissory note to bank, which indorsed it to holder for valuable consideration, did not deny execution of note or allege any affirmative defense to holder's suit to recover on note, which was past due and payable, holder could recover under UCC § 3-307(2) without having to prove that it was holder in due course. *Little v. Business Data Ctr., Inc.*, 550 S.W.2d 406 (Tex. Civ. App. 1977).

Where note showed on its face that it was due on date on which it was made and that it provided for rate of interest illegal at that time, plaintiff to whom note had been negotiated failed to sustain burden of proof under UCC § 3-307 that he was holder in due course, and trial court did not err in considering defense that since defendant maker had assumed, under contract pursuant to which note was given, greater obligation than he had contracted for, he could offset such amount in action on note. *Seamans v. Miller*, 142 Ga. App. 147, 235 S.E.2d 542 (1977).

It is only after it is shown that a defense exists that one claiming the rights of a holder in due course has the burden of establishing that fact. *Aetna Cas. & Sur. Co. v. Watson*, 476 S.W.2d 868 (Tex. Civ. App. 1972).

Evidence indicating possibility of defense is sufficient under UCC § 3-307(2) to place burden on plaintiff of proving himself to be holder in due course, a burden that is satisfied if the trier of fact is persuaded that the existence of the holder in due course elements as defined by UCC § 3-302 is more probable than their nonexistence. *Oklahoma Nat'l Bank v. Equitable Credit Fin. Co.*, 489 P.2d 1331 (Okla. 1971).

Just as where a person who establishes holder in due course status is entitled to take free of personal defenses such as fraud, so too can a holder in due course who has already been paid assert his status as a defense under UCC § 3-307 in an action by the drawer to recover back the payment. *Nida v. Michael*, 34 Mich. App. 290, 191 N.W.2d 151 (1971).

Person claiming to be holder in due course has affirmative burden of proving

that instrument was taken for value in good faith and without notice. *Brown v. Kelley*, 120 Ga. App. 788, 172 S.E.2d 181 (1969).

Once the defendant establishes that he has some kind of defense, the burden is on the holder to establish that he is a holder in due course. *Daric Constr. Corp. v. Radice Constr. Corp.*, 4 U.C.C. Rep. Serv. 763 (1967, NY Sup).

Where the maker of the notes sued on proved that they were given as part of an agreement under which he was to receive a franchise for the sale of certain merchandise, and that none of the merchandise was ever delivered by the payee, the holder of the notes had the burden of proving that he took the notes for value, and without notice of any infirmity. *Pugatch v. David's Jewelers*, 53 Misc. 2d 327 (1967).

Even if defenses are established so as to overcome right of holder to recover on instrument under Code § 3-307(2), holder should be accorded opportunity of successfully overcoming any defense raised. *Gate City Furn. Co. v. Rumsey*, 115 Ga. App. 753, 156 S.E.2d 221 (1967).

Where defenses such as payment or that the paper is overdue are asserted by the maker of a note, the burden is upon the party claiming the rights of a holder in due course to prove his status as such. *Unadilla Nat'l Bank v. McQueer*, 27 A.D.2d 778 (3d Dep't 1967).

One claiming to be the holder of a check in good faith and without knowledge of any defense to its acceptance and payment has the burden of proving it. *Peoples Bank v. Haar*, 421 P.2d 817 (Okla. 1966).

To overcome a defense of defective workmanship in the article purchased which constituted consideration for the execution of the promissory notes sued on, the holder is under the burden of proving that it is a holder in due course, and where that burden is not met it cannot recover. *United Sec. Corp. v. Bruton*, 213 A.2d 892 (D.C. 1965).

The provision in subdivision (3) of this section that the holder of a promissory note has the burden of establishing that it is a holder in due course where a defense exists is procedural and not substantive in effect, and it applies to an action brought

after the section became effective, although the entire transaction was concluded prior to its effective date. *United Sec. Corp. v. Bruton*, 213 A.2d 892 (D.C. 1965).

Under subsection (3) of the instant section where indorsees sue upon instruments, and a defense of fraud in the procuring of the instruments is established, the burden is on the plaintiffs to show that they are holders in due course. *Korzenik v. Supreme Radio, Inc.*, 347 Mass. 309, 197 N.E.2d 702 (1964).

The burden of showing that he is a holder in due course is on the one claiming to be such where the defense of fraud appears to be meritorious as to the payee. *Norman v. World Wide Distribs., Inc.*, 202 Pa. Super. 53, 195 A.2d 115 (1963).

Where it appeared that a note was obtained by fraud, one seeking to recover on the note as a holder in due course had the burden of showing that it was a holder in due course. *Budget Charge Accounts, Inc. v. Mullaney*, 187 Pa. Super. 190, 144 A.2d 438 (1958).

Testimony by the makers of a note, that it was fraudulently executed and used for a purpose not intended, placed the burden on the holder to show that it was a holder in due course, or that some person under whom it claimed was in all respects a holder in due course. *First Pa. Banking & Trust Co. v. De Lise*, 186 Pa. Super. 398, 142 A.2d 401 (1958).

The holder of a note who introduced no testimony as to the time or circumstances under which it was negotiated did not sustain the burden of showing itself to be a holder in due course; on the other hand, if it had introduced evidence that it received the note for value before maturity and without notice of any claim or defense, a refusal to open a judgment by confession on the note would have been warranted. *First Pa. Banking & Trust Co. v. De Lise*, 186 Pa. Super. 398, 142 A.2d 401 (1958).

The holder meets the burden of establishing that he is a holder in due course when a petition is filed to open the judgment which he has entered on the instrument and (1) the defendant's own evidence shows that the holder did not have notice of the defect until months after he ac-

quired the instrument, and (2) the defendant, by failing to file a replication, admitted the holder's averments of facts which if true would make the holder a holder in due course. *Bachman & Co. v. Brubaker*, 56 Lanc. L. Rev. 289 (Pa. 1959).

23. —Failure to show due course.

In action to recover on check issued by defendant and made payable to named corporation, where plaintiff's testimony showed that sole owner of payee corporation had indorsed check in blank and delivered it to plaintiff in payment for personal debt and that defendant had dishonored check by stopping payment thereon, and where defendant testified that payment was stopped at request of payee because check had been stolen from payee's mail and had been fraudulently indorsed, under UCC § 3-307(2) plaintiff's failure to place check in evidence or satisfactorily explain its absence, together with defendant's establishment of good defense, prevented plaintiff from recovering as holder of such check, even though signatures thereon were established by plaintiff. *McKirgan v. American Hosp. Supply Corp.*, 37 Md. App. 85, 375 A.2d 591 (1977).

In action by bank against maker to recover on note, where maker executed note and security agreement in connection with purchase of construction equipment and where equipment dealer assigned note to bank but failed to deliver equipment, bank was not holder in due course under UCC § 3-302 and thus its claim on note was subject to defense of failure of consideration under UCC § 3-306; under evidence that bank failed to advise maker of note of its acquisition of note and security agreement, that it placed payment coupon book in hands of dealer and received all monthly payments from dealer, that close working relationship existed between bank and dealer and dealer was clothed with authority to collect and forward all payments due on transaction, and that agency and authority were further shown to exist by bank's authorizing return of machinery to dealer and terminating of balances due on purchase money paper, bank did not, under UCC § 3-307(3), sustain its burden of proving that it was holder in due course and under

facts and circumstances known to and participated in by bank in connection with transaction, it could not be said that bank did not have reason to know that defense of failure of consideration existed. *Kaw Valley State Bank & Trust Co. v. Riddle*, 219 Kan. 550, 549 P.2d 927 (1976).

Where bank accepted check from its depositor, forwarded it for collection, drawer stopped payment on check and, during interval between deposit of check and notice of stop payment order, bank granted credit and made payment upon checks drawn by its customer, bank was holder in due course to extent of advances made to its depositor; fact that standard banking practice would have been to withhold payment on check until it had been collected was not sufficient to establish that bank did not exercise good faith in handling check. *St. Cloud Nat'l Bank & Trust Co. v. Sobania Constr. Co.*, 302 Minn. 71, 224 N.W.2d 746 (1974).

In action by corporate assignee to recover on promissory note, assignee failed to establish that it was holder in due course under UCC § 3-307(3) where assignee claimed only an assignment of unspecified date and did not even allege that it was holder in due course, and where note recited on its face that it was "taken for insurance." *College Park Credit Corp. v. Carver*, 132 Vt. 524, 322 A.2d 305 (1974).

Purchaser of note had burden of proving holder in due course status, but could not qualify for such status where fact that note was executed in violation of District of Columbia Loan Shark Act was apparent on face of instrument. In re *Parkwood, Inc.*, 461 F.2d 158, 149 U.S. App. D.C. 67 (1971).

Assignee of conditional sales contract and note could not recover "finance charge" or "carrying charge" exceeding 8% per year, where assignee had established neither that he was holder in due course nor that transaction was usurious. *Fuller v. Universal Acceptance Corp.*, 264 A.2d 506 (D.C. 1970).

To show he is a holder in due course, the holder of an instrument satisfies his burden with respect to good faith by testifying that he took the instrument in complete innocence and by disclosing the circum-

stances of the transfer, and where circumstances revealed plaintiff had actual knowledge of legal deficiencies in the transaction, he was not a holder in due course and consequently took the note subject to defenses raised under provisions of the Secondary Mortgage Loan Act. *HIMC Inv. Co. v. Siciliano*, 103 N.J. Super. 27, 246 A.2d 502 (1968).

Bank to which promissory note was negotiated has not met the burden of establishing that it is a holder in due course to the extent entitling it to summary judgment where there remains, among others, the question of the identity of the person who altered the maturity date from 5 days to 45 days after date. *Unadilla Nat'l Bank v. McQueer*, 27 A.D.2d 778 (3d Dep't 1967).

24. Practice and procedure.

Where lender brought action to recover money evidenced by promissory notes purportedly signed by husband, wife, and daughter, denial by all three defendants that signature on note was daughter's constituted sufficient evidence to rebut presumption that signatures were genuine or authorized pursuant to UCC § 3-307(1). *McCusker v. Fascione*, 117 R.I. 478, 368 A.2d 1220 (1977).

In action to enforce guarantor's liability on promissory note, trial court did not err in instructing jury that sole question was whether or not defendant had signed guarantee agreement where, inter alia, defendant did not raise issue of effectiveness of her signature, where jury was presented with guarantee agreement which contained what appeared to be defendant's signature, raising presumption of genuineness under UCC § 3-307, and where, under UCC § 3-416, guarantee agreement obligated defendant to repay loan, interest, and attorneys' fees. *Wolfe v. Madison Nat'l Bank*, 30 Md. App. 525, 352 A.2d 914 (1976).

Under UCC § 3-307(1), where purported maker of note denied signature but introduced no evidence to support defense that signature was forged or unauthorized, presumption of validity of signature was not rebutted, and expert testimony is not required to support claim as trial judge, sitting as trier of fact, is entitled to make his own comparison of signatures

and form his own opinion as to authenticity. *Jax v. Jax*, 73 Wis. 2d 572, 243 N.W.2d 831 (1976).

In action on promissory note, where maker of note admitted his signature but asserted defense of lack of consideration, trial court erred in instructing jury where instructions failed to properly identify issue being tried, i. e., lack of consideration, did not properly inform jury that defendant maker had burden of proving lack of consideration, and did not define consideration. *Villegas v. Bagwell*, 529 P.2d 1011 (Okla. Ct. App. 1974).

The elements constituting a holder in due course are questions of fact for the triers of fact to determine. *Northside Bank v. Investors Acceptance Corp.*, 278 F. Supp. 191 (W.D. Pa. 1968).

25. —Failure to state claim for relief.

Although UCC § 3-307(2) is concerned with evidentiary burdens of proof, it is also determinative of sufficiency of allegations required to state claim for relief in action to recover on negotiable instrument, and, consistent with this statutory provision, assignee of negotiable instrument suing thereon need not plead specific facts from which his assignor derived status of holder in due course. Thus, in action to recover on check, allegations by plaintiff-assignee to effect that her assignor was holder in due course and that instrument had been regularly transferred to her by assignment, were sufficient as to holder status and as to transfer, and complaint sufficiently set forth claim for relief. *Blake v. Samuelson*, 34 Colo. App. 183, 524 P.2d 624 (1974).

Defendants seeking to reopen judgment by confession on promissory note signed by them failed to allege sufficient facts to clearly show that they had defense to note based on lack of consideration under UCC § 3-307(2) where defendants were heirs of owner of automobile dealership who was indebted to plaintiff on prior promissory note, where defendants were actively managing automobile dealership after owner's death, and where defendants had paid interest owing on prior note up through date of renewal note they executed; under UCC § 3-408, note signed as security for antecedent claim or debt, even though signed by third party, needs

no consideration, and defendants failed to demonstrate that note signed by them was not given as security for antecedent debt of deceased owner. *First Nat'l Bank v. Achilli*, 14 Ill. App. 3d 1, 301 N.E.2d 739 (2d Dist. 1973).

26. —Summary judgment.

In action by equipment rental company in South Carolina court to enforce default judgment rendered against defendants in New York court for amount owed under equipment lease that was secured by defendants' written "guarantee of payment," where such guarantee provided for consensual personal jurisdiction in New York courts in all actions or proceedings based on guarantee, and where answer of one defendant in South Carolina action did not deny genuineness of her signature on guarantee which was sole foundation for New York judgment, production of guarantee, New York judgment thereon, and absence of any assertable defense to guarantee's validity (such as forgery thereon of defendant's signature) entitled plaintiff under UCC § 3-307, as matter of law, to summary judgment in South Carolina action. *National Equip., Ltd. v. David Jones Sales, Trucking Div., Inc.*, 268 S.C. 551, 235 S.E.2d 125 (1977).

Under UCC § 3-307(2), where defendant admitted genuineness of his signature on note and defenses raised in defendant's answer were not supported by the evidence, which was uncontroverted, trial court did not err in granting summary judgment as to principal amount of note and accrued interest thereon. However, since plaintiff offered no evidence on his motion for summary judgment that provisions in note concerning attorney's fees had been complied with, trial court erred in granting summary judgment as to such fees. *Bowman v. McDonough Realty Co.*, 143 Ga. App. 128, 237 S.E.2d 647 (1977).

In action by two makers and all but one coguarantor on promissory note against remaining guarantor for entire amount of unpaid principal balance due, where plaintiffs relied for recovery on UCC § 3-307(2) dealing with effect of admission of signatures on instrument, but complaint showed on its face that persons primarily liable on instrument were seeking to recover from one who was only secondarily

liable thereon and plaintiffs did not explain in their pleadings how such liability could arise, trial court committed error in granting judgment on pleadings for plaintiffs. *Auerback v. Maslia*, 142 Ga. App. 184, 235 S.E.2d 594 (1977).

Where maker of note executed in conjunction with conditional sales contract for purchase of airplane stated in affidavit in response to motion for summary judgment that he believed crash of airplane had resulted from defective manufacture of plane, this was strictly speculation and opinion of maker and as such did not raise fact issue on affirmative defense against holder in due course under UCC § 3-307. *Whittenburg v. Cessna Fin. Corp.*, 536 S.W.2d 444 (Tex. Civ. App. 1976), *ref. n.r.e.* (Oct. 6, 1976).

Debtor who claimed to have signed promissory note as representative of corporation and not individually was personally liable under UCC §§ 3-307(b) and 3-403(b)(2) where instrument itself did not indicate that debtor was signing in representative capacity and where assertion that he intended to sign, and did sign, in representative capacity was insufficient to raise issue of fact to "otherwise establish" his representative capacity. *Seale v. Nichols*, 505 S.W.2d 251 (Tex. 1974).

In action by holder of two promissory notes to recover against corporate maker, trial court properly granted summary judgment for holder where corporation did not specifically plead lack of authority of corporate officer to make instrument either in counter-affidavit or in its pleading. *Universal Printing Co. v. Sayre & Fisher Co.*, 501 S.W.2d 180 (Mo. Ct. App. 1973).

The trial court did not err in granting the plaintiff's motion for summary judgment in an action on two promissory notes where the defendant admitted execution but failed to establish an affirmative defense. *Freezomatic Corp. v. Brigadier Indus. Corp.*, 125 Ga. App. 767, 189 S.E.2d 108 (1972).

Action to recover on promissory note; held, defendant's general denial raised substantial fact issue as to ownership of note precluding summary judgment. *Blair v. Halliburton Co.*, 456 S.W.2d 414 (Tex. Civ. App. 1970).

A trial was required and plaintiff should be required to file a reply where the de-

fendant, under oath, denied that he had any knowledge as to how his signature got on the note sued on, denied delivery of the note, denied that there was any consideration for the note originally, and denied that the plaintiff was a holder in due course. *Neboshek v. Berzani*, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

27. —Damages.

The production of the promissory note sued on entitled the holder to recover unless a defense is established, and the term "recover on it" appearing in subdivision (2) of this section makes it quite clear that the holder is entitled to the full amount sued for, without proof of the amount or of nonpayment, unless the defendant pleads and proves some defense thereto. *Persson v. McCormick*, 412 P.2d 619 (Okla. 1966).

III. DECISIONS UNDER FORMER STATUTES.

28. In general.

Whether or not one is a holder in due course does not depend upon his diligence or negligence. *Securities Inv. Co. v. Cohen*, 241 Miss. 549, 131 So. 2d 439 (1961).

Where it was shown that the bank had no actual notice of a warranty and agreement and the breach thereof, the fact that there was stapled to the note given for the purchase of farm equipment, at the time it was indorsed to the bank, a purchase order signed by the maker-purchaser in favor of the seller-payee on the reverse side of which there was a "warranty and agreement" did not put the bank upon notice as to such warranty and agreement or put it upon inquiry as to whether the warranty and agreement had been breached at the time of purchase, so that the bank as a holder in due course for value, and without notice, was entitled to recover against the maker even though the warranty had actually been breached. *Misso v. National Bank of Commerce*, 231 Miss. 249, 95 So. 2d 124 (1957).

Every holder is deemed *prima facie* to be a holder in due course subject to limitation that if negotiator's title was defective, the holder must prove that he, or his predecessor in title, acquired the title as holder in due course. *Credit Indus. Co. v.*

Adams County Lumber & Supply Co., 215 Miss. 282, 60 So. 2d 790 (1952).

Purchaser of note with unfilled blanks for payee's name and time interest should begin was put on inquiry as to defects, and was not "holder in due course." *Moore v. Vaughn*, 167 Miss. 758, 150 So. 372 (1933).

Where title of one negotiating note was defective, holders had burden of proving they were holders in due course. *Cassedy*

v. Wells, Jones, Wells & Lipscomb, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

Partners seeking to probate note against estate where title of one negotiating it was defective held not to have met burden showing they were holders in due course. *Cassedy v. Wells, Jones, Wells & Lipscomb*, 162 Miss. 102, 137 So. 472, 79 A.L.R. 1133 (1931).

RESEARCH REFERENCES

ALR. Applicability of waiver or estoppel to preclude claim of nonconformance of documents as ground for dishonor of presentment under letter of credit under UCC § 5-114. 53 A.L.R.5th 667.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 60-65.

CJS. 10 C.J.S., Bills and Notes § 27-29, 80.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-309. Enforcement of lost, destroyed, or stolen instrument.

(a) A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(b) A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, Section 75-3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

SOURCES: Laws, 1992, ch. 420, § 35, eff from and after January 1, 1993.

Cross References — Entitlement of claimant, who has right to assert claim under subsection (b) of § 75-3-312 and who is further entitled to enforce lost, stolen, or destroyed cashier's, teller's, or certified check, to assert rights with respect to the check, see § 75-3-312.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-804.

11. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-804.

11. In general.

UCC § 3-804 permits the owner of lost commercial paper to maintain an action thereon in his own name and recover from any party liable on the instrument on due proof of ownership, the facts that prevent his production of the instrument, and the instrument's terms. The degree of proof required of the plaintiff in such an action is a mere preponderance of the evidence and not clear and convincing evidence. *HFC v. Johnson*, 56 Ohio App. 2d 14, 381 N.E.2d 215 (1978).

The court may not order payment on a lost negotiable instrument without requiring the payee to post security as required by section 3-804 of the Uniform Commercial Code, since the furnishing of such security is mandatory and not discretionary. Thus, where petitioner payee lost, misplaced or was criminally relieved of two certified checks drawn on respondent bank, which refused to honor replacement checks unless an indemnity bond was posted in twice the amount of the original checks as required by section 3-804, the court despite the onerous and unjust burden thereby imposed has no authority to grant petitioner's application for recovery of the amount of the checks from the bank without the posting of such security. *Diaz v. Manufacturers Hanover Trust Co.*, 92 Misc. 2d 802 (1977).

Under New York version of UCC § 3-804, court may not order payment to be made on lost negotiable instrument without requiring payee of such instrument to post security in amount not less than

twice the amount allegedly unpaid on the instrument. *Diaz v. Manufacturers Hanover Trust Co.*, 92 Misc. 2d 802 (1977).

In action by bank to recover funds credited to defendant's checking account plus cash paid to defendant following defendant's deposit of check which was subsequently dishonored, although bank lost check, it was entitled to maintain action where it presented photostatic copy of original instrument at trial. *Laurel Bank & Trust Co. v. Sahadi*, 32 Conn. Supp. 172, 345 A.2d 53 (1975).

In an action by a Massachusetts collecting bank against a Puerto Rican firm with offices in New York, which had bought yarn from an Italian corporation, and its New York guarantor, to recover the amount credited to the depository bank in Italy upon receipt of a check drawn on a Tennessee bank, which check was lost after the collecting bank had taken steps to present the check for payment to the Tennessee bank, it was held that since the Puerto Rican firm because of the non-payment of the check never discharged its obligation under its contract of sale with the Italian firm, the Italian firm had cause of action against the Puerto Rican firm and its guarantor, which cause of action was assignable to the collecting bank. *National Shawmut Bank v. International Yarn Corp.*, 322 F. Supp. 116 (S.D.N.Y. 1970).

UCC § 3-804 provision that security "shall" be required is not mandatory and payee of stolen certified check could recover upon furnishing less than security required to protect bank where it seemed almost certain that checks would never be presented or honored. *487 Clinton Ave. Corp. v. Chase Manhattan Bank*, 63 Misc. 2d 715 (1970).

Where assignee did not have possession of check at time of commencement of action, it could not maintain action against drawer even though, after commencement of action, payee gave depository bank the check and, prior to commencement of action, payee had assigned partial interest in proceeds of check to depository bank. *Investment Serv. Co. v. Martin Bros. Container & Timber Prods. Corp.*, 255 Or. 192, 465 P.2d 868 (1970).

For an indorsee to recover from his indorser upon dishonored checks there must be clear and convincing proof of their ownership, and in the absence of possession, ownership would usually depend upon proof that the indorsee did not voluntarily surrender possession unless he did so conditioned upon payment of the

checks, and surrender of the checks to the indorser, without payment, and without even a demand for payment, tells against the retention of ownership and indicates an intention not to hold the indorsee liable on the instruments. *Dluge v. Robinson*, 204 Pa. Super. 404, 204 A.2d 279 (1964).

RESEARCH REFERENCES

ALR. Rights of one who acquires lost or stolen traveler's checks. 42 A.L.R.3d 846.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 304, 305, 334, 342, 395.

6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Forms 3:201, 3:202 (complaint, petition, or declaration — for recovery on lost promissory notes).

12 Am. Jur. Legal Forms 2d, Lost and Destroyed Instruments, §§ 169:15, 169:16 (affidavit of loss — written instrument — negotiable instrument).

18 Am. Jur. Legal Forms 2d, Uniform Commercial Code §§ 253:2235, 253:2236 (commercial paper: lost, destroyed, or stolen instruments).

§ 75-3-310. Effect of instrument on obligation for which taken.

(a) Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not affect any liability that the obligor may have as an indorser of the instrument.

(b) Unless otherwise agreed and except as provided in subsection (a), if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

(1) In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

(3) Except as provided in paragraph (4), if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

(4) If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the

obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

(c) If an instrument other than one described in subsection (a) or (b) is taken for an obligation, the effect is (i) that stated in subsection (a) if the instrument is one on which a bank is liable as maker or acceptor, or (ii) that stated in subsection (b) in any other case.

SOURCES: Laws, 1992, ch. 420, § 36, eff from and after January 1, 1993.

Cross References — Payment by check as conditional and defeated as between parties by dishonor of check on due presentment, subject to provisions of this section, see § 75-2-511.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-802.

11. In general.
12. Applicability to various obligations.
13. "Taken" instrument.
14. Pro tanto discharge.
15. Suspension of obligation.
16. Election of remedy upon dishonor.
17. Discharge from instrument and obligation.
18. Practice and procedure.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-802.

11. In general.

Under UCC § 3-802(1), when an obligee takes a negotiable instrument drawn or made to his order and on which there is no recourse against the obligor, the obligor is discharged from paying the underlying payment obligation. In all other situations, in the absence of a contrary agreement, when an obligee takes a negotiable instrument that is tendered in payment of a promise to pay money, the obligor is not

discharged on the underlying promise of payment until the second instrument itself is paid. When the second instrument is due, the first instrument is revived, and failure to pay the second instrument gives rise to a cause of action on either instrument. *First Pa. Bank v. Triester*, 251 Pa. Super. 372, 380 A.2d 826 (1977).

12. Applicability to various obligations.

The acceptance of promissory notes by a lessor from a lessee and one of two guarantors as conditional payment for an underlying debt obligation in the form of leases operated to suspend the obligation of the second guarantor under a Continuing Guaranty until such time as the notes became due and unpaid. *Woods-Tucker Leasing Corp. v. Kellum*, 641 F.2d 210 (5th Cir. 1981).

UCC § 3-802(1)(b) applies to the taking of a third person's negotiable note for an existing debt. (where two notes of corporation were taken and applied to individual debt of officer of such corporation). *McDowell v. Miller*, 557 S.W.2d 266 (Mo. Ct. App. 1977).

13. "Taken" instrument.

Although giving of check is conditional payment and, under UCC § 3-802 (1) (b), where an instrument is "taken for an underlying obligation...the obligation is suspended pro tanto until the instrument

is due or if it is payable on demand until its presentment," mailing of ordinary corporate check in Kansas City on February 28 did not constitute payment of promissory note in New York City on March 1 where check did not arrive until March 5 and payee did not accept check, but rejected it at first opportunity. *Stream v. CBK Agronomics, Inc.*, 79 Misc. 2d 607 (1974), modified, 48 A.D.2d 637, 368 N.Y.S.2d 20 (1 Dep't 1975).

14. Pro tanto discharge.

Fact that loan servicing agent of mortgagee accepted check drawn on title company, payment of which was later stopped, as payment for three instalments due on mortgage loan, did not operate to satisfy or discharge mortgagor's underlying obligation: (1) Obligation was merely suspended pending collection or rejection of instrument pursuant to UCC § 3-802(1)(b) and testimony by officer of loan serving agent that agent as matter of practice accepted checks of title companies was not sufficient to raise question of fact as to whether there was any agreement to accept check as satisfaction of underlying obligation; (2) Furthermore, underlying obligation was not pro tanto discharged upon acceptance of check pursuant to UCC § 3-802(1)(a) since there was no showing that title company was in business of receiving deposits subject to demand payments, or that it held itself out as bank. *Congress Indus., Inc. v. Federal Life Ins. Co. (Mut.)*, 114 Ariz. 361, 560 P.2d 1268 (Ct. App. 1977).

Where party to litigation admitted owing to opposing party specified sum of money which was paid into registry of court by certified check, but lapse of nine days occurred before check was deposited by court clerk in court's registry account, opponent was not entitled to interest on amount of check during nine-day period; although first party, as drawer, was not discharged until certified check was paid, nevertheless, check was negotiated by delivery to clerk, the named payee, and this had effect of suspending underlying obligation of party, pro tanto, until instrument was presented for payment, and, thus, interest claimed by other party would be owing only if check had been dishonored when presented for payment.

Huffman Towing, Inc. v. Mainstream Shipyard & Supply, Inc., 388 F. Supp. 1362 (N.D. Miss. 1975).

Where customer of stockbroker caused bank to issue teller's check payable to stockbroker's order in payment of customer's debt and check was mailed to stockbroker's office but was wrongfully appropriated by employee who erased stockbroker's name, substituted his own and collected amount of check from drawee, underlying obligation was discharged under UCC § 3-802(1)(a), and bank, as drawer, had no further responsibility on the instrument. *Abraham & Co. v. Dollar Sav. Bank*, 48 A.D.2d 807 (1st Dep't 1975), appeal dismissed in part, denied in part, 38 N.Y.2d 795, 381 N.Y.S.2d 870, 345 N.E.2d 342 (1975).

Teller's check, delivered as equivalent of cash, was bank's own direct and primary obligation to plaintiff, and it could not resist enforcement of its contract in order to make setoff or counterclaim available to its depositor who had used check as payment for automobile. *Manhattan Imported Cars, Inc. v. Dime Sav. Bank*, 70 Misc. 2d 889 (1972).

Under the provision of subd 1(a) of this section where bank draws teller's check on another bank payable to third person, the underlying obligation for which the check is given is discharged even though the issuing bank stops payments on the check. *Malphrus v. Home Sav. Bank*, 44 Misc. 2d 705 (1965).

15. Suspension of obligation.

Where defendant along with another comaker signed original 90-day promissory note on February 14, 1974 and also 60-day renewal note for same amount on May 15, 1974, and where, in bank's suit on original note after comakers' default on both notes, defendant contended that he was not liable because renewal note that he gave bank had discharged original note, (1) because defendant signed renewal note, bank had recourse against him on renewal note as underlying obligor and defendant was therefore not discharged under UCC § 3-802(1)(a); (2) under UCC § 3-802(1)(b), obligation underlying renewal note was promise to pay original note (on which bank brought suit); and (3) in absence of contrary agree-

ment, as to which defendant offered no evidence, renewal note merely suspended, and did not discharge, defendant's underlying obligation (original note) until renewal note became due (holding that liability on original note had not been discharged by payment or satisfaction). First Pa. Bank v. Triester, 251 Pa. Super. 372, 380 A.2d 826 (1977).

Where guarantor of sales contract signed promissory note to pay balance after default by buyer, execution of note was not payment, but without express agreement to the contrary, obligation was merely suspended, rather than discharged pursuant to UCC § 3-802(1)(b). Knight v. Cheek, 369 A.2d 601 (D.C. 1977).

Even though check was conditional payment, it was sufficient to satisfy provision of divorce decree requiring husband to pay wife one-half of appraised value of certain property since, if check was dishonored, debt still remained. Kelley v. Kelley, 53 Ala. App. 608, 303 So. 2d 108 (Civ. App. 1974).

When an indorser makes payment by check his liability is merely suspended as provided by UCC Sec 3-802. Makel Textiles, Inc. v. Dolly Originals, Inc., 4 U.C.C. Rep. Serv. 95 (1967, NY Sup).

The defendant's indebtedness to the plaintiff for services performed was not discharged by delivery of the promissory note of a third party indorsed by the defendant "without recourse", and defendant's obligation was merely suspended until the instrument became due at which time the plaintiff had the election of maintaining an action either on the instrument or on the obligation. Central Stone Co. v. John Ruggiero, Inc., 49 Misc. 2d 622 (1966).

16. Election of remedy upon dishonor.

Where payment of check tendered in discharge of defendant's underlying obligation was refused by bank solely for lack of sufficient funds in defendant's account and not for lack of proper indorsement or presentment, formal presentment of check was entirely excused under UCC § 3-511(3)(b) (holding that tendered check was conditional payment only, and that under UCC § 3-802(1)(b), underlying obligation was revived after check's dis-

honor). Rains v. Lewis, 20 Wash. App. 117, 579 P.2d 980 (1978).

In breach of contract action in which plaintiffs elected to seek recovery on dishonored check, under UCC § 3-802(1)(b), validity of underlying obligation, insofar as it related to check, was not issue in case. Perry & Greer, Inc. v. Manning, 282 Or. 25, 576 P.2d 791 (1978).

Under UCC § 3-802(1)(b), the holder of a note taken for an underlying contract has a choice of remedies: he can sue on the note itself or on the underlying contract (action on note in which court held that since UCC Article 3 has no statute of limitations, six-year period of limitations applicable to actions on an express or implied obligation applied, instead of four-year statute contained in UCC § 2-725(1)). O'Neill v. Steppat, 270 N.W.2d 375 (S.D. 1978).

Under UCC § 3-802(1)(b), personal check given to extend option agreement to purchase land, which was dishonored on presentment, was merely a conditional payment that served only to extent option provisionally until check's presentment, and on dishonor of check, payment failed and option contract lapsed (where grantor of option, who was not required to negotiate check by depositing it, presented it directly to drawee bank for payment). Merriman v. Sandeen, 267 N.W.2d 714 (Minn. 1978).

In action by two subcontractors against owner of land and company which had leased restaurant that it was building on such land to enforce mechanic's lien claims for unpaid labor and materials employed in restaurant's construction, where evidence showed (1) that defendant lessee's procedure was to make progress payments to main contractor on receipt of labor and materials releases executed by all subcontractors working on project, (2) that plaintiffs had executed such releases to main contractor to cover all claims for labor and materials up through specified date, (3) that defendant lessee had then paid main contractor for all work done on project as of such date, and (4) that main contractor had thereafter paid plaintiffs by checks on which payment was subsequently stopped, plaintiffs could not successfully contend that because taking of

seemingly solvent party's check is proper and normal commercial practice under UCC § 2-511(3) and UCC § 3-802, and because under such sections if check is dishonored, payee can either sue on check or on underlying obligation, such sections therefore made plaintiffs' lien claim releases conditional as to defendants, and defendants were not entitled to rely on releases as defense to plaintiffs' claims. In such situation, if releases were intended to be conditional, plaintiffs should have inserted in them language appropriate for such purpose (observing that as against main contractor, plaintiff lien claimants retained rights enumerated by UCC § 3-802). *Mountain Stone Co. v. H.W. Hammond Co.*, 39 Colo. App. 58, 564 P.2d 958 (1977).

Where subcontractor accepted note of third party in satisfaction of obligation of primary contractor, made presentment and demand, but note was dishonored, note did not extinguish contractor's debt to subcontractor and subcontractor's right to sue on underlying obligation was revived upon dishonor of note pursuant to UCC § 3-802. *Stone Ft. Nat'l Bank v. Elliott Elec. Supply Co.*, 548 S.W.2d 441 (Tex. Civ. App. 1977), *ref. n.r.e.* (July 13, 1977).

Issuance of check to auto repairman did not operate as assignment of funds and did not extinguish mechanics lien; underlying obligation was resurrected upon dishonor of draft. *Leavitt v. Charles R. Hearn, Inc.*, 19 Ill. App. 3d 980, 312 N.E.2d 806 (1st Dist. 1974).

Mailing of ordinary check in payment of estate tax on last day of expiration of fifteen months from date of death did not constitute "payment" of tax on that day to bring assessable interest within rate of four and one half per cent mandated by tax law. *In re Nowicki's Estate*, 76 Misc. 2d 384 (1973).

Upon breach of airplane hangar construction contract, assignee was not obliged to proceed on promissory note given to cover balance due on contract, but could instead seek damages for breach of

underlying contract. *Jones v. Bailey*, 1 Mass. App. Ct. 41, 294 N.E.2d 599 (1973).

Where defendant delivered his check to plaintiffs as escrow money on purchase of business, and later gave back business and stopped payment on check, plaintiffs were entitled under UCC to bring action on check. *Gaskins v. Duke*, 483 S.W.2d 499 (Tex. Civ. App. 1972).

Between the original parties to a check payment is conditional, and if the instrument is dishonored, an action may be maintained on either the instrument or the underlying obligation. *Mansion Carpets, Inc. v. Marinoff*, 24 A.D.2d 947 (1st Dep't 1965).

17. Discharge from instrument and obligation.

In action against endorser of dishonored check which covered part of purchase price of automobile under retail installment contract, plaintiff's claim was defeated by his failure to give timely notice of dishonor under UCC § 3-501(2)(a), thus discharging endorser from any liability on draft under UCC § 3-502(1)(a) as well as from liability on underlying obligation under UCC § 3-802(1)(b); argument that no notice of dishonor was required under UCC § 3-501(4) was rejected where draft was endorsed before, not after, maturity. *Chandler Motors, Inc. v. Dunham*, 127 N.J. Super. 320, 317 A.2d 386 (App. Div. 1974).

18. Practice and procedure.

Subcontractor's receipt of contractor's check and execution of release form that accompanied it did not operate as waiver of subcontractor's lien or bar subcontractor from enforcing it where contractor's check was subsequently dishonored. *Westland Homes Corp. v. Hall*, 193 Neb. 237, 226 N.W.2d 622 (1975).

A subsequent stop-payment order has no bearing on whether or not an enforceable contract came into being upon the delivery and acceptance of the check. *Cohn v. Fisher*, 118 N.J. Super. 286, 287 A.2d 222 (L. Div. 1972).

RESEARCH REFERENCES

Am Jur. 11 Am. Jur. 2d, Bills and Notes
§ 139.

§ 75-3-311. Accord and satisfaction by use of instrument.

(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within ninety (90) days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).

(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

SOURCES: Laws, 1992, ch. 420, § 37, eff from and after January 1, 1993.

RESEARCH REFERENCES

ALR. Modern status of rule that acceptance of check purporting to be final settlement of disputed amount constitutes accord and satisfaction. 42 A.L.R.4th 12.

Am Jur. 11 Am. Jur. 2d, Bills and Notes
§ 397.

§ 75-3-312. Lost, destroyed, or stolen cashier's check, teller's check, or certified check.

(a) In this section:

(1) "Check" means a cashier's check, teller's check, or certified check.

(2) "Claimant" means a person who claims the right to receive the amount of a cashier's check, teller's check, or certified check that was lost, destroyed, or stolen.

(3) "Declaration of loss" means a written statement, made under penalty of perjury, to the effect that (i) the declarer lost possession of a check, (ii) the declarer is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check, (iii) the loss of possession was not the result of a transfer by the declarer or a lawful seizure, and (iv) the declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

(4) "Obligated bank" means the issuer of a cashier's check or teller's check or the acceptor of a certified check.

(b) A claimant may assert a claim to the amount of a check by a communication to the obligated bank describing the check with reasonable certainty and requesting payment of the amount of the check, if (i) the claimant is the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check, (ii) the communication contains or is accompanied by a declaration of loss of the claimant with respect to the check, (iii) the communication is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid, and (iv) the claimant provides reasonable identification if requested by the obligated bank. Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration. If a claim is asserted in compliance with this subsection, the following rules apply:

(1) The claim becomes enforceable at the later of (i) the time the claim is asserted, or (ii) the ninetieth day following the date of the check, in the case of a cashier's check or teller's check, or the ninetieth day following the date of acceptance, in the case of a certified check.

(2) Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check. Payment to a person entitled to enforce the check discharges all liability of the obligated bank with respect to the check.

(3) If the claim becomes enforceable before the check is presented for payment, the obligated bank is not obliged to pay the check.

(4) When the claim becomes enforceable, the obligated bank becomes obliged to pay the amount of the check to the claimant if payment of the check has not been made to a person entitled to enforce the check. Subject to

Section 75-4-302(a)(1), payment to the claimant discharges all liability of the obligated bank with respect to the check.

(c) If the obligated bank pays the amount of a check to a claimant under subsection (b)(4) and the check is presented for payment by a person having rights of a holder in due course, the claimant is obliged to (i) refund the payment to the obligated bank if the check is paid, or (ii) pay the amount of the check to the person having rights of a holder in due course if the check is dishonored.

(d) If a claimant has the right to assert a claim under subsection (b) and is also a person entitled to enforce a cashier's check, teller's check, or certified check which is lost, destroyed, or stolen, the claimant may assert rights with respect to the check either under this section or Section 75-3-309.

SOURCES: Laws, 1992, ch. 420, § 38, eff from and after January 1, 1993.

Cross References — Definitions of other terms for purposes of this chapter, see § 75-3-103.

RESEARCH REFERENCES

ALR. Rights of one who acquires lost or stolen traveler's checks. 42 A.L.R.3d 846.

Am Jur. 11 Am. Jur. 2d, Bills and Notes §§ 304, 305, 334, 342, 395.

6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Forms 3:201, 3:202 (com-

plaint, petition, or declaration — for recovery on lost promissory notes).

12 Am. Jur. Legal Forms 2d, Lost and Destroyed Instruments, Forms 169:15, 169:16 (affidavit of loss — written instrument — negotiable instrument).

PART 4.

LIABILITY OF PARTIES.

SEC.

75-3-401.	Signature.
75-3-402.	Signature by representative.
75-3-403.	Unauthorized signature.
75-3-404.	Impostors; fictitious payees.
75-3-405.	Employer's Responsibility for fraudulent indorsement by employee.
75-3-406.	Negligence contributing to forged signature or alteration of instrument.
75-3-407.	Alteration.
75-3-408.	Drawee not liable on unaccepted draft.
75-3-409.	Acceptance of draft; certified check.
75-3-410.	Acceptance varying draft.
75-3-411.	Refusal to pay cashier's checks, teller's checks, and certified checks.
75-3-412.	Obligation of issuer of note or cashier's check.
75-3-413.	Obligation of acceptor.
75-3-414.	Obligation of drawer.
75-3-415.	Obligation of indorser.
75-3-416.	Transfer warranties.
75-3-417.	Presentment warranties.
75-3-418.	Payment or acceptance by mistake.
75-3-419.	Instruments signed for accommodation.
75-3-420.	Conversion of instrument.

§ 75-3-401. Signature.

(a) A person is not liable on an instrument unless (i) the person signed the instrument, or (ii) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under Section 75-3-402.

(b) A signature may be made (i) manually or by means of a device or machine, and (ii) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing.

SOURCES: Former § 75-3-401: Codes, 1942, § 41A:3-401; Laws, 1966, ch. 316, § 3-401; Laws, 1992, ch. 420, § 39, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-401.

11. In general.
12. Sufficiency of signature, generally.
13. Collateral agreements.
14. Corporate undertakings.
15. Joint undertakings.
16. Oral agreements.
17. Practice and procedure.

III. DECISIONS UNDER FORMER STATUTES.

18. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-401.

11. In general.

Renewal of note by person other than original debtor simply means that original debtor has no personal liability on note as subsequently renewed, but in no way operates to cancel original deed of trust, where subsequent renewals were neither signed nor endorsed by original debtors. *Cochran v. Deposit Guar. Nat'l Bank*, 509 So. 2d 1045 (Miss. 1987).

Corporation officer who signed corporate note by placing his name on line

below typed name of corporation and after typed word "By," and who indicated capacity in which he signed by writing on another line word "President" after typed word "Individually," was relieved from liability under UCC §§ 3-401(1) and 3-403(2)(a), since handwritten word "President" on "Individually" line characterized officer's act as that of official of corporation. *Donald M. Clement Contractor v. Demon, Inc.*, 364 So. 2d 204 (La. App. 1978).

An undisclosed principal is not liable on a negotiable instrument. Instead, under UCC § 3-401(1), the party who signed the instrument is liable thereon (observing, however, that undisclosed principal may still be liable for the debt under equitable doctrine of quasi-contract). *Opelika Prod. Credit Ass'n v. Lamb*, 361 So. 2d 95 (Ala. 1978).

Where defendant, after stealing driver's license, social security card, and car registration from her landlord's wallet, took such identification to bank, opened checking account in landlord's name, filled out appropriate signature cards, and made small deposit in the account, and where later, when attempting to purchase a television set, defendant used one of the checks obtained from the bank, signed it with landlord's name, and made check out for amount that exceeded defendant's deposit in the account, defendant was not guilty of forgery, since under UCC § 3-401(2), dealing with making of signature on instruments, only defendant would be liable on such check. *People v. Hodgins*, 85 Mich. App. 62, 270 N.W.2d 527 (1978).

Where only defendant's signature appeared on promissory note and note did not name any party represented by defendant or demonstrate that defendant had signed it in representative capacity, defendant's unambiguous status as maker of note necessitated conclusion under UCC § 3-401(1), § 3-403(2) and (3), and § 3-413 that he was obligor thereunder and thus appropriate party from whom to seek payment. *Marine Midland Bank v. DiMarzo*, 57 A.D.2d 733 (4th Dep't 1977).

Any writing to be a negotiable instrument must be signed by the maker or drawer. *Jenkins v. Evans*, 31 A.D.2d 597 (3d Dep't 1968).

Under § 3-401 of the Uniform Commercial Code, no person is liable on an instrument unless his signature appears thereon and under § 3-306(c), except as to a holder in due course, no person is liable thereon unless there has been a delivery of the instrument, and the same rule with reference to execution and delivery was in effect under the former Illinois Negotiable Instruments Law. *Neboshek v. Berzani*, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

12. Sufficiency of signature, generally.

In action against issuing bank by holder of money order for face amount thereof, bank was not absolved from liability by UCC § 3-401(1) and (2), dealing with necessity of signature on instrument and use of any word or mark as signature, where money order in suit had bank's name printed on it. *Mirabile v. Udoh*, 92 Misc. 2d 168 (1977).

Where only defendant's signature appeared on promissory note and note did not name any party represented by defendant or demonstrate that defendant had signed it in representative capacity, defendant's unambiguous status as maker of note necessitated conclusion under UCC § 3-401(1), § 3-403(2) and (3), and § 3-413 that he was obligor thereunder and thus appropriate party from whom to seek payment. *Marine Midland Bank v. DiMarzo*, 57 A.D.2d 733 (4th Dep't 1977).

Bank that accepted forged checks for collection acted in accordance with reasonable commercial standards under UCC § 3-406, notwithstanding checks were en-

dorsed with typewritten name of payee bank, since checks were regular on their face and bore purported endorsement of named payee; collecting bank was not required to obtain holographic signature of one of payee bank's officers, and written evidence of his authority to endorse, before accepting checks for collection. Furthermore, typewritten endorsement which identified payee bank met requirements of UCC § 4-206, governing transfers between banks. *West Penn Admin., Inc. v. Union Nat'l Bank*, 233 Pa. Super. 311, 335 A.2d 725 (1975).

Employee's typewritten and handwritten initials on documents contained in benefit file where employee designations of retirement plan beneficiary were contained, constituted signature of employee under provisions of UCC §§ 1-201(39) and 3-401(2). *Mohawk Airlines v. Peach*, 81 Misc. 2d 211 (1974), modified, 61 A.D.2d 346, 402 N.Y.S.2d 496 (4th Dep't 1978), appeal denied, 44 N.Y.2d 645 (1978), appeal denied, 44 N.Y.2d 838, 406 N.Y.S.2d 758, 378 N.E.2d 121 (1978).

13. Collateral agreements.

Where defendants purchased real property from sellers who had signed note secured by second deed of trust on property, and where the defendants agreed to assume payment of deed of trust, assignee of note and deed of trust could recover against defendants, notwithstanding their signatures did not appear on note, since defendants were liable, not on the note, but on their contract of assumption. *City Mtg. Inv. Club v. Beh*, 334 A.2d 183 (D.C. 1975).

Subsection (1) of the instant section cannot be read to mean that no person is liable on a debt whose signature does not appear on a note given as collateral security for that debt. In *re Eton Furn. Co.*, 286 F.2d 93 (3d Cir. Pa. 1961).

14. Corporate undertakings.

Although corporation under UCC § 3-401(1) was not liable on note that it did not sign, it was still liable on underlying obligation for which note was given where separate identity of such corporation and its president and sole shareholder could not be disregarded (where lender of funds for which note was given believed that

funds would be used in maker's business). *Wiebke v. Richardson & Sons*, 83 Wis. 2d 359, 265 N.W.2d 571 (1978).

Where instrument for payment of money was written on personalized check form, individual defendants' names were printed at top of form and their signatures appeared at bottom right-hand corner, where name of bank and account number were crossed out, but remainder of form was filled in as check would be and was payable to plaintiff's order in amount of \$12,000 and where it was dated December 31, 1972, and notation "Note-6% Int." appeared at lower left-hand corner, instrument was negotiable demand instrument under UCC § 3-108, individual defendants were personally liable thereon under UCC § 3-403(2), and parol evidence was inadmissible to disestablish such obligation; however, under UCC § 3-401, corporate defendant, whose signature did not appear on instrument, was not liable on it. *Kaminsky v. Van Dusen*, 88 Misc. 2d 833 (1976).

Corporation had sought and been refused bank loan; loan was made for note signed by individual stockholders; stockholders were acting for corporation and proceeds of loan were deposited in corporation's bank account; held, corporation was not liable to bank on note for loan since bank had not secured corporate endorsement on, or guarantee of, note. *Potts v. First City Bank*, 7 Cal. App. 3d 341 (2d Dist. 1970).

Obligation was solely that of corporation where officers signed notes in representative capacity as clearly set forth in acknowledgment within chattel mortgage. *Security Ins. Co. v. Mangan*, 250 Md. 241, 242 A.2d 482 (1968).

Where a corporate shareholder did not sign a corporation note as an obligor on the note or as one of the signing officers of the corporation, the dismissal of the complaint in a suit on the note as to that shareholder was proper, since no person is liable on an instrument unless his signature appears thereon. *First W. Bank & Trust Co. v. Bookasta*, 267 Cal. App. 2d 910 (2d Dist. 1968).

Where corporate name was printed in maker's position on check above two lines for signature of one or more corporate

officers, printed corporate name alone was not valid corporate signature. *Pollin v. Mindy Mfg. Co.*, 211 Pa. Super. 87, 236 A.2d 542 (1967).

Notwithstanding that the bankrupt corporation's name did not appear on a note given by its general manager as collateral security for loans made by bank to the general manager, the bankrupt was indebted to the bank where the proceeds of the loan were used for its benefit, and from a course of dealing between the bank and the general manager each understood that when the general manager borrowed money and credited the proceeds to bankrupt's account, the general manager was acting for the account of and in the interest of the bankrupt, his principal. *In re Eton Furn. Co.*, 286 F.2d 93 (3d Cir. Pa. 1961).

Where a note was signed, on successive lines, "John P. Conville," "Doris E. Conville," "Hughesville Mfg. Co., Inc.," and another note was signed, on successive lines, "Hughesville Mfg. Co.," "John P. Conville," "Doris E. Conville," the company was not liable on the notes even though the individuals who signed might have been authorized to sign for it, because the notes did not show that the signatures were made on behalf of the company. *Grange Nat'l Bank v. Conville*, 8 Pa. D. & C.2d 616 (1957).

15. Joint undertakings.

In action by bank on promissory note executed by husband and wife to evidence loan presently due, bank's claim that son of signers of note, who did not sign it himself, was liable thereon as undisclosed principal because proceeds of loan were used to improve real estate owned by son and his mother could not be sustained under UCC § 3-401(1). In such case, since son's relationship to makers of note and his part ownership of such real estate was known to bank when loan was made, if bank intended him to be liable on note, it should have obtained his signature thereon. *Marine Midland Bank v. Anderson*, 90 Misc. 2d 909 (1977).

Parties had joined together to build houses on tract of land which they acquired and placed in name of corporation belonging to one member of group; held, each member of group was jointly liable

on note executed by corporation owning land. *McClung v. Saito*, 4 Cal. App. 3d 143 (2d Dist. 1970).

Where one partner executes a note in the name of the firm, other partners are liable thereon although they have not personally signed the note. *McCollum v. Steitz*, 261 Cal. App. 2d 76 (5th Dist. 1968).

16. Oral agreements.

Political candidate who promised to assume any liability which might be cast upon signers of note if sufficient campaign contributions did not come in to pay note and who received proceeds from note was held accountable on his oral agreement with signers notwithstanding candidate did not sign note and bank made loan only on signatures attached to note and did not look to candidate for its payment. *Farmers State Bank v. Conrardy*, 215 Kan. 334, 524 P.2d 690 (1974).

17. Practice and procedure.

Suit may not be maintained or judgment obtained on promissory note against undisclosed principal whose signature does not appear thereon; thus, complaint based on promissory note alleging that maker acted as agent of defendants, did not state cause of action against defendants where their names did not appear on note and it was not alleged that note disclosed that agent signed in any capacity other than for himself individually. *Ness v. Greater Ariz. Realty, Inc.*, 21 Ariz. App. 231, 517 P.2d 1278 (1974).

A trial was required and plaintiff should be required to file a reply where the de-

fendant, under oath, denied that he had any knowledge as to how his signature got on the note sued on, denied delivery of the note, denied that there was any consideration for the note originally, and denied that the plaintiff was a holder in due course. *Neboshek v. Berzani*, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

Although a mere allegation of fraud in a pleading is not sufficient and the party relying on fraud must plead sufficient facts or acts to establish it, where a defendant pleads that he has no knowledge as to how his signature got on the note or as to how the note got in the hands of the plaintiff, it would seem difficult to see how the court could require him to plead facts of which he alleges he has no knowledge. *Neboshek v. Berzani*, 42 Ill. App. 2d 220, 191 N.E.2d 411 (1st Dist. 1963).

III. DECISIONS UNDER FORMER STATUTES.

18. In general.

Where person signing instrument as agent does so with authority he is not liable thereon but if not duly authorized he is personally liable on such instrument. *Shemper v. Hancock Bank*, 206 Miss. 775, 40 So. 2d 742 (1949).

Where guardian signed instrument as agent for partnership consisting of minor ward and mother, minor was not bound, and since partnership of only one person cannot exist, the partnership was nonexistent and as agent for nonexistent principal guardian is liable personally on note. *Shemper v. Hancock Bank*, 206 Miss. 775, 40 So. 2d 742 (1949).

§ 75-3-402. Signature by representative.

(a) If a person acting, or purporting to act, as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in the instrument.

(b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:

(1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.

(2) Subject to subsection (c), if (i) the form of the signature does not show unambiguously that the signature is made in a representative capacity or (ii) the represented person is not identified in the instrument, the representative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument. With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument.

(c) If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person.

SOURCES: Former § 75-3-402: Codes, 1942, § 41A:3-402; Laws, 1966, ch. 316, § 3-402; Laws, 1992, ch. 420, § 40, eff from and after January 1, 1993.

Cross References — Burden on plaintiff to establish liability of defendant as represented person under this section, in action to enforce instrument against person as undisclosed principal of signor of instrument, see § 75-3-308.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-402, 75-3-403.

11. In general.
12. Signature in representative capacity.
13. Indorser or accommodation party.
14. Other matters.
15. In general scope.
16. Agent's authority.
17. Agent's liability.
18. —Disclosure of principal.
19. —Representative capacity; sufficient indication.
20. — —Insufficient indication.
21. —Representative and individual capacity.
22. Practice and procedure.
23. —Pleading.
24. —Evidence and burden of proof.
25. —Parol evidence; admissible.
26. — —Inadmissible.

27. —Sufficiency of evidence.

IV. DECISIONS UNDER FORMER UCC § 75-3-402.

28. In general.
29. Decisions under Code 1942 § 60.
30. Decisions under Code 1942 § 61.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-402, 75-3-403.

11. In general.

Forged signature of payee on front of check did not preclude defendant's conviction for forgery since UCC § 3-202(2) does not specify any specific location for an indorsement, nor was there any indication that the signature was not intended as an indorsement within the meaning of UCC § 3-402. *United States v. Tufi*, 536 F.2d 855 (9th Cir. Haw. 1976).

Any ambiguity as to the capacity in which a signature is made on an instrument must, under this section, be resolved that it is an indorsement, and unless the instrument itself makes it clear that one signed in some other capacity, the signer must be treated as an indorser. *Grange Nat'l Bank v. Conville*, 8 Pa. D. & C.2d 616 (1957).

The question of the capacity in which one signed an instrument must be determined from the face of the instrument alone. *Grange Nat'l Bank v. Conville*, 8 Pa. D. & C.2d 616 (1957).

12. Signature in representative capacity.

In suit on note executed by president of corporation, where (1) on front of note, immediately underneath the word "signatures", the name of the corporation was printed by hand, (2) immediately below the corporation's name, the word "by" was printed by hand and was followed by the president's signature, (3) below such signature appeared the half-printed, half-script word "President," (4) to the right of the president's signature on the front of the note also appeared the corporation's address, (5) on the back of the note, on the first of two printed lines, the president's signature appeared again, followed by the script abbreviation "pres.," and (6) below such signature, the president's address was also set forth, court held that president's indorsement of note was personal indorsement under (1) UCC § 3-402, which provides that unless the instrument clearly indicates that a signature is made in some other capacity, it is an indorsement, and (2) UCC § 3-403(2)(b), which provides that except as is otherwise established between the immediate parties, an authorized representative who signs his own name to an instrument is personally obligated if the instrument does not name the person represented, but does show that the representative signed in a representative capacity. *Lanier v. Bank of Virginia—Potomac*, 39 Md. App. 589, 387 A.2d 614 (1977).

Under UCC § 3-402, corporate officer's unqualified signature on back of note was endorsement where there was no clear indication within four corners of instrument that he was acting in representative

capacity, and under UCC § 3-403(2)(b) parol evidence was not admissible to show that he was acting not individually but in representative capacity. *Norfolk County Trust Co. v. Vichinsky*, 5 Mass. App. Ct. 768, 359 N.E.2d 59 (1977).

In an action brought prior to the effective date of the UCC, the court held that as between the parties in Maryland although a person who signed a note made by a corporation is prima facie liable to the payee, if there is conflict in the evidence relative to the circumstances, the individual who signed that note is not liable if he affirmatively shows an understanding between him and the payee that there was to be no personal liability, and it observed that this same principle was embodied in the UCC. *Leahy v. McManus*, 237 Md. 450, 206 A.2d 688 (1965).

13. Indorser or accommodation party.

Where president of corporation signed promissory note as president of corporation and also signed note personally, under UCC § 3-402 president clearly and unambiguously did not sign promissory note in representative capacity but as "accommodation party" under UCC § 3-415(1), making president personally liable on note. *Sullivan County Nat'l Bank v. Lieman*, 89 Misc. 2d 780 (1977).

In action for balance due on promissory note, where defendant claimed that he was merely accommodation indorser of note and not a comaker but admitted, as note clearly indicated, that he had signed note in lower righthand corner instead of on back where spaces were expressly provided for indorsers, defendant was liable as comaker under UCC § 3-402. Moreover, in such suit defendant's alleged accommodation status was inconsequential, since accommodation maker under UCC § 3-415 is liable on instrument without any resort to his principal. *Bankers Trust of S.C. v. Culbertson*, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

In action by bank as holder of promissory note against corporation and two individuals who signed note, where it was clear from face of instrument that individual signers intended to sign note other than as endorsers, but there was dispute as to which capacity, parol evidence was admissible to show intention of parties as

to capacity in which instrument was signed, and evidence that loan was made directly to two individual signers as principal debtors (i.e., makers), together with evidence concerning structure of corporation, active solicitation of loan by individual signers, and fact that one individual signer was director of bank, was sufficient to show that individual signers signed note as makers rather than accommodation parties. *Peoples Bank v. Pied Piper Retreat, Inc.*, 158 W. Va. 170, 209 S.E.2d 573 (1974).

Parol evidence is admissible to show party's capacity as accommodation party; and, as payee, holder of instrument who has taken it for value has rights of holder in due course as against accommodation party who signed as maker, except where holder has induced maker to become accommodation party, as by actually agreeing that he should not be held liable as principal. *Philadelphia Bond & Mtg. Co. v. Highland Crest Homes, Inc.*, 221 Pa. Super. 89, 288 A.2d 916 (1972).

Where an accommodation party signs in a manner which does not indicate his capacity he is deemed an indorser. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

14. Other matters.

"Envelope draft" presented by beneficiary of letter of credit to issuer was not validly drawn in accordance with letter's terms where (1) it did not contain statement, "Drawn Under National Bank of Austin Letter of Credit No. 8274," as required by such letter, and (2) instrument was not a draft under UCC § 3-104(1)(a), since drawer's alleged signature was on back of instrument and not on line in right-hand corner of face of instrument that was provided for drawer's signature (applying Illinois law, and holding that signature on back of instrument was actually indorsement under UCC § 3-402). *North Valley Bank v. National Bank*, 437 F. Supp. 70 (N.D. Ill. 1977).

Signature of person who signed promissory note on back under words, "Assenting to Terms and Waivers on the Face of this Note," was endorsement under UCC § 3-402, and signer was liable to bank for debt represented by note, upon default of

maker, notwithstanding signer received no consideration for his signature. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 340 N.E.2d 877 (1976).

Where indorsers of note indorsed instrument without clear indication of capacity or intention to qualify status, such signatory became indorser by virtue of UCC § 3-402 and liable for payment of instrument upon dishonor by its payor under UCC § 3-414(1); where note provided that "presentment for payment and notice of nonpayment are hereby waived", indorsers automatically waived presentment or notice pursuant to UCC § 3-511(2). *First New Haven Nat'l Bank v. Clarke*, 33 Conn. Supp. 179, 368 A.2d 613 (1976).

15. In general scope.

Where promissory note was not negotiable under UCC § 3-104(1), liability of signer of such note was not controlled by Uniform Commercial Code provisions governing personal liability of agent who signs on behalf of principal or corporation (see UCC § 3-403). *Central States, S.E. & S.W. Areas, Health & Welfare Fund v. Pitman*, 66 Ill. App. 3d 300, 383 N.E.2d 793 (3d Dist. 1978).

UCC Sec 3-403(2)(b), in common with the other provisions of Article 3, apply only to negotiable instruments and therefore do not apply to a contract of guaranty of payment of the purchase price by a buyer. *Associates Dist. Corp. v. Elgin Organ Ctr., Inc.*, 375 F.2d 97 (7th Cir. Ill. 1967).

16. Agent's authority.

An agent is not authorized under UCC § 3-403 to endorse commercial paper unless otherwise agreed or the endorsement is usually incident to performance of acts that he is authorized to perform for the principal. If within his authority he receives cash for endorsement and delivery of commercial paper payable to the principal, the payer is not responsible for payment of the amount to the principal or its application to the principal's uses. A payee engaged in business ordinarily should deposit collection items for credit to his account. *Farmers Union Coop. Ass'n v. Commercial State Bank*, 187 Neb. 376, 191 N.W.2d 168 (1971).

Where administratrix had endorsed check to order of husband's estate, purported further endorsement as trustee of estate by one who was not trustee was unauthorized and ineffective. *Salsman v. National Community Bank*, 102 N.J. Super. 482, 246 A.2d 162 (1968), *aff'd*, 105 N.J. Super. 164, 251 A.2d 460 (1969).

Where business name and address were printed at top of check and nothing on face of check indicated limitation on authority of agent to sign checks for business obligation, business was liable to holder in due course for amount of checks, even though used for personal obligations of agent. *Jenkins v. Evans*, 31 A.D.2d 597 (3d Dep't 1968).

Where the signatures of persons intending to become partners in a business were affixed to a promissory note representing part of the purchase price by one of their number who negotiated the purchase and later became the managing partner of the business, the party who signed their names to the note was a duly authorized agent as provided in subsec. (1), and they could not later contend that the signatures were forgeries. *Rehrig v. Fortunak*, 39 Pa. D. & C.2d 20 (1966).

17. Agent's liability.

UCC § 3-403(1) does not expressly authorize deceptive agency arrangements whereby the signatory fails to reveal his true identity. (prosecution under 18 USCS § 1014 for making materially false statements in bank-loan application). *United States v. Carr*, 582 F.2d 242 (2d Cir. N.Y. 1978).

Party who signed note as agent for corporation was not personally liable thereon where letters "L.T.G. De.," which signer placed above his signature on note and which stood for "L.T.G. Development, Inc.," sufficiently named person represented, as required by UCC § 3-403(2)(b). *J.P. Sivertson & Co. v. Lolmaugh*, 63 Ill. App. 3d 724, 380 N.E.2d 520 (2d Dist. 1978).

UCC § 3-403(3), providing that the name of an organization preceded or followed by the name and office of an authorized individual is signature made in a representative capacity, does not expressly exempt authorized agent who signs in a representative capacity, naming

his principal, from personal liability. *Grotz v. Jerutis*, 13 Ill. App. 3d 543, 301 N.E.2d 60 (1st Dist. 1973).

A representative signing an instrument is liable personally thereon unless the instrument itself clearly shows that he signed only on behalf of another named on the paper. *Grange Nat'l Bank v. Conville*, 8 Pa. D. & C.2d 616 (1957).

18. —Disclosure of principal.

Under UCC § 3-403(2), president of automobile motor sales corporation was personally liable on checks drawn by him to pay for merchandise furnished to corporation where (1) only the corporation's checking account number appeared on such checks and corporation's name was not written or printed thereon; (2) officer's signature on checks did not indicate that he was signing them in representative capacity; and (3) evidence did not show understanding between payee and drawer that drawer was acting in representative capacity. *A.L. Jackson Chevrolet, Inc. v. Oxley*, 564 P.2d 633 (Okla. 1977).

Where only defendant's signature appeared on promissory note and note did not name any party represented by defendant or demonstrate that defendant had signed it in representative capacity, defendant's unambiguous status as maker of note necessitated conclusion under UCC § 3-401(1), § 3-403(2) and (3), and § 3-413 that he was obligor thereunder and thus appropriate party from whom to seek payment. *Marine Midland Bank v. DiMarzo*, 57 A.D.2d 733 (4th Dep't 1977).

In suit on note executed by president of corporation, where (1) on front of note, immediately underneath the word "signatures", the name of the corporation was printed by hand, (2) immediately below the corporation's name, the word "by" was printed by hand and was followed by the president's signature, (3) below such signature appeared the half-printed, half-script word "President," (4) to the right of the president's signature on the front of the note also appeared the corporation's address, (5) on the back of the note, on the first of two printed lines, the president's signature appeared again, followed by the script abbreviation "pres.," and (6) below such signature, the president's address was also set forth, court held that presi-

dent's indorsement of note was personal indorsement under (1) UCC § 3-402, which provides that unless the instrument clearly indicates that a signature is made in some other capacity, it is an indorsement, and (2) UCC § 3-403(2)(b), which provides that except as is otherwise established between the immediate parties, an authorized representative who signs his own name to an instrument is personally obligated if the instrument does not name the person represented, but does show that the representative signed in a representative capacity. *Lanier v. Bank of Virginia—Potomac*, 39 Md. App. 589, 387 A.2d 614 (1977).

Under UCC § 3-403, one who signs instrument in representative capacity must, if he is to escape personal liability thereon, set out name of his principal before or after his own name and office. *Custom Equip. Co. v. Young*, 564 P.2d 1020 (Okla. Ct. App. 1976).

Where officers of corporation admitted execution of note but claimed that note was executed in representative capacity in behalf of corporation and where note did not give name of principal or any indication that note was signed in representative capacity, makers were personally liable on note as matter of law under UCC § 3-403(2)(a). *Barden & Robeson Corp. v. Ferrusi*, 52 A.D.2d 1061 (4th Dep't 1976).

In action to recover on contract of guaranty on behalf of corporation in which guarantors were officers and thus "representatives" under UCC § 1-201(35), guarantors were personally liable on contract of guaranty under UCC § 3-403, notwithstanding their claims that they signed in representative capacity and that their intention at the time of signing guaranty was not to be bound in their individual capacities, (1) where guaranty did not name any person represented and (2) where there was evidence that bank officials explained to guarantors in detail that personal guaranty would be required of them and that bank relied on their personal obligation in making loan to corporation; burden of proof was on guarantors under UCC § 3-403 to "otherwise establish" that they were not personally liable. *Southern Nat'l Bank v. Pocock*, 29 N.C. App. 52, 223 S.E.2d 518 (1976), cert.

denied, 290 N.C. 94, 225 S.E.2d 324 (1976).

Corporation is "named" within Code § 3-403(b)(1) by use of its assumed name, and that section does not forbid extrinsic evidence to show further, as between original parties, that signer was not personally obligated on note, where such proof is offered not to vary terms of instrument or to show mistake, but rather to explain ambiguity with respect to capacity of signer. *Nichols v. Seale*, 493 S.W.2d 589 (Tex. Civ. App. 1973), rev'd, 505 S.W.2d 251 (Tex. 1974).

Where body of note did not name maker and there was nothing on face of note which showed agency of signer, fact that name similar to that of corporation asserted to be real maker of note appeared in space for address at bottom left of note did not name person represented within meaning of Code § 3-403(2)(b) so as to make question of fact as to whether signer acted in representative capacity. *Southern Oxygen Supply Co. v. de Golian*, 230 Ga. 405, 197 S.E.2d 374 (1973).

Under UCC § 3-403(2) provision that there may be individual liability on an instrument which "names the person represented" but does not indicate his representative capacity, the name of the person represented must clearly appear on the face of the instrument, and such was not the case where the notation "Food for Love Acc't" signified an account and suggested a direction to the drawee rather than a notice to the payee alerting it to any representational capacity in which the signature was executed. *Star Dairy, Inc. v. Roberts*, 37 A.D.2d 1038 (3d Dep't 1971).

Where an individual signed a promissory note as an accommodation indorser and signed as Trustee, his personal liability was unaffected, since he failed to identify the trust for which he was acting. *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968).

19. —Representative capacity; sufficient indication.

Corporation officer who signed corporate note by placing his name on line below typed name of corporation and after typed word "By," and who indicated capacity in which he signed by writing on another line word "President" after typed

word "Individually," was relieved from liability under UCC §§ 3-401(1) and 3-403(2)(a), since handwritten word "President" on "Individually" line characterized officer's act as that of official of corporation. *Donald M. Clement Contractor v. Demon, Inc.*, 364 So. 2d 204 (La. App. 1978).

Under UCC § 3-403(3), president of corporation was not personally liable on promissory note where note was signed, "Executive Funding Corporation by Vincent P. Salvione, President." *Donaghey v. Executive Funding Corp.*, 45 Ill. App. 3d 951, 360 N.E.2d 472 (1st Dist. 1977).

Where maker of check was "McCann Industries Inc., Pay Roll Account, (signed) J.Y. McCann" liability was that of corporation and not individual defendant. *Bennett v. McCann*, 125 Ga. App. 393, 188 S.E.2d 165 (1972).

An officer of a corporation manually signing a check is not bound thereby because the requirement of identifying his principal and his representative capacity are met when the check carries the name and address of the corporate drawer, the notation that it is a payroll check, and carried the drawer's printed name as drawer with lines thereunder for a manual signature; and the difference between a check and a note confirms this conclusion since the check was purportedly drawn on a particular bank account set up for the payment of wages, over which the individual signer would by definition have no control. *Mott v. Sewickley Sav. & Loan Ass'n*, 211 Pa. Super. 357, 236 A.2d 541 (1967).

Individual who signed check without specifically designating his representative capacity was not individually liable to party cashing check, since check was designated payroll check with corporate name printed at top and in maker's position above individual signature. *Pollin v. Mindy Mfg. Co.*, 211 Pa. Super. 87, 236 A.2d 542 (1967).

Defendant unquestionably indorsed note in his corporate capacity, where his representative capacity and name of corporation were appropriately designated on both sides of note. *Trenton Trust Co. v. Klausman*, 94 Montg. County L. Rep. 203 (Pa. 1971).

20. — Insufficient indication.

Where words "We promise to pay" in note were followed by typewritten identification of makers as "Walton Drug Co., Inc., d/b/a Touchton Drugs and/or Bob Edrington, Owner," and where owner, who alleged that he signed note in representative capacity only, signed note as "Bob Edrington, President," owner could not escape personal liability on note under UCC § 3-403(3), since use of words "and/or" in identification of makers destroyed any effect that naming of principal (Walton Drug Co.) would have had as limitation on alleged agent's (Edrington's) capacity, especially in view of fact that such "agent" signed instrument on line reserved for his signature as an individual. *Havatampa Corp. v. Walton Drug Co.*, 354 So. 2d 1235 (Fla. App. 1978).

UCC § 3-403(2)(a) requires that an agent or representative must show that he is actually representing someone. If the instrument neither names the entity represented nor shows that the representative signed in a representative capacity, the person who signed the instrument is personally obligated (where check in suit had on its face only the words "Investor's Publishing Co.," and such words were followed only by signatures of defendants with no designation of capacity in which they signed). *Sterling Press v. Pettit*, 580 P.2d 599 (Utah 1978).

Maker of promissory note who signed instrument with her own name "Anita Willis" on one line, and who also wrote "Anita Willis, Inc." on line below her name, was personally obligated on note under UCC § 3-403(2)(b), notwithstanding appearance on instrument of both her personal signature and also signature of her corporation, since instrument did not show in any way that she had signed it in a representative capacity. *DeBlanco v. Dooley*, 164 N.J. Super. 155, 395 A.2d 909 (App. Div. 1978).

Under UCC § 3-403(2)(b), signer of blank check, drawn against account of corporation of which signer was president and sole owner without indicating after his signature title of office that he held in such corporation, was personally liable on check. *Miller & Miller Auctioneers, Inc. v. Mersch*, 442 F. Supp. 570 (W.D. Okla. 1977).

Where only defendant's signature appeared on promissory note and note did not name any party represented by defendant or demonstrate that defendant had signed it in representative capacity, defendant's unambiguous status as maker of note necessitated conclusion under UCC § 3-401(1), § 3-403(2) and (3), and § 3-413 that he was obligor thereunder and thus appropriate party from whom to seek payment. *Marine Midland Bank v. DiMarzo*, 57 A.D.2d 733 (4th Dep't 1977).

Person who drew checks on corporation that were payable to himself as officer of such corporation for future legal services to be rendered to it, but who failed to sign checks in representative capacity, was personally obligated on such checks under UCC § 3-403(2)(b) to holder in due course who purchased checks without notice of any impediment to their collection, since purpose of UCC § 3-403(2)(b) is to prevent drawer or maker of instrument, who fails to indicate his representative capacity thereon, to contest his individual liability on instrument as against holder in due course. *Financial Assocs. v. Impact Mktg. Inc.*, 90 Misc. 2d 545 (1977).

In suit on two dishonored checks drawn by defendant, where each check was imprinted with name of corporation and was signed by defendant, but neither signature was followed by additional language indicating that defendant had signed only in representative capacity, defendant under UCC § 3-403(2)(b) was personally liable on obligations evidenced by checks in absence of parol evidence showing that he had signed only in representative capacity. *Seamon v. Acree*, 142 Ga. App. 662, 236 S.E.2d 688 (1977).

President of corporation who signed corporate check, which did not show that he signed in representative capacity, was personally liable on check where he failed to show that he signed instrument in representative capacity; fact that payee had received on numerous occasions other checks drawn on corporation's bank account by other officers of corporation and that payee had never looked to those officers for payment did not constitute evidence of prior understanding or prior dealings between parties sufficient to establish signature in representative capac-

ity, since prior dealings shown were not between president of corporation and payee, but between other officers of corporation and payee. *Griffin v. Ellinger*, 530 S.W.2d 329 (Tex. Civ. App. 1975), writ granted, 19 Tex. Sup. Ct. J. 229 (Tex. 1976), aff'd, 538 S.W.2d 97, 97 A.L.R.3d 791 (Tex. 1976).

Where officer of corporation signed note for loan to corporation in blank designated "Co-Maker," and also signed "Co-Maker's/Guarantor's Statement" which clearly stated that he was personally liable on such note, officer did not sign note in corporate capacity and was liable on note following default by corporation. *Citibank E. v. Minbiole*, 50 A.D.2d 1052 (3d Dep't 1975).

Drawer was personally obligated on check, notwithstanding his claim that he signed in representative capacity as president or general manager of corporation, where drawer's signature did not show title of his office. *American Exch. Bank v. Cessna*, 386 F. Supp. 494 (N.D. Okla. 1974).

Debtor who claimed to have signed promissory note as representative of corporation and not individually was personally liable under UCC §§ 3-307(b) and 3-403(b)(2) where instrument itself did not indicate that debtor was signing in representative capacity and where assertion that he intended to sign, and did sign, in representative capacity was insufficient to raise issue of fact to "otherwise establish" his representative capacity. *Seale v. Nichols*, 505 S.W.2d 251 (Tex. 1974).

Note bearing signature of individual and name of construction company was insufficient to establish that individual had not signed in individual capacity. *Vickers v. Fireman's Fund Am. Ins. Co.*, 445 S.W.2d 530 (Tex. Civ. App. 1969).

Note named person represented but did not show that signer of note was signing in a representative capacity; held, signer was personally bound, and holder in due course could recover against both person represented and signer. *O.P. Ganjo, Inc. v. Tri-Urban Realty Co.*, 108 N.J. Super. 517, 261 A.2d 722 (L. Div. 1969).

Note, bearing signature of individual with corporate name underneath without any indication that individual held any

office with corporation, is joint obligation of corporation and individual, who is personally liable thereon. *Perez v. Janota*, 107 Ill. App. 2d 90, 246 N.E.2d 42 (1st Dist. 1969).

Where a conditional sales contract identified the company the defendant was representing, but did not show he signed the instrument in a representative capacity, the trial judge did not err in finding defendant personally liable. *Blayton v. Ford Motor Credit Co.*, 118 Ga. App. 517, 164 S.E.2d 262 (1968).

A maker who affixes his signature to a promissory note immediately beneath the name of a corporation but with nothing to indicate he executed the instrument on behalf of the corporation in a representative capacity was held personally liable for the payment of the note; but it should be noted that by reason of the Dead Man's Statute it was impossible for the individual maker to testify concerning the transaction. *Bell v. Dornan*, 203 Pa. Super. 562, 201 A.2d 324 (1964).

A person was liable on the note where he, without indicating that he did so in a representative capacity, signed a promissory note in the following manner and form: "Rischall Electric Co. Inc. [and under this designation] Harold M. Rischall." *Universal Lightning Rod, Inc. v. Rischall Elec. Co.*, 1 Conn. Cir. Ct. 623, 192 A.2d 50 (1963).

Where a note was signed, on successive lines, "John P. Conville," "Doris E. Conville," "Hughesville Mfg. Co. Inc.," and another note was signed, on successive lines, "Hughesville Mfg. Co.," "John P. Conville," "Doris E. Conville," the designated individuals were personally liable thereon, even though they were the authorized representatives of the company and intended to sign for it. *Grange Nat'l Bank v. Conville*, 8 Pa. D. & C.2d 616 (1957).

21. —Representative and individual capacity.

Fact that individual defendants signed promissory note individually with specificity and then signed note again with their signatures preceded by word, "by," indicated that they also signed note in representative capacity, although note did not reveal identity of person or corporation represented, and thus under UCC

§ 3-403(2)(b) parole testimony was admissible in suit between immediate parties to establish whether individual defendants signed note in representative, as well as individual, capacity; however, evidence, including parole testimony, failed to establish that individual defendants signed in representative capacity so as to obligate corporate defendants. *Dynamic Homes, Inc. v. Rogers*, 331 So. 2d 326 (Fla. App. 1976).

Individuals cosigned noted on left-hand side beneath name of corporation and in representative capacity as officers thereof; these same individuals signed right-hand side of note individually; held, they were personally liable on note even though they were acting in reliance on manager of corporation that they would not be personally liable. *Manufacturers Hanover Trust Co. v. Eisenstadt*, 64 Misc. 2d 397 (1970).

Where president of corporation twice signed note, once below typewritten name of corporation and once above his own typewritten name, parties clearly intended that president would be personally liable on instrument, and insertion of abbreviation "Pres." was inadvertence performed out of habit or rote not intended to alter undertaking of parties. *Corbin v. Safety Container Corp.*, 93 Montg. County L. Rep. 22 (Pa. 1970).

22. Practice and procedure.

Where seller sought to recover total amount of purchase price (see UCC § 2-709(1)(a)) of pipe and did not seek recovery on check given by buyer in partial payment as to which payment had been stopped, trial court incorrectly held that buyer's personal liability for purchase price was governed by UCC § 3-403(2)(b), dealing with circumstances under which authorized representative can be held personally liable on commercial paper (ovrld on other grounds *Reams v. Tulsa Cable Television, Inc.* (Okla.) 604 P.2d 373; stating, on remand of cause, that issue was not who was legally liable on check, but who was liable on contract to purchase the pipe). *Culpepper v. Lloyd*, 583 P.2d 500 (Okla. 1978), overruled on other grounds, *Reams v. Tulsa Cable Television, Inc.*, 604 P.2d 373 (Okla. 1979).

Under the formula in UCC § 3-403(2)(b), if the form of the agent's signa-

ture is such that reasonable persons examining the face of the instrument could arrive at different conclusions concerning whether the parties intended the agent to be bound, the agent will be bound, except as is otherwise established between the immediate parties. *Havatampa Corp. v. Walton Drug Co.*, 354 So. 2d 1235 (Fla. App. 1978).

Suit may not be maintained or judgment obtained on promissory note against undisclosed principal whose signature does not appear thereon; thus, complaint based on promissory note alleging that maker acted as agent of defendants, did not state cause of action against defendants where their names did not appear on note and it was not alleged that note disclosed that agent signed in any capacity other than for himself individually. *Ness v. Greater Ariz. Realty, Inc.*, 21 Ariz. App. 231, 517 P.2d 1278 (1974).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of \$300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of \$300 should bear signature of two specified signatories, one-year statute of limitations contained in UCC § 4-406(4) attached to each separate check bearing unauthorized signature, and new one-year period began to run with each subsequent check at moment it was made available to customer. *Neo-Tech Sys. v. Provident Bank*, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

Where promissory note was signed by corporation president with his signature, followed by dash and printed name of corporation, way in which note was signed was ambiguous; however, there was sufficient evidence to support finding that corporate president was individually and personally liable on note, and testimony of payee to effect that he was loaning money to corporation, not to corporation president, did not constitute judicial admission so as to bar his recovery from corporation president. *Geer v. Farquhar*, 270 Or. 642, 528 P.2d 1335 (1974).

Where promissory note was signed with handprinted name of sole proprietorship,

immediately below which appeared defendants' signatures without disclosing a representative or agency relationship, court erred in denying defendants' motion to open judgment by confession to allow defendants to establish that as between them and payee of note it was agreed that signers signed only in representative capacity, and that at time note was executed, payee knew signers were unauthorized to sign in such capacity, in which case signers would have meritorious defense under Code § 3-404(1); ambiguous evidence was insufficient to meet signers' burden of overcoming presumption of consideration for promissory note. *First Nat'l Bank v. Achilli*, 14 Ill. App. 3d 1, 301 N.E.2d 739 (2d Dist. 1973).

Where check contained on top left-hand side printed legend "Oste Bros." and beneath it an address, and defendant's signature on bottom right-hand side with nothing to indicate that signature was in representative capacity, burden was on defendant to disprove personal liability. *Carleton Ford, Inc. v. Oste*, 1 Mass. App. Ct. 819, 295 N.E.2d 402 (1973).

Although defendant's indorsement on promissory note was followed by notation "Sec. & Treas.," apparently connoting his representative capacity, jury should consider, on question of defendant's individual liability, all of circumstances of signing, including fact that complete, correct name of corporate defendant maker was not utilized, that defendant indorsed note on its reverse side, rather than on line for maker on face of note, and that he may have considered there to have been insufficient space in which to indorse on face of note. *National Bank v. Ament*, 127 Ga. App. 838, 195 S.E.2d 202 (1973).

In suit to hold agent personally liable on note, judgment on pleadings is improper where answer raises factual issue of understanding of parties as to signature in representative capacity and form of signature indicates representative capacity even though principal is not named. *Kramer v. Johnson*, 121 Ga. App. 848, 176 S.E.2d 108 (1970).

In determining whether a person has signed in a representative capacity, it is necessary to examine the entire instrument. *Mott v. Sewickley Sav. & Loan*

Ass'n, 211 Pa. Super. 357, 236 A.2d 541 (1967).

Where one of the parties to the instrument contended that her signature was affixed in a representative capacity but through accident and mistake or inadvertence that fact was not shown on the note, and the payee contended that such party signed individually and that her signature and that of her husband, in their capacity as officers of the corporation, were omitted inadvertently, the result was that both parties alleged a mistake in the execution of the note, and the lower court properly exercised its discretion in reopening judgment entered by confession on the note. *Pittsburgh Nat'l Bank v. Kemilworth Restaurant Co.*, 202 Pa. Super. 238, 195 A.2d 919 (1963).

23. —Pleading.

Unless specifically denied, the authority of a person to sign a check as agent is admitted. *Gate City Furn. Co. v. Rumsey*, 115 Ga. App. 753, 156 S.E.2d 221 (1967).

Under an Arkansas pleading statute, a maker sued personally on a promissory note could not, under a plea of general denial, defend on the ground that he had executed the paper in a representative capacity, the exception provided by ¶ (b) of subd (2) of this section, for the point could only be raised under a special plea to that effect. *Chiles v. Mann & Mann, Inc.*, 240 Ark. 527, 400 S.W.2d 667 (1966).

24. —Evidence and burden of proof.

Summary judgment was properly granted to the holder of a series of negotiable promissory notes where an authorized representative signed his own name to the instruments, which named the principal represented but did not show that the representative signed in a representative capacity, since to bring a note within the exception clause of section 3-403 (subd [2], par [b]) of the Uniform Commercial Code, which provides that an authorized representative who signs his own name to an instrument is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representa-

tive capacity, except as otherwise established between the immediate parties, there must be more than the mere self-serving allegation of the signer's subjective intent to sign as representative; to escape personal liability, the signer must establish an agreement, understanding or course of dealing to the contrary, and without an affirmative demonstration that the taker of the note knew or understood that the signer intended to execute the instrument in a representative status only, there can be no defense that, notwithstanding the form of the note, representative liability was otherwise established between the parties. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068 (1978).

25. —Parol evidence; admissible.

As between the immediate parties to a negotiable instrument, parol evidence is admissible under UCC § 3-403(2)(b) to show the parties' intention where the instrument names the person represented, but does not show that the person who signed the instrument signed it in a representative capacity. In such a case, there is a presumption that the instrument was signed in an individual capacity, and the person who signed it has the burden of overcoming that presumption (holding that trial court committed reversible error in excluding parol testimony concerning understanding of parties as to defendant's capacity in signing note sued on). *Rosedale State Bank & Trust Co. v. Stringer*, 2 Kan. App. 2d 331, 579 P.2d 158 (1978).

In action by payee against drawer of dishonored corporate checks, where name and address of the corporation appeared at top of each check, and where drawer simply signed his name to each check and there was no indication on any check that drawer's signature had been affixed in representative capacity as officer, director, or shareholder of such corporation, drawer signed checks in individual capacity and was personally liable thereon under UCC § 3-403(2)(b), "except as otherwise established between the immediate parties." In such case, trial court erred in dismissing plaintiff's complaint, and at trial of cause relevant parol evidence would be admissible to show intention of

parties as to whether drawer had signed checks in representative capacity. *Medley Harwoods, Inc. v. Novy*, 346 So. 2d 1224 (Fla. App. 1977).

Parol evidence was admissible to show intention of parties with respect to check which was ambiguous on its face as to whether cosignor had signed as comaker or in representative capacity. *Speer v. Friedland*, 276 So. 2d 84 (Fla. App. 1973).

In suit by payee of promissory note allegedly signed by individual defendant as representative of corporate defendant, even though there was no indication on instrument that individual defendant's signature was signed in representative capacity, parol evidence was admissible under UCC § 3-403(2)(b) to show that individual defendant had signed in representative capacity because (1) action was between immediate parties to instrument, and (2) name of individual defendant's alleged principal—namely, the corporate defendant—appeared on face of instrument. *Sullivan County Wholesalers, Inc. v. Sullivan County Dorms*, 59 A.D.2d 628 (3d Dep't 1977).

In action by endorser of promissory note against its maker where plaintiff alleged that he was manager of branch office of life insurance company, that defendant purchased insurance contract for which he executed and delivered note payable to bank, and that plaintiff endorsed note as accommodation party, where note was endorsed without recourse and was signed "Duane S. Wolfram (Manager)", and where plaintiff alleged that he paid note when defendant defaulted at due date: (1) under UCC § 3-403(2)(b) parole evidence was admissible to show whether plaintiff signed note as representative of insurance company or whether he signed note in capacity of sole proprietor making him individually liable and, thus, whether plaintiff had capacity to sue on note. *Wolfram v. Halloway*, 46 Ill. App. 3d 1045, 361 N.E.2d 587 (1st Dist. 1977).

Under UCC § 3-403(2)(b), comaker of promissory note should have been permitted to produce evidence to show that he had signed note in representative capacity where word "President" appeared after comaker's signature, but name of corporation he purported to represent was not on

instrument. *Lowry v. Lomire*, 143 Ga. App. 479, 238 S.E.2d 594 (1977).

In action by payee of promissory note parol evidence was admissible to show that defendant endorsed note in representative capacity, and not as individual, where name of corporation was typewritten on maker's signature line, president of corporation signed his name on line below with designation "President," and defendant signed his name on third line without indication of agency status, but it was conceded that he signed note as maker in his capacity as officer of corporation, and where signatures of same men, including defendant's endorsement, appeared on reverse side of note in same form. *Weather-Rite, Inc. v. Southdale Pro-Bowl, Inc.*, 301 Minn. 346, 222 N.W.2d 789 (1974).

Face of chattel mortgage note represented corporate obligation that did not personally obligate defendants whose signatures appeared on note with no designation of representative capacity, where parties all testified that it was their intention to create corporate obligation, contemporaneously executed security agreement clearly showed that corporation was party to this loan transaction, and strict application of Code § 3-403(2)(a) would create result that was contrary to clearly understood intentions of original parties. *First Bank & Trust Co. v. Post*, 10 Ill. App. 3d 127, 293 N.E.2d 907 (1st Dist. 1973).

Evidence concerning intention of parties on issue of personal versus corporate liability should have been admitted in action on note where company was named but defendant's signature did not show any representative capacity. *DeGolian v. Southern Oxygen Supply Co.*, 127 Ga. App. 504, 194 S.E.2d 265 (1972), rev'd on other grounds, 230 Ga. 405, 197 S.E.2d 374 (1973).

Where creditor-payee was urged by defendant indorser to forebear from carrying out replevin against goods of debtor-maker, and did so upon defendant's guarantee of payment and credit, creditor-payee was entitled to introduce parol evidence to establish intent of defendant in signing note, and to sue defendant directly and primarily on the notes not only as accommodation indorser-guarantor but also as de facto co-maker. *Jamaica*

Tobacco & Sales Corp. v. Ortner, 70 Misc.2d 388 (1972).

Extrinsic evidence was admissible to establish understanding of parties with respect to capacity of corporate officers, where note contained indorsements of all 3 officers and their corporate offices as well as indorsement in corporate name followed by signature and office of one of officers. *Trenton Trust Co. v. Klausman*, 222 Pa. Super. 400, 296 A.2d 275 (1972).

A note reciting "we promise to pay" and signed with both the name of a corporation and an individual is ambiguous so that as between the parties evidence is admissible to show the character in which the individual signed. *Slayton v. Lomar Constr. Corp.*, 4 U.C.C. Rep. Serv. 955 (1967, NY Sup.).

By a Pennsylvania amendment in 1959 the stringent rule of subsection (2) of this section which made a signing agent personally liable unless the instrument itself both named the principal and disclosed the agency relationship was changed to provide that an agent who has complied with one of the two statutory requirements may show the other requirement by evidence outside the instrument, and this rule was applied in the case of a promissory note executed on behalf of a corporation by an individual who did not show that he executed the instrument in a representative capacity. *Walton v. William H. Corby, Inc.*, 33 Pa. D. & C.2d 703 (1963).

26. — Inadmissible.

UCC § 3-403(2)(a), providing that authorized representative who signs his own name to an instrument is personally obligated if instrument neither names person represented nor shows that representative signed in representative capacity, is in accord with Illinois case law which holds that one who signed as maker without qualification cannot introduce, in action by payee to enforce such instrument, parol evidence to alter capacity in which he signed. *Metropolitan Lumber Co. v. Dodge*, 567 S.W.2d 729 (Mo. Ct. App. 1978).

To make commercial paper freely negotiable without undue risk, the basic law is that resort to extrinsic proof is impermissible when the face of the instrument itself does not serve to put its holder on

notice of the limited liability of a signer. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068 (1978).

Under UCC § 3-402, corporate officer's unqualified signature on back of note was endorsement where there was no clear indication within four corners of instrument that he was acting in representative capacity, and under UCC § 3-403(2)(b) parol evidence was not admissible to show that he was acting not individually but in representative capacity. *Norfolk County Trust Co. v. Vichinsky*, 5 Mass. App. Ct. 768, 359 N.E.2d 59 (1977).

Where instrument for payment of money was written on personalized check form, individual defendants' names were printed at top of form and their signatures appeared at bottom right-hand corner, where name of bank and account number were crossed out, but remainder of form was filled in as check would be and was payable to plaintiff's order in amount of \$12,000 and where it was dated December 31, 1972, and notation "Note-6% Int." appeared at lower left-hand corner, instrument was negotiable demand instrument under UCC § 3-108, individual defendants were personally liable thereon under UCC § 3-403(2), and parol evidence was inadmissible to disestablish such obligation; however, under UCC § 3-401, corporate defendant, whose signature did not appear on instrument, was not liable on it. *Kaminsky v. Van Dusen*, 88 Misc.2d 833 (1976).

Where corporation admitted liability on promissory notes signed by officers of corporation in their representative capacities, it was error to have allowed parol evidence as to individual liability thereon where completely inconsistent with written instrument. *Wright v. Seco Metals, Inc.*, 38 Mich. App. 410, 196 N.W.2d 341 (1972).

27. — Sufficiency of evidence.

In action on promissory note, defendant who merely signed note with word "by" preceding his name was liable, under UCC § 3-403(2)(a), on note in individual capacity as maker where note did not name person represented or show that defendant had signed instrument in representative capacity. In such case, word "by" preceding defendant's signature,

without more on face of note, did not show that defendant had signed note in representative capacity, and extrinsic evidence was not admissible to show that defendant had signed instrument as representative of corporation. *Giacalone v. Bernstein*, 348 So. 2d 679 (Fla. App. 1977), cert. denied, 354 So. 2d 980 (Fla. 1977).

There was sufficient evidence to raise question of fact as to whether endorser had actual, apparent or implied authority to endorse three checks on behalf of corporate payee where, inter alia, endorser had authority to pick up checks from various customers of payee, including customer who drew checks in question, solicit jobs and make bids on contracts, sign his own name to business letters on payee's stationary, and make deposits for payee in its bank account. *W.R. Grimshaw Co. v. First Nat'l Bank & Trust Co.*, 563 P.2d 117 (Okla. 1977).

Under UCC § 3-403(2)(b), authorized representative was liable on note that he signed "Farnan Advertising Public Relations by A. J. Farnan," despite such representative's contention that he was not liable because records of secretary of state showed that true name of principal was "Farnan Advertising Agency, Inc." *Farnan v. National Bank*, 142 Ga. App. 777, 236 S.E.2d 923 (1977).

In action to obtain deficiency judgment against president of corporation after sale of collateral securing note, corporation president was entitled to introduce parol evidence to establish requisite agency status to avoid personal liability where note was signed "LaFayette Transportation Service (Seal)," followed by signature of corporation president, "x(s) James L. DeBruhl (Seal)," and evidence was sufficient to support finding that payee of note knew or should have known that corporation president was acting for and as president of corporation and that he did not sign note and security agreement as individual, but as president of corporation. *North Carolina Equip. Co. v. DeBruhl*, 28 N.C. App. 330, 220 S.E.2d 867 (1976), review denied, 289 N.C. 451, 223 S.E.2d 160 (1976).

In action under usury statute by individual signers of corporate promissory note against bank to recover interest and

penalty on allegedly usurious loan, whether note was usurious depended on construction of note in accordance with nature of parties' obligations as represented by their signatures and there was sufficient evidence to present disputed fact question as to capacity in which plaintiffs signed note, although five signatures on note were unqualified individual signatures and could leave those signing personally obligated under UCC § 3-403(2)(a), where bank claimed that they signed as guarantors of corporate loan and sought to introduce parol evidence under UCC § 3-415(3) to establish such claim and where there was evidence that it was understood by parties that interest rate being charged was not usurious interest because it was being charged to corporation and not individuals. *Pinemont Bank v. DuCroz*, 528 S.W.2d 877 (Tex. Civ. App. 1975), ref. n.r.e (Jan. 28, 1976).

Where three-man law partnership was dissolved when one partner left firm but other two partners continued practice under new partnership, where bank account of former partnership was kept open for purpose of depositing receivables of former firm, where check made payable to withdrawn partner and one of his former partners was received by new partnership, bookkeeper rubber-stamped check with indorsement of former partnership, bank deposited proceeds in former partnership account, and where new partnership subsequently withdrew money from former partnership account and withdrawn partner sued bank and former partner alleging conversion of check, judgment in favor of bank and former partner was upheld on two grounds: (1) Since indorsement may be made by agent under UCC § 3-403, and agent's authority may be actual, implied or apparent under UCC § 1-201(43), there was sufficient evidence to support conclusion that apparent authority existed for affixing rubber stamp in lieu of withdrawn partner's signature; (2) Record further supported defense predicated upon UCC § 3-419(3), since there was expert testimony to effect that under circumstances handling of check was in accord with reasonable commercial standards and, although bank knew

former partnership had dissolved, it was logical for its account to be kept open for purpose of depositing fees which were subsequently collected for services rendered by old firm. *Keane v. Pan Am. Bank*, 309 So. 2d 579 (Fla. App. 1975).

In an action brought prior to the effective date of the UCC, the court held that as between the parties in Maryland although a person who signed a note made by a corporation is prima facie liable to the payee, if there is conflict in the evidence relative to the circumstances, the individual who signed that note is not liable if he affirmatively shows an understanding between him and the payee that there was to be no personal liability, and it observed that this same principle was embodied in the UCC. *Leahy v. McManus*, 237 Md. 450, 206 A.2d 688 (1965).

IV. DECISIONS UNDER FORMER UCC § 75-3-402.

28. In general.

As between the indorsers on a note, the indorser whose name appeared first on back of note was liable first for payment of note and his discharge by receiver of payee bank by authority of chancery court discharged indorser whose name appeared second on back of note. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

Where first indorser on note payable to bank paid bank receiver certain sum and receiver gave receipt releasing indorser from further liability on note and the compromise settlement was made by authority of chancery court decree authorizing discharge of first indorser and holding of second indorser was unauthorized where made without second indorser's consent. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

The two statutory provisions regarding qualified indorsement and indorsement generally must be read together. *Divelbiss v. Burns*, 161 Miss. 724, 138 So. 346 (1931).

Indorser intending to qualify indorsement without using words "without recourse" must use words clearly expressing such intention. *Divelbiss v. Burns*, 161 Miss. 724, 138 So. 346 (1931).

Indorsement on note reading "this is to certify that I have this day sold all my

right, title and interest to the within note and mortgage" held "general indorsement in due course." *Divelbiss v. Burns*, 161 Miss. 724, 138 So. 346 (1931).

One writing name in blank on back of note is an endorser. *Skinner v. Mahoney*, 140 Miss. 625, 106 So. 211 (1925).

One signing an instrument other than as maker, drawer, or acceptor, is endorser unless contrary intent appears. *Taylor v. Ross*, 129 Miss. 536, 92 So. 637 (1922); *Carter v. Jennings*, 134 Miss. 263, 98 So. 687 (1924).

29. Decisions under Code 1942 § 60.

Bank not "holder for value" of check endorsed in blank and deposited for collection. *Bank of Gulfport v. Smith*, 132 Miss. 63, 95 So. 785 (1923).

Bank paying a depositor full amount of check on same day presented becomes holder for value. *Bank of Gulfport v. Smith*, 132 Miss. 63, 95 So. 785 (1923).

Rights of bank and methods of procedure upon presentation by deposit of check against conditional credit stated. *Bank of Gulfport v. Smith*, 132 Miss. 63, 95 So. 785 (1923).

"Holder for value" is one who has given value for the instrument. *Bank of Gulfport v. Smith*, 132 Miss. 63, 95 So. 785 (1923).

Unauthorized alteration of note may be ratified by owner. *Coulson v. Stevens*, 122 Miss. 797, 85 So. 83 (1920).

Agent authorized to accept and collect note could not alter it or ratify alteration. *Coulson v. Stevens*, 122 Miss. 797, 85 So. 83 (1920).

"Implied authority" of agent is only that which is proper, usual, and necessary to exercise of authority expressly granted. *Coulson v. Stevens*, 122 Miss. 797, 85 So. 83 (1920).

30. Decisions under Code 1942 § 61.

Where a note given to a supplier by a corporate wholesaler was signed by the wholesaler's vice president as the vice president, and contained a marginal notation that the note was secured by the signatories signing thereon, and the first part of the notation was part of the printed form of the note, but the last part was typewritten, and the vice president denied that the note contained the type-

written words when it was signed by him, the evidence was insufficient to hold the vice president personally liable on the note. Case apparently decided under former § 61. *Laher Spring & Elec. Car Corp. v. Breckenridge*, 221 So. 2d 718 (Miss. 1969).

Where person signing instrument as agent does so with authority he is not liable thereon but if not duly authorized he is personally liable on such instrument. *Shemper v. Hancock Bank*, 206 Miss. 775, 40 So. 2d 742 (1949).

Where guardian signed instrument as agent for partnership consisting of minor ward and mother, minor was not bound, and since partnership of only one person

cannot exist, the partnership was nonexistent and as agent for nonexistent principal guardian is liable personally on note. *Shemper v. Hancock Bank*, 206 Miss. 775, 40 So. 2d 742 (1949).

An officer of a corporation who signed the corporate name by himself to an accommodation note which was beyond the power of the corporation to undertake was not personally liable on the note. *Ketcham v. Mississippi Outdoor Displays, Inc.*, 203 Miss. 52, 33 So. 2d 300 (1948).

If execution of note signed by defendant as administratrix was not authorized by law, defendant was personally liable on note. *Orgill Bros. v. Perry*, 157 Miss. 543, 128 So. 755 (1930).

RESEARCH REFERENCES

Am Jur. 18 Am. Jur. Legal Forms 2d, Uniform Commercial Code §§ 253:2061 et seq. (commercial paper, signature by authorized representative).

§ 75-3-403. Unauthorized signature.

(a) Unless otherwise provided in this chapter or Chapter 4, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of this chapter.

(b) If the signature of more than one (1) person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking.

(c) The civil or criminal liability of a person who makes an unauthorized signature is not affected by any provision of this chapter which makes the unauthorized signature effective for the purposes of this chapter.

SOURCES: Former § 75-3-403: Codes, 1942, § 41A:3-403; Laws, 1966, ch. 316, § 3-403; Laws, 1992, ch. 420, § 41, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-404.

11. In general.
12. Payment upon forged signature; liability.

13. Good faith.
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III. DECISIONS UNDER FORMER STATUTES.

17. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-404.

11. In general.

Under UCC § 3-404(1), forged indorsements are inoperative as signatures of payee, regardless of whether they are indorsements for deposit or indorsements in blank, unless such indorsements are ratified by person whose name is signed or such person is precluded from denying authority to make indorsements. *Mott Grain Co. v. First Nat'l Bank & Trust Co.*, 259 N.W.2d 667 (N.D. 1977).

In a case where forged indorsements were placed upon a check, it was said that the forged indorsements were wholly inoperative as the signature of the payee under §§ 3-404(1) and 1-201(43), and that this was so both as to restrictive indorsements for deposit under § 3-205(c) and as to indorsements in blank under § 3-204(2). *Stone & Webster Eng'g Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358, 99 A.L.R.2d 628 (1962).

12. Payment upon forged signature; liability.

Depository bank which accepted check payable to two joint payees, forwarded check to drawee bank for collection, and credited full amount of check's proceeds to account of joint payee who, without authority of other joint payee, had indorsed check in names of both payees, was liable to joint payee whose signature had wrongfully been indorsed, since unauthorized indorsement of such signature was inoperative under UCC § 3-404(1) and collection of proceeds of check based on an unauthorized indorsement constitutes conversion. *Equipment Distribs., Inc. v. Charter Oak Bank & Trust Co.*, 34 Conn. Supp. 606, 379 A.2d 682 (Super. Ct. 1977).

Bank which was authorized depository of plaintiff was liable to plaintiff in conversion under UCC § 3-404(1) for face amount of 17 third-party checks which were made payable to plaintiff and were indorsed without authority by plaintiff's manager and deposited in manager's per-

sonal account, where bank failed to inquire as to manager's authority to negotiate such checks. *Mott Grain Co. v. First Nat'l Bank & Trust Co.*, 259 N.W.2d 667 (N.D. 1977).

In action by bank against drawer of check deposited with it, where signature of payee as purported indorser was forged and where below it was added signature of another entity, which was authorized signature, forged signature of payee was inoperative to make bank holder nor did presumably valid second signature convert order paper to bearer paper. *Sumiton Bank v. Funding Sys. Leasing Corp.*, 512 F.2d 774 (5th Cir. Ala. 1975).

Where person who presented check to collecting bank did not have authority to negotiate check, collecting bank could not become holder of check based upon unauthorized endorsement, and hence could not become holder in due course. *Thieme v. Seattle-First Nat'l Bank*, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Where an individual was granted a loan from Bank 1 for the purpose of buying a car from his father-in-law, and Bank 1 issued its check for the loan amount made payable to the borrower and his father-in-law, which check was subsequently cashed at Bank 2 upon the borrower's endorsement and an unauthorized endorsement purportedly the signature of the father-in-law, and such check was eventually presented to Bank 1 and paid by it, Bank 2 was liable to Bank 1 under UCC §§ 3-404(1) and 4-207(2)(b). *Franklin Nat'l Bank v. Chase Manhattan Bank*, 68 Misc. 2d 880 (1972).

Under UCC § 3-404(1), a bank breaches its agreement with a customer when it pays the holder of a forged check, and it is this breach which constitutes the customer's cause of action against a bank to recover sums paid out on checks bearing forged signatures. *Hardex-Steubenville Corp. v. Western Pa. Nat'l Bank*, 446 Pa. 446, 285 A.2d 874 (1971).

Payments made on forged or unauthorized endorsements are at the peril of the bank unless it can claim protection upon some principle of estoppel. *Gotham-Vladimir Adv., Inc. v. First Nat'l City Bank*, 27 A.D.2d 190 (1st Dep't 1967).

As between the payor bank and its customer, the bank bears the risk of mak-

ing payment upon a forged indorsement of the payee's name. *Thompson Maple Prods., Inc. v. Citizens Nat'l Bank*, 211 Pa. Super. 42, 234 A.2d 32, 1967.

Payee of check has cause of action against collecting bank which has paid check made payable to joint payees bearing indorsement by one payee signing his own name and forging that of his joint payee. *Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank*, 253 Cal. App. 2d 368 (2d Dist. 1967).

Since chief clerk of county commissioners, a public official, did not have authority, either actual or implied, to indorse checks belonging to the county or to an institution district, and to receive cash therefor, and the defendant bank, in dealing with the chief clerk, was bound to recognize his lack of authority in that regard, defendant bank was not the holder in due course, and county could recover from defendant bank for its act in paying proceeds of checks belonging to the county and the institution district to the chief clerk. *Huntingdon County v. First-Grange Nat'l Bank*, 20 Pa. D. & C.2d 418 (1960).

13. Good faith.

In bank's action to recover on promissory notes, where evidence revealed (1) that notes had been executed by defendant members of limited partnership to partnership itself, which had been formed to sell apartment projects, and (2) that corporate developer of project, which was sole general partner and managing agent of the limited partnership, had indorsed notes to itself in its corporate capacity, without required written consent or ratification of all of the limited partners, and has sold notes at discount to plaintiff, (1) plaintiff under UCC § 3-304(2) was not holder of notes in due course, since it knew that transferor had negotiated them to plaintiff without authority for transferor's sole benefit, (2) unauthorized indorsement of notes by limited partnership was wholly inoperative under UCC § 3-404(1) against both partnership itself and its members, and (3) even though partnership was not party defendant to action, in essence it was before the court, in the person of the defendant partners, within meaning of UCC § 3-306(d), since such

partners were asserting their own rights and not rights of third person. *Chemical Bank v. Ashenburg*, 94 Misc. 2d 64 (1978).

Corporate customer of bank failed, under UCC § 4-406(1), to "exercise reasonable care and promptness to examine the statement and items to discover [the] unauthorized signature...on an item," where, in accordance with instructions given by president of corporation, clerk in charge of examining bank statements examined them only to check accuracy of mathematics and "items"-cancelled checks-were not examined at all. Thus, corporation failed to discover and report forgeries under UCC § 4-406(2) and was precluded from recovering against bank unless it could establish, under § 4-406(3), lack of ordinary care on part of bank in paying forgeries. However, corporation failed to establish lack of ordinary care by bank where bank assigned clerk, who was responsible for approximately 200 accounts and who examined all checks from each account daily, comparing signatures on checks with memorization of signature on customer's signature card, where forgeries were sufficiently adroit so as to escape detection by such methods, and where method used by bank was substantially same as that employed by other commercial banks in area. On other hand, customer did establish bank's lack of ordinary care with respect to altered checks where alterations were so mal-adroitly performed that they should have been readily discovered. *Nu-Way Servs., Inc. v. Mercantile Trust Co. Nat'l Ass'n*, 530 S.W.2d 743 (Mo. Ct. App. 1975).

14. Ratification.

Where (1) plaintiff lending bank issued cashier's check for \$3,500 to borrower as proceeds of automobile loan made to borrower, (2) such check named borrower's alleged employer as payee because of borrower's false representation to plaintiff that borrower was employed by such payee and was purchasing a pickup truck from it, (3) borrower, to whom plaintiff had given check for delivery to borrower's "employer," forged "employer's" indorsement on check and also indorsement of borrower's stepfather, who was connected with borrower's "employer," and deposited proceeds in stepfather's account at defen-

dant bank, (4) stepfather, on discovering that money had been deposited in his account without his knowledge or authorization, demanded that defendant remove such funds from his account, (5) defendant, on complying with such demand, then issued its own cashier's check, payable to borrower, and gave it to borrower's stepfather, who in turn gave it to borrower, (6) defendant then sent cashier's check issued by plaintiff through co-defendant bank for collection, both banks indorsed check "P.E.G.," and plaintiff paid it on presentment, and (7) plaintiff, after subsequently learning that borrower had never worked for alleged employer, that alleged employer had not sold borrower pickup truck, and that signatures of borrower's alleged employer and borrower's stepfather had been forged on check issued by plaintiff, then sued both defendants for failure to return funds which plaintiff had paid to them over the forged indorsements, court held (1) that both defendants as matter of law, by receiving check issued by plaintiff over the forged indorsements, had breached their implied warranty of good title under UCC § 4-207(1)(a) and were liable therefor to plaintiff, (2) that manner in which plaintiff had negotiated loan with borrower and plaintiff's delivery of its cashier's check to borrower, who was not named as payee thereof, did not, as a matter of law, constitute negligence under UCC § 3-406 that had substantially contributed to the making of the unauthorized signatures on such check, (3) that borrower's misrepresentations to plaintiff did not make him an imposter within meaning of UCC § 3-405(1)(a), so as to render effective his forged indorsements on such check, since term "imposter" refers to impersonation and did not extend to false representation that borrower was authorized agent of check's payee, and (4) that borrower's stepfather did not ratify, under UCC 3-404(2), the forged signatures on the check, since stepfather did not have full knowledge of all material facts involved, did not accept any benefit from the unauthorized signatures, and did not exercise any dominion or control over check's proceeds that indicated that he viewed such funds as his own. Guaranty Bank & Trust

Co. v. Federal Reserve Bank, 454 F. Supp. 488 (W.D. Okla. 1977).

Under UCC § 3-404(2), a forged signature may be adopted. The word "ratified" is used in the statute in order to make it clear that the adoption is retroactive, and that it may be found from conduct as well as from express statements. However, the statute makes ratification effective only for the purposes of UCC Article 3. The unauthorized signature becomes valid so far as its effect as a signature is concerned. But although ratification will relieve the actual signer from liability on the signature, it will not, of itself, relieve him from liability to the person whose name is signed. Moreover, it does not in any way affect the criminal law. Thus, while ratification of a signature may be taken into account, along with other relevant facts, in determining punishment, it will not relieve the signer of criminal liability. Guaranty Bank & Trust Co. v. Federal Reserve Bank, 454 F. Supp. 488 (W.D. Okla. 1977).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee's endorsement forged by other payee, co-payee, which was not a "customer" of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee "and" other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in absence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank's failure to ascertain whether co-payee's signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. Atlas Bldg. Supply Co. v. First Indep. Bank, 15 Wash. App. 367, 550 P.2d 26 (1976).

Pursuit by plaintiff of forger to recover payments for plaintiff's losses from check did not constitute ratification of unauthorized indorsement under UCC § 3-404.

Twellman v. Lindell Trust Co., 534 S.W.2d 83, 93 A.L.R.3d 943 (Mo. Ct. App. 1976).

Under UCC § 3-404, payee, a general contractor, ratified unauthorized indorsements of checks by subcontractor so as to preclude recovery from collecting and drawee banks and from drawer of checks where payee made no demand against either banks or drawer after learning of unauthorized indorsements, but continued to do business with subcontractor for six months at which time subcontractor stopped working for payee and payee changed its position of acquiescence and affirmation of subcontractor's acts and attempted to hold drawer and bank liable on basis of subcontractor's lack of authority to negotiate checks. *Thermo Contracting Corp. v. Bank of N.J.*, 69 N.J. 352, 354 A.2d 291 (1976).

In action involving loan to corporation, evidenced by promissory note executed by corporation and individually by its president and three of its principal shareholders, evidence supported finding that one shareholder had ratified his forged signature where, after he discovered forgery, he had benefitted financially from corporation, whose continued survival was made possible by loan, where he delayed exposing forgery to avoid casting suspicion on other two shareholders, and where he assured lender he was doing everything possible to bring loan current and failed to repudiate his signature until he became convinced that corporation was hopelessly insolvent; under UCC § 3-404 a forged signature may be ratified even where the forger is not the agent of the purported signer. *Common Wealth Ins. Sys. v. Kersten*, 40 Cal. App. 3d 1014 (4th Dist. 1974).

In action to recover payment of check upon unauthorized indorsement, fact that plaintiffs asserted their claim against payee and collecting bank, and refused offer by payee, supported finding that plaintiffs did not intend ratification of unauthorized indorsement. *Thieme v. Seattle-First Nat'l Bank*, 7 Wash. App. 845, 502 P.2d 1240 (1972).

When payees accepted payments due them from proceeds of checks, unauthorized endorsements thereon were ratified by persons or companies whose names

had been forged. *Starkey Constr., Inc. v. Elcon, Inc.*, 248 Ark. 958, 457 S.W.2d 509 (1970).

Where plaintiff's bookkeeper, in order to conceal her embezzlements, forged a check on his inactive account and deposited it to his credit in an active account where there was an overdraft, the plaintiff was denied recovery against the drawee bank which paid the forged check for, by retaining the sum deposited in his active account, he suffered no damage and, in effect, ratified the unauthorized signature. *Wiest v. National Bank*, 10 Lycoming R. 125 (Pa. 1966), *aff'd*, 209 Pa. Super. 751, 226 A.2d 227 (1967).

Partners whose signatures were affixed to a promissory note representing part of the consideration for the purchase price of a business who for many years allowed without demur the party who placed their names on the note to act as sole manager of the business had ratified his signing of the note in their behalf. *Rehrig v. Fortunak*, 39 Pa. D. & C.2d 20 (1966).

15. Precluding assertion of lack of authority.

Where (1) insurance drafts, payable to two corporate payees, were sent to one corporate payee of which defendant was president and principal stockholder, indorsed while in such payee's possession, and thereafter deposited in another corporation's account with plaintiff bank, and (2) such other corporation was owned by defendant, court held that trial court did not commit error in concluding that defendant was fully responsible under UCC § 3-404(1), dealing with effect of unauthorized signatures, for unauthorized indorsement of second payee in view of (1) evidence by plaintiff that defendant had informed plaintiff's accounts officer that second payee had authorized defendant to indorse and deposit drafts into such other corporation's account with plaintiff, and (2) evidence by second payee that its indorsement of drafts was unauthorized. *First Nat'l Bank of Commerce v. Davis*, 365 So. 2d 8 (La. App. 1978).

Under UCC § 3-404(1), payee's receipt of proceeds of check bearing payee's forged indorsement might preclude payee's denial of indorsement's authenticity and assertion of forgery and, if denial of signa-

ture was precluded, then signature would be operative and collecting bank would not be required to bear any loss from taking check with forged indorsement. *Bank of W. v. Wes-Con Dev. Co.*, 15 Wash. App. 238, 548 P.2d 563 (1976).

In conversion action against both collecting and payor banks to recover amounts of instruments handled by them on forged endorsements, where there was substantial evidence to support finding that plaintiffs had been negligent in failing to discover forging secretary's defalcations as of date approximately 6 months following their commencement, and that such negligence substantially contributed to making of subsequent forged endorsements, plaintiffs were precluded by Code § 3-404 from denying forged signatures were operative endorsements. *Cooper v. Union Bank*, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Because of bank's negligence in not insisting on written instructions from depositor before canceling unendorsed treasurer's check and transferring funds to another bank upon instructions contained in letter from person claiming to be agent for depositor, depositor was not precluded in action to recover funds represented by treasurer's check from asserting agent's lack of authority. *Taylor v. Equitable Trust Co.*, 269 Md. 149, 304 A.2d 838 (1973).

Where the drawer of checks and his accountant both testified that the proceeds of the checks actually reached the payee corporation which maintained no bank account of its own but used the account of a predecessor corporation, and the drawer who was the majority stockholder in the payee corporation failed to supervise its banking activities, the drawer was not entitled to recover from drawee banks which had paid checks indorsed in name of predecessor rather than the payee corporation. *Gotham-Vladimir Adv., Inc. v. First Nat'l City Bank*, 27 A.D.2d 190 (1st Dep't 1967).

16. Practice and procedure.

Where promissory note was signed with handprinted name of sole proprietorship, immediately below which appeared defendants' signatures without disclosing a representative or agency relationship, court erred in denying defendants' motion to

open judgment by confession to allow defendants to establish that as between them and payee of note it was agreed that signers signed only in representative capacity, and that at time note was executed, payee knew signers were unauthorized to sign in such capacity, in which case signers would have meritorious defense under Code § 3-404(1); ambiguous evidence was insufficient to meet signers' burden of overcoming presumption of consideration for promissory note. *First Nat'l Bank v. Achilli*, 14 Ill. App. 3d 1, 301 N.E.2d 739 (2d Dist. 1973).

A judgment entered on a note which is forged is a void judgment and consequently a sale made in execution on the judgment does not pass title to even a good faith buyer. *Harris v. Harris*, 428 Pa. 473, 239 A.2d 783 (1968).

III. DECISIONS UNDER FORMER STATUTES.

17. In general.

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

While a bank is required at its peril to know the signature of its depositor, it is not required to know the signature of the payee named in a check of its depositor, who is unknown to the bank and with whose signature it is not familiar, and under no duty to become familiar. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed same for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was filed such bank had not reimbursed its

depositor. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

Where a credit association was induced to make a loan to a property owner's brother on the latter's representation that he was the owner of the property used as security, and the association's agent told a merchant about the loan and asked him to cash the loan check, which was issued in the name of the real owner of the property, the association, its agent and the merchant all believing that the name of the borrower was that appearing on the check, although he was known by a different name, the merchant, in cashing the check upon indorsement by the borrower in the name appearing on the check, was acting in good faith, and so was not chargeable under the statute relating to notice of infirmity in a negotiable instrument or of defect of title of the person negotiating it. *Hattiesburg Prod. Credit Ass'n v. McNair*, 193 Miss. 615, 10 So. 2d 97 (1942).

Where the drawer delivers a check, draft or bill of exchange to an impostor supposing that he is the person whom he has falsely represented himself to be, and

that his false representations as to his ownership or authority in regard to the property offered as security for the loan or a consideration for the paper are true, the impostor's subsequent indorsement of the paper in the name by which the payee is described is to be regarded as a genuine indorsement so far as the rights of subsequent parties who deal with the paper in good faith are dependent thereon. *Hattiesburg Prod. Credit Ass'n v. McNair*, 193 Miss. 615, 10 So. 2d 97 (1942).

Bank's payment of check to payee's agent on latter's forged indorsement of payee's name after deposit of balance of proceeds above amount of payee's note to personal credit of one receiving check as security for note was payment out of bank's funds, not depositor's account. *Hart v. Moore*, 171 Miss. 838, 158 So. 490 (1935).

Bank which paid check on forged signature of its depositor should bear loss, as between bank and holder which, without knowledge of forgery, took check from its agent, crediting agent's account therefor. *Railway Express Agency v. Bank of Philadelphia*, 168 Miss. 279, 150 So. 525 (1933).

§ 75-3-404. Impostors; fictitious payees.

(a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) If (i) a person whose intent determines to whom an instrument is payable (Section 75-3-110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

(1) Any person in possession of the instrument is its holder.

(2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

(c) Under subsection (a) or (b), an indorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to that of the payee.

(d) With respect to an instrument to which subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

SOURCES: Former § 75-3-404; Codes, 1942, § 41A:3-404; Laws, 1966, ch. 316, § 3-404; Laws, 1992, ch. 420, § 42, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-405.

11. In general.
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15. Imposter's inducement of maker or drawer.
16. Signer's intent regarding payee's interest.
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18. Bond protection.
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I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-405.

11. In general.

The Official Comments to UCC § 3-405(1)(c) contemplate that losses resulting from fraudulent employee behavior in causing the issuance of checks to payees intended to have no interest therein should be a risk of the employer's business and not of the banking community, since the employer is in a better position than the banks to prevent the success of such frauds. However, the Official Comments assume that such checks will never be delivered to the payees named therein, whether or not they are real persons or entities (holding that UCC § 3-405(1)(c)

had no application where check made payable to bank, under mistaken belief that drawer owed bank amount for which check was drawn, was actually delivered to bank and was negotiated by it). *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

As carried forward from the Negotiable Instrument Law a negotiable instrument is treated as payable to bearer where if it is payable to the order of a fictitious or nonexistent person, and such fact was known to the person making it so payable. *Hartford Accident & Indem. Co. v. Walston & Co.*, 21 N.Y.2d 219, 234 N.E.2d 230 (1967), reargument granted, 21 N.Y.2d 1041 (1968), on reargument, 22 N.Y.2d 672, 291 N.Y.S.2d 366, 238 N.E.2d 754 (1968).

The effect of UCC § 3-405 is to put the loss on the customer and not on the bank. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

The rule that one who makes and delivers a check to an imposter, whom he believes to be the named payee, cannot recover from the drawee bank which pays the check on a forged indorsement by the imposter of the payee's signature will still be the law under the Pennsylvania Uniform Commercial Code. *Davis v. Western Union Tel. Co.*, 35 Wash. C. R. 276 (1954).

12. Purpose.

The purpose of UCC § 3-405 is to promote negotiability. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

13. Indorsement requirement.

In order for the "padded payroll" defense of UCC § 3-405(1)(c) to be appli-

cable, the forged indorsement must be in the exact name of the named payee. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

Issuing and collecting banks did not have defense of UCC § 3-405(1)(c) where forged indorsement was not "in the name of a named payee" as specified by statute. *Twellman v. Lindell Trust Co.*, 534 S.W.2d 83, 93 A.L.R.3d 943 (Mo. Ct. App. 1976).

Code will not exempt drawee bank from liability on check payable to fictitious payee in absence of some indorsement thereon. *Wright v. Bank of Cal.*, 276 Cal. App. 2d 485 (1st Dist. 1969).

14. Imposter-payee requirement.

Where (1) plaintiff bank issued ten cashier's checks for purchase of automobile leases and conditional sales contracts presumably entered into between payee of checks (an existing automobile sales firm) and certain specified third persons, (2) such leases and contracts actually were fictitious, since they involved nonexistent automobiles, lessees, and purchasers, and also unauthorized signatures of such "lessees" and "purchasers," (3) such documents were presented to plaintiff by employee of intended payee of checks and such employee, after receiving checks from plaintiff, which he had authority to do, indorsed each check with words "Sumner Motors," rather than "Sumner Motors, Inc.," which was payee's true name, (4) employee by his indorsement also made checks payable to order of defendant bank, and defendant, on such unauthorized indorsements, permitted checks to be deposited in account maintained by employee with defendant, (5) defendant indorsed each check thus guaranteeing employee's prior indorsement, and presented them to plaintiff, which paid them, and (6) plaintiff, on discovering fictitious nature of documents for which checks were issued, demanded payment from defendant of unpaid balance on such documents, court held (1) that defendant breached its warranty of good title under UCC § 4-207(1)(a) when it presented checks to plaintiff for payment and received payment thereon, (2) that defendant could not avoid liability under "padded payroll" defense of UCC § 3-405(1)(c)

because employee of firm that was intended payee of checks did not indorse them in payee's exact name, (3) that defense of UCC § 3-405(1)(c) also was not available to defendant because such employee, in supplying plaintiff with name of payee of checks, did not act as plaintiff's agent, (4) that negligence defense of UCC § 3-406 could not be used by defendant, since it had not acted in accordance with reasonable commercial standards where it accepted and deposited the improperly indorsed checks in account of payee's employee, (5) that since defendant had not acted in accordance with reasonable commercial banking standards, it could not contend that plaintiff had duty under UCC § 4-406(1) to discover the unauthorized indorsements on checks, and (6) that plaintiff could not complain of trial court's failure to award it attorneys' fees under UCC § 4-207(3), since allowance of such fees is discretionary. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

Where (1) plaintiff lending bank issued cashier's check for \$3,500 to borrower as proceeds of automobile loan made to borrower, (2) such check named borrower's alleged employer as payee because of borrower's false representation to plaintiff that borrower was employed by such payee and was purchasing a pickup truck from it, (3) borrower, to whom plaintiff had given check for delivery to borrower's "employer," forged "employer's" indorsement on check and also indorsement of borrower's stepfather, who was connected with borrower's "employer," and deposited proceeds in stepfather's account at defendant bank, (4) stepfather, on discovering that money had been deposited in his account without his knowledge or authorization, demanded that defendant remove such funds from his account, (5) defendant, on complying with such demand, then issued its own cashier's check, payable to borrower, and gave it to borrower's stepfather, who in turn gave it to borrower, (6) defendant then sent cashier's check issued by plaintiff through co-defendant bank for collection, both banks indorsed check "P.E.C.," and plaintiff paid it on presentment, and (7) plaintiff, after subsequently learning that borrower had

never worked for alleged employer, that alleged employer had not sold borrower a pickup truck, and that signatures of borrower's alleged employer and borrower's stepfather had been forged on check issued by plaintiff, then sued both defendants for failure to return funds which plaintiff had paid to them over the forged indorsements, court held (1) that both defendants as matter of law, by receiving check issued by plaintiff over the forged indorsements, had breached their implied warranty of good title under UCC § 4-207(1)(a) and were liable therefor to plaintiff, (2) that manner in which plaintiff had negotiated loan with borrower and plaintiff's delivery of its cashier's check to borrower, who was not named as payee thereof, did not, as a matter of law, constitute negligence under UCC § 3-406 that had substantially contributed to the making of the unauthorized signatures on such check, (3) that borrower's misrepresentations to plaintiff did not make him an imposter within meaning of UCC § 3-405(1)(a), so as to render effective his forged indorsements on such check, since term "imposter" refers to impersonation and did not extend to false representation that borrower was authorized agent of check's payee, and (4) that borrower's stepfather did not ratify, under UCC § 3-404(2), the forged signatures on the check, since stepfather did not have full knowledge of all material facts involved, did not accept any benefit from the unauthorized signatures, and did not exercise any dominion or control over check's proceeds that indicated that he viewed such funds as his own. *Guaranty Bank & Trust Co. v. Federal Reserve Bank*, 454 F. Supp. 488 (W.D. Okla. 1977).

In action arising when employee of plaintiff bank secured execution of numerous checks by employer bank as drawer against itself as drawee and payable to defendant bank which, as payee, indorsed them for collection, received payment of funds, and credited them to account held by plaintiff's employee, defendant bank was not protected by UCC § 3-405 where payee's indorsements were genuine and where defendant bank received proceeds of checks and disbursed them to its depositor without inquiry of drawer-owner

as to their proper disposition, despite absence of any showing of entitlement to checks or their proceeds on part of depositor, whose name appeared nowhere on instrument; nor was affirmative defense of failure to exercise proper control and supervision over its employees available to defendant bank under UCC §§ 3-406 and 4-406 since checks at issue involved neither unauthorized signatures nor alterations. *Federal Ins. Co. v. Groveland State Bank*, 44 A.D.2d 182 (4th Dep't 1974), modified, 37 N.Y.2d 252, 372 N.Y.S.2d 18, 333 N.E.2d 334 (1975), reargument denied, 37 N.Y.2d 924 (1975).

Where borrower obtained check, drawn to himself and automobile dealer, by misrepresenting to lender-drawer that he was purchasing automobile, and obtained payment of check upon forged indorsement of dealer from collection bank, which forwarded check to drawee bank, which paid check to collecting bank and charged account of drawer, "imposter rule" of § 3-405 was not applicable as defense to drawee bank's action against collecting bank for repayment under § 4-207. *East Gadsden Bank v. First City Nat'l Bank*, 50 Ala. App. 576, 281 So. 2d 431, 67 A.L.R.3d 135 (Civ. App. 1973).

Collecting bank which accepted plaintiff bank's cashier's check with unauthorized endorsement could not rely upon protection of imposter rule, where person who presented check to collecting bank did not claim to be payee but only agent of payee. *Thieme v. Seattle-First Nat'l Bank*, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Where an individual was granted a loan from Bank 1 for the purpose of buying a car from his father-in-law, and Bank 1 issued its check made payable to the borrower and his father-in-law, and the check was subsequently cashed at Bank 2 upon the borrower's endorsement and an unauthorized endorsement purportedly the signature of the father-in-law, the "impostor payee" provisions of UCC § 3-405 did not apply to the unauthorized endorsement so as to relieve Bank 2 from liability to Bank 1. *Franklin Nat'l Bank v. Chase Manhattan Bank*, 68 Misc. 2d 880 (1972).

15. Imposter's inducement of maker or drawer.

Where (1) drawer signed 27 checks, each naming as payee a firm to which

payment was due, (2) drawer's book-keeper, after presenting such checks to drawer and having them signed, forged payee's indorsement thereon and diverted them into personal account at defendant bank, and (3) drawer then sued defendant for wrongfully debiting drawer's account for such checks, bank could not escape liability by reliance on UCC § 3-405(1)(c), which provides that indorsement by any person in name of named payee is effective if employee of drawer supplied drawer with name of payee with intent that payee have no interest in the instrument, since all checks in issue had been prepared as result of bona fide business transactions between named payee and drawer, and thus drawer's employee did not "supply" drawer with name of payee, but simply converted checks to employee's own use (observing that in such case, creditor-payee is the person who supplies drawer with name of payee and that drawer's fraudulent employee, in essence, has simply stolen the checks, thereby rendering his forged indorsements ineffective). *Danje Fabrics Div. of Kingspoint Int'l Corp. v. Morgan Guar. Trust Co.*, 96 Misc. 2d 746 (1978).

Purchaser of cashier's check which was obtained from purchaser by fraud and paid in contravention of stop order was not entitled to recover amount of check from collecting or drawee bank, although check was made payable to "James Baird," an employee of an oil exploration company, whose endorsement was forged on check, where person named "James F. Beaird, Jr.," who posed as employee of oil exploration company, dealt directly with purchaser, purchaser was induced by him to purchase check, check was purchased by purchaser as consideration for oil lease and presented to imposter personally. *Covington v. Penn Square Nat'l Bank*, 545 P.2d 824 (Okla. Ct. App. 1975).

The words "or otherwise" in subdivision (1)(a) of this section are sufficiently broad to impose liability upon the "innocent" drawer of a check made payable to an imposter and his confederate even though there is no direct communication between the imposter and the drawer, and the impersonation took place in the presence of third persons. *Philadelphia Title Ins.*

Co. v. Fidelity-Philadelphia Trust Co., 419 Pa. 78, 212 A.2d 222, 23 A.L.R.3d 925 (1965).

16. Signer's intent regarding payee's interest.

In action by corporation, as drawer against drawee bank to recover proceeds of 24 checks paid by bank, where evidence showed (1) that each check that was fraudulently cashed had had plaintiff's signature imprinted on it by facsimile signature machine maintained in plaintiff's accounting department, (2) that operation of such machine was normally under control of either plaintiff's assistant treasurer or one of plaintiff's accountants, (3) that an accountant had actually "signed" three of the 24 checks in issue, but had had nothing to do with placing name of any particular payee on any check, and (4) that accountant was involved in scheme for fraudulently cashing such checks and diverting proceeds thereof, court held (1) that accountant's testimony that he had intended to convert the three checks on which he had impressed plaintiff's signature prior to time checks came to him for impression of such signature was inherently incredible, and (2) that as a result, bank could not successfully defend its action in paying checks by resorting to UCC § 3-405(1)(b), which provides that indorsement by any person in name of named payee is effective if person signing on behalf of drawer intended payee to have no interest in instrument (holding that accountant had not formed intent to misappropriate any particular check until after it had been "signed" by facsimile machine). *Dayton, Price & Co. v. First Nat'l City Bank*, 64 A.D.2d 563 (1st Dep't 1978), appeal denied, 45 N.Y.2d 712 (1978).

A party may successfully employ the "padded payroll" defense of UCC § 3-405(1)(c) by showing the following: (1) that a person indorsed the check in the name of the named payee, (2) that such person was an agent or employee of the drawer, (3) that such person supplied the payee's name to the drawer, and (4) that such person did not intend that the named payee should have any interest in the check. *Seattle-First Nat'l Bank v. Pacific*

Nat'l Bank, 22 Wash. App. 46, 587 P.2d 617 (1978).

Where forger, using stolen, preprinted checks belonging to plaintiff construction company and utilizing plaintiff's facsimile check signature machine (or perfect copy of signature produced by such machine), drew checks in plaintiff's name to order of two probably fictitious sole proprietorships, and where unknown person subsequently desposited such checks, after indorsing them with probably fictitious name in individual and not representative capacity, and then withdrew such funds from depository bank, (1) plaintiff's loss was forged check loss and not indorsement loss; (2) indorsements, whether genuine or fictitious, on checks were effective under UCC § 3-405(1)(b), since named payees were not intended to have any interest in checks; (3) indorser's failure to indorse checks in representative capacity did not shift plaintiff's loss to depository, collecting, and drawee banks under theories of improper payment, breach of title warranty, and conversion, since there were no true payees to demand payment and thus subject plaintiff to double liability; and (4) depository and collecting banks, on satisfying requirement of final payment rule in UCC § 3-418 as to being holders in due course, could assert protection of such rule against plaintiff's causes of action for common-law negligence and restitution in connection with banks' handling of forged checks, despite incomplete indorsements on such checks. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. Ga. 1977), reh'g denied, 557 F.2d 823 (5th Cir. Ga. 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing

forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers' savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977).

Where borrower who was given line of credit by bank for purchase of cattle executed "bill of sale drafts" drawn on bank with intention that payee of drafts, a cattle seller, would have no interest in them and borrower or his agent placed forged signatures of payee on both face and back of instruments, endorsements on instruments were effective under UCC § 3-405(1)(b); accordingly, warranties given by collecting bank under UCC § 4-207(1) were not breached and collecting bank did not convert instruments. *Kansas Bankers Sur. Co. v. Bank of Odessa*, 386 F. Supp. 555 (W.D. Mo. 1974).

Collecting bank which guaranteed indorsement of fictitious payee was not liable under § 4-207 for breach of warranty to drawee bank which paid check and thus sustained no insured loss in refunding payment. *Aetna Life & Cas. Co. v. Hampton State Bank*, 497 S.W.2d 80 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Oct. 10, 1973).

Where plaintiff's assistant comptroller drew checks on plaintiff corporation payable to fictitious company whose name lacked only the term "Inc." in name of plaintiff, but did not intend plaintiff corporation to have any interest in checks which were sent to third party who would endorse checks in payee's name and deposit them in defendant bank in account showing third party as president and authorized signatory, any loss arising from such transaction must fall upon plaintiff corporation which employed dishonest signing agent and no liability attached to defendant bank for accepting deposits made by third party or in dispersing funds thereof on checks written by him. *Braswell Motor Freight Lines v. Bank of Salt Lake*, 28 Utah 2d 347, 502 P.2d 560 (1972).

Drawer of check could not recover from drawee bank amount of drawer's check paid by bank on forged signature of wife of payee where drawer did not intend wife of payee to have any interest in check, and where entire proceeds of check had been paid to husband-payee whom drawer intended to have full interest in money. *Gordon v. State St. Bank & Trust Co.*, 361 Mass. 258, 280 N.E.2d 152 (1972).

Where payee's name was included on check "in the normal course of [bank] business" and "as a matter of policy" because payee was intended ultimately to receive check proceeds on transfer of title to automobile, payee was intended by drawer to have an interest in check and endorsement of payee's name by another cannot be legally effective. *Franklin Nat'l Bank v. Chase Manhattan Bank*, 68 Misc. 2d 880 (1972).

X pretends to be A; if drawer issues check to X payable to A, imposter defense is available; drawer intended to issue check to X, imposter, albeit in name of A, person impersonated; held, A's forged endorsement is effective; action by drawer's surety to recover from drawee bank for paying checks over forged endorsement, dismissed. *Fidelity & Deposit Co. v. Manufacturers Hanover Trust Co.*, 63 Misc. 2d 960 (1970).

A payor-drawee bank cannot recover from the collecting bank for the breach of a warranty that the signature of the payee

on the endorsement was genuine where the signature, otherwise a forgery, comes within the imposter provision of UCC § 3-405(1)(b) by which an endorsement forged by the payee is effective as negotiation, because the payor-drawee bank can show no loss as caused by the forgery. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

17. Indorsement by agent or employee of maker or drawer.

The drawer of a check may sue a depositary bank which accepts the check and pays out the proceeds in violation of a forged restrictive indorsement based on either money had and received or conversion where the indorsement, although forged by an employee of the drawer who supplied the drawer with the name of the payee intending the latter to have no interest in the instrument (Uniform Commercial Code, § 3-405, subd [1], par [c]), is nonetheless "effective", since in those cases where the forgery is effective, the depositary bank may be deemed to have dealt with valuable property of the drawer, inasmuch as the check is both a valuable instrument and a valid instruction to the drawee to honor the check and debit the drawer's account accordingly; additionally, only a depositary bank may be held liable for payment in disregard of a restrictive indorsement (Uniform Commercial Code, § 3-419, subd [4]; § 3-206, subd [2]) since that bank is in the best position to ensure that the restriction is satisfied. *Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank*, 46 N.Y.2d 459, 386 N.E.2d 1319 (1979).

Since the checks stolen, forged and then cashed by plaintiff's accounts payable bookkeeper were legitimate and bona fide payments due and owing to the named payee legitimately based upon open invoices due and owing to the payee, which arose out of the normal business relationship between plaintiff and the payee, and were not based on fraudulent transactions, section 3-405 (subd [1], par [c]) of the Uniform Commercial Code, which provides that an indorsement "by any person in the name of a named payee is effective if * * * an agent or employee of the maker or drawer has supplied him with the name

of the payee intending the latter to have no such interest" does not operate to relieve the drawee bank from liability for wrongfully debiting plaintiff's account for the checks containing forged payee's indorsements since, in such an instance, the creditor "supplied" plaintiff with the name of the payee not plaintiff's employee, who stole the checks, thereby making his forged indorsements ineffective. *Danje Fabrics Div. of Kingspoint Int'l Corp. v. Morgan Guar. Trust Co.*, 96 Misc.2d 746 (1978).

Where (1) checks of corporation were required to be issued only on signature of two corporate officers and one of them signed a number of checks in blank each week to accommodate corporation's needs; (2) where one of such presigned, in-blank checks was later signed by other corporate officer who, after making such check payable to first officer without first officer's authorization or knowledge, then indorsed first officer's name on back of check and also added his own indorsement thereunder; and (3) where such check was thus drawn as devious method by second officer of drawing check to his own order or to cash, court would grant second officer's motion to dismiss indictment charging him with forged indorsement of first officer's name. Although UCC § 3-405(2) provides that nothing therein shall affect criminal or civil liability of person who indorses instrument in name of named payee under conditions specified in UCC § 3-405(1), UCC § 3-405(2) did not render second officer's indorsement of payee's signature a forgery, since this was case within scope of UCC § 3-405(1)(c) in which agent of drawer of check had supplied drawer with name of payee who was not intended to have any interest in check, and under UCC § 3-405(1)(c), indorsement by any person in name of payee who is not intended to have any interest in check is effective (observing that criminal liability of second officer might have extended to larceny, a crime not charged in indictment). *People v. Hoffman*, 91 Misc.2d 525 (1977).

Where employee of insurance company who was authorized to draw and sign drafts in settlement of claims, selected inactive claim files and drew drafts pay-

able to claimant, indorsed name of payee on back of draft and took them to collecting bank where he cashed them, where employee was well known to employees of collecting bank as employee of insurance company with authority to sign drafts for his employer, and where collecting bank did not require employee to personally indorse drafts nor produce payee, under UCC § 3-405(1)(b) forged indorsements were "effective," titles to instruments passed as though there had been no forgery, and collecting bank, as good faith transferee was entitled to payment from parties liable on instrument since undisputed facts established that employee was authorized to draw drafts and that he intended payees to have no interest in instruments. *General Accident Fire & Life Assurance Corp. v. Citizens Fid. Bank & Trust Co.*, 519 S.W.2d 817 (Ky. 1975).

In action by insurance company that issued \$20,000 check to one of its policy owners whose name had been supplied by employee with intent that owner have no interest in instrument, UCC § 3-405(1)(c) precluded company from recovering face value of check from bank that had paid it in good faith over forged endorsement; bank's alleged negligence in paying check was irrelevant due to conspicuous absence in UCC § 3-405 of requirement that paying or collecting bank exercise ordinary care and fact that draftsmen of UCC consciously allocated such type of loss to employer. *Prudential Ins. Co. of Am. v. Marine Nat'l Exch. Bank*, 371 F. Supp. 1002 (E.D. Wis. 1974).

Even though at time checks payable to fictitious company were drawn, assistant treasurer who had caused checks to be drawn was employee of drawer and had supplied drawer with names of fictitious payees, neither check was indorsed "in the name of a named payee," so that indorsements were not effective and collecting bank was not relieved of liability by Code § 3-405(1)(c). *Travco Corp. v. Citizens Fed. Sav. & Loan Ass'n*, 42 Mich. App. 291, 201 N.W.2d 675 (1972).

An employee "supplied" to his employer the name of payee intended to have no interest in proceeds of check, thereby making forged endorsement effective as between broker and drawee bank where

registered representative of broker initiated normal business practice leading to drawing of check by submitting fraudulent sell order. *New Amsterdam Cas. Co. v. First Pa. Banking & Trust Co.*, 451 F.2d 892 (3d Cir. Pa. 1971).

The drawee bank was not liable for charging a department store's account with checks which its employee had fraudulently caused to be drawn by the store to fictitious suppliers whose endorsements were forged by the employee, for the bank was protected by subsec. (1)(c). *May Dep't Stores Co. v. Pittsburgh Nat'l Bank*, 374 F.2d 109 (3d Cir. Pa. 1967).

It is not essential that the agent involved in the impostor situation be on the payroll of the drawer as long as the agent is in fact entrusted by the drawer company with taking the information from the drawer's incoming goods department to its bookkeeping department, on the basis of which information the bookkeeping department prepares checks, which it then entrusts to the agent for delivery to the payees, the "agent" supplying false information of goods not actually received and then forging the names of the payees of the checks entrusted to him, for delivery to the payees. *Thompson Maple Prods., Inc. v. Citizens Nat'l Bank*, 211 Pa. Super. 42, 234 A.2d 32, 1967.

In a typical "padded payroll" case where an employee causes a check to be issued payable to a real or fictitious person to whom the check is never to be delivered, and the employee keeps the check and "forges" the indorsement required; the

loss is placed upon the employer as a risk of his business enterprise rather than upon the subsequent holder or drawee. *Pacific Indem. Co. v. Security First Nat'l Bank*, 248 Cal. App. 2d 75 (2d Dist. 1967).

If an instrument is made payable to an existing person not intended to have any interest in it, and such fact was known to the person making it so payable or known to his employee, the Legislature intended to make such an instrument bearer paper, thereby relieving a drawee or any endorser from the resulting loss and imposing the loss resulting from actions of a dishonest employee on the drawer-employer. *Phoenix Die Casting Co. v. Manufacturers & Traders Trust Co.*, 50 Misc. 2d 152 (1966).

18. Bond protection.

Banker's blanket bond provided that any check payable to fictitious payee and endorsed in his name was forged indorsement; held, bond provided coverage for loss sustained by bank which honored checks endorsed with payee's name by person other than payee. *Delmar Bank v. Fidelity & Deposit Co.*, 428 F.2d 32 (8th Cir. Mo. 1970).

19. Parol evidence.

Although there is no indication that note signed in lower right corner was signed other than as comaker, parol evidence was admissible to show that note was indeed signed in capacity of surety or accommodation party. *Philadelphia Bond & Mtg. Co. v. Highland Crest Homes, Inc.*, 221 Pa. Super. 89, 288 A.2d 916 (1972).

RESEARCH REFERENCES

ALR. Construction and effect of "padded payroll" rule of UCC § 3-405. 45 A.L.R.5th 389.

§ 75-3-405. Employer's Responsibility for fraudulent indorsement by employee.

(a) In this section:

(1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

(2) "Fraudulent indorsement" means (i) in the case of an instrument payable to the employer, a forged indorsement purporting to be that of the

employer, or (ii) in the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee.

(3) “Responsibility” with respect to instruments means authority (i) to sign or indorse instruments on behalf of the employer, (ii) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity. “Responsibility” does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.

(b) For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(c) Under subsection (b), an indorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name substantially similar to the name of that person or (ii) the instrument, whether or not indorsed, is deposited in a depository bank to an account in a name substantially similar to the name of that person.

SOURCES: Former § 75-3-405: Codes, 1942, § 41A:3-405; Laws, 1966, ch. 316, § 3-405; Laws, 1992, ch. 420, § 43, eff from and after January 1, 1993.

§ 75-3-406. Negligence contributing to forged signature or alteration of instrument.

(a) A person whose failure to exercise ordinary care substantially contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection.

(b) Under subsection (a), if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure substantially contributes to loss, the loss is allocated between the person

precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss.

(c) Under subsection (a), the burden of proving failure to exercise ordinary care is on the person asserting the preclusion. Under subsection (b), the burden of proving failure to exercise ordinary care is on the person precluded.

SOURCES: Former § 75-3-406; Codes, 1942, § 41A:3-406; Laws, 1966, ch. 316, § 3-406; Laws, 1992, ch. 420, § 44, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-406.

11. In general.
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13. Negligence; substantial contribution.
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18. Practice and procedure.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-406.

11. In general.

UCC § 3-406 does not make the negligent party liable in tort for damages that result from the alteration. Instead, it estops such party from asserting the alteration against a holder in due course or the drawee. The holder or the drawee is protected by estoppel, and the task of pursuing the wrongdoer is left to the negligent party. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

UCC § 3-406 and § 4-406(2) merely preclude a person who was negligent prior to (UCC § 3-406) or after (UCC § 4-406) a check transaction from asserting an unauthorized signature or alteration against the bank (where customer, instead of asserting unauthorized signature or alteration against bank, sued bank on theory

that it had negligently permitted customer's accountant to divert proceeds of checks drawn by customer). *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

General pattern of UCC §§ 3-406 and 4-406 is to absolve payor bank, which has been deceived by third party, from liability to its customer if customer's negligence played substantial part in making deception possible; however, bank is absolved from liability only if it has acted with reasonable care or in accordance with reasonable banking standards. *Transamerica Ins. Co. v. United States Nat'l Bank*, 276 Or. 945, 558 P.2d 328 (1976).

The Code modifies the prior law with respect to the effect of fault of the drawer by adopting as a criterion such negligence as substantially contributes to...the making of an unauthorized signature. *Thompson Maple Prods., Inc. v. Citizens Nat'l Bank*, 211 Pa. Super. 42, 234 A.2d 32, 1967.

12. Applicability.

UCC § 3-406 and § 4-406(2) preclude recovery by customer from bank only if bank paid instrument in accordance with reasonable commercial standards (see UCC § 3-406) or ordinary care (see UCC § 4-406(3)) (holding that since bank was negligent as a matter of law in paying checks presented by customer's accountant and thereby permitting accountant to divert proceeds of checks to his own use, bank could not claim benefit of either UCC § 3-406 or § 4-406(2)). *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collect-

ing bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). *Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank*, 82 Misc.2d 1013 (1975).

No distinction is made under UCC § 3-406 as to whether the signature which is forged is the signature of the negligent person or not, so that the Code provision has been applied where the drawer was deemed negligent in permitting a situation to arise in which the forger forged an indorsement of the payee's name. *Thompson Maple Prods., Inc. v. Citizens Nat'l Bank*, 211 Pa. Super. 42, 234 A.2d 32, 1967.

13. Negligence; substantial contribution.

The question whether a bank was negligent in paying an item—that is, whether it paid the item in accordance with reasonable commercial standards under UCC § 3-406 and § 4-406—is one that must be decided on the facts of each particular case. The reasonableness of the bank's conduct, of course, may be assessed in light of the plaintiff's conduct. *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

Nowhere does the Uniform commercial Code State in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the code. They start with § 1-103, providing that common-law rules of negligence still apply. Section 3-419(3) limits recovery against collecting banks for conversion only if they acted in good faith and followed "reasonable commercial standards." Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrongdoing, but only if

the payor is a holder in due course or paid "in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." A bank is prohibited from disclaiming "responsibility for its own lack of good faith or failure to exercise ordinary care" under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank's lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrongdoing, back to the bank under § 4-406(3). *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

Where (1) plaintiff lending bank issued cashier's check for \$3,500 to borrower as proceeds of automobile loan made to borrower, (2) such check named borrower's alleged employer as payee because of borrower's false representation to plaintiff that borrower was employed by such payee and was purchasing a pickup truck from it, (3) borrower, to whom plaintiff had given check for delivery to borrower's "employer," forged "employer's" indorsement on check and also indorsement of borrower's stepfather, who was connected with borrower's "employer," and deposited proceeds in stepfather's account at defendant bank, (4) stepfather, on discovering that money had been deposited in his account without his knowledge or authorization, demanded that defendant remove such funds from his account, (5) defendant, on complying with such demand, then issued its own cashier's check, payable to borrower, and gave it to borrower's stepfather, who in turn gave it to borrower, (6) defendant then sent cashier's check issued by plaintiff through co-defendant bank for collection, both banks indorsed check "P.E.G.," and plaintiff paid it on presentment, and (7) plaintiff, after subsequently learning that borrower had never worked for alleged employer, that alleged employer had not sold borrower a pickup truck, and that signatures of borrower's alleged employer and borrower's stepfather had been forged on check issued by plaintiff, then sued both defendants for failure to return funds which plaintiff had paid to them over the forged indorsements, court held (1) that both

defendants as matter of law, by receiving check issued by plaintiff over the forged indorsements, had breached their implied warranty of good title under UCC § 4-207(1)(a) and were liable therefor to plaintiff, (2) that manner in which plaintiff had negotiated loan with borrower and plaintiff's delivery of its cashier's check to borrower, who was not named as payee thereof, did not, as a matter of law, constitute negligence under UCC § 3-406 that had substantially contributed to the making of the unauthorized signatures on such check, (3) that borrower's misrepresentations to plaintiff did not make him an imposter within meaning of UCC § 3-405(1)(a), so as to render effective his forged indorsements on such check, since term "imposter" refers to impersonation and did not extend to false representation that borrower was authorized agent of check's payee, and (4) that borrower's stepfather did not ratify, under UCC § 3-404(2), the forged signatures on the check, since stepfather did not have full knowledge of all material facts involved, did not accept any benefit from the unauthorized signatures, and did not exercise any dominion or control over check's proceeds that indicated that he viewed such funds as his own. *Guaranty Bank & Trust Co. v. Federal Reserve Bank*, 454 F. Supp. 488 (W.D. Okla. 1977).

Finding of more than ordinary negligence is not necessary under language of UCC § 3-406 before that section operates to preclude recovery on forged indorsement. *Commonwealth v. National Bank & Trust Co.*, 469 Pa. 188, 364 A.2d 1331 (1976).

In action by drawer's assignee against bank to recover amount of nine checks bearing forged indorsements which bank charged to drawer's account, test of conduct amounting to "negligence" within meaning of UCC § 3-406 was whether prudent person in position of drawer's manager, having at his disposal only amount of information and experience manager had concerning purported loan applications, would have foreseen danger of subsequent forgery by automobile dealer and accomplice involved in making purported loans and drawing and issuing checks without conducting credit investi-

gation; if prudent person would have foreseen such danger, then drawer, acting through its manager, could not be said to have properly exercised its duty of ordinary care to bank as required by statute in so making purported loans and in so drawing and issuing checks. *Fidelity & Cas. Co. v. Constitution Nat'l Bank*, 167 Conn. 478, 356 A.2d 117 (1975).

A customer is precluded from asserting his unauthorized signature against the bank where he has failed to exercise reasonable care. *Terry v. Puget Sound Nat'l Bank*, 80 Wash. 2d 157, 492 P.2d 534 (1972).

The phrase "substantially contributes" indicates a causal relationship and is the equivalent of the "substantial factor" test applied in the law of negligence generally. *Gast v. American Cas. Co.*, 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

14. Proximate cause requirement.

Lax conduct of business affairs or negligent delivery of check by drawer to one not payee will not preclude drawer from asserting forged indorsement, unless lax conduct or negligent delivery proximately caused loss; in instant case, person who drew check payable to existing payee, held not negligent in delivering it to payee's agent who subsequently forged payee's endorsement thereon. *Society Nat'l Bank v. Capital Nat'l Bank*, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

UCC § 3-406 provision precluding drawer from recovering from bank which cashed check on forged indorsement where drawer's negligence substantially contributes to unauthorized alteration is a change from pre-Code law which required that drawer's negligence must have proximately caused conduct of cashing bank. *Com. v. National Cent. Bank*, 94 Dauph. Co. 359 (Pa. 1972).

15. Non-negligent acts.

Where copayee obtained check, drawn to himself and automobile dealer, from drawer-lender, by misrepresenting that he was purchasing automobile, and by forging copayee's indorsement obtained payment from collecting bank, which forwarded check to drawee bank, which paid check to collecting bank and charged drawee's account, but credited drawee's

account upon learning of forged indorsement, there was presented no such negligence of drawer, within meaning of § 3-406, as would preclude drawer from asserting forgery against drawee, so that drawer's failure to assert such defense would not preclude drawee bank under § 4-406(5) from prosecuting its claim against collecting bank. *East Gadsden Bank v. First City Nat'l Bank*, 50 Ala. App. 576, 281 So. 2d 431, 67 A.L.R.3d 135 (Civ. App. 1973).

In action by holder of forged payroll checks to recover damages from defendant, where defendant's offices were burglarized, blank checks were stolen and imprinted with defendant's check "protectograph," signature of defendant's bookkeeper was forged, and checks were cashed at plaintiff's stores, facts that defendant kept blank checks in unlocked cabinet and that check "protectograph" was in unlocked desk drawer was not sufficient to show that defendant was negligent and that its negligence substantially contributed to making of forgeries under UCC § 3-406; check "protectograph" was not "signature stamp or other automatic signing device" but merely stamped amount of check in manner that made alteration difficult and, although such checks might appear more authentic than usual checks, they still had to be signed by defendant's bookkeeper, whose signature was forged; furthermore, door to defendant's office was locked, as well as its windows and exterior doors to building and, in addition, defendant employed security service to check premises periodically during night. *Fred Meyer, Inc. v. Temco Metal Prods. Co.*, 267 Or. 230, 516 P.2d 80 (1973).

Payee of check was not negligent in following attorney's instructions to endorse check to order of late husband's estate nor in assuming that check would thereafter be deposited in estate account. *Salsman v. National Community Bank*, 102 N.J. Super. 482, 246 A.2d 162 (1968), *aff'd*, 105 N.J. Super. 164, 251 A.2d 460 (1969).

The fact that a check is mailed to an attorney by another attorney to obtain a signature does not constitute negligence as there is no reason to foresee that the

check will be misappropriated by the client who will then forge the names of the payees thereon. *Gast v. American Cas. Co.*, 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

Church whose financial secretary forged checks on its account and was the person to whom cancelled checks and bank statements were required to be sent was not negligent in failing to discover the forgeries where the secretary had been a faithful and trusted member of the church for more than 20 years, and secretary's knowledge of the forgeries could not be imputed to the church. *Jackson v. First Nat'l Bank, Inc.*, 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

16. Preclusion; contributing to unauthorized signature.

Where (1) accountant, who was not authorized to sign checks on behalf of plaintiff corporation or to make deposits into any account other than plaintiff's tax and loan account with defendant bank, presented over a period of time a total of eleven checks to defendant which were signed by plaintiff's president, made payable to defendant, and intended to be deposited into plaintiff's tax and loan account, (2) some of such checks were signed in blank by plaintiff's president and filled in by accountant, which he had authority to do, (3) defendant knew about limitation on accountant's authority, but nevertheless permitted accountant on several occasions to deposit part of a check's proceeds into tax and loan account and remainder into either accountant's personal account or some other account, (4) defendant also allowed accountant to purchase cashier's check with proceeds of one check and to have it made payable to payee designated by accountant, and (5) defendant never required accountant to indorse checks presented or made any inquiry into his authority to use plaintiff's funds in unauthorized manner, court held (1) that defendant had been negligent as a matter of law in dealing with plaintiff's funds, (2) that although Uniform Commercial Code does not expressly state that bank is liable for negligently paying item, bank must nevertheless use ordinary care in disbursing depositor's funds, (3) that reasonableness of defendant bank's conduct could be

assessed in light of plaintiff's conduct, (4) that under pre-code rule not displaced by UCC, where check is drawn to order of bank to which drawer is not indebted, bank (a) is authorized to pay proceeds only to persons specified by drawer, (b) takes risk in treating check as payable to bearer, and (c) is placed on inquiry as to authority of drawer's agent to receive payment himself, (5) that if drawer clothes agent with apparent authority to receive proceeds of check made payable to bank's order, bank is not liable to drawer for paying proceeds to agent or applying proceeds in manner specified by agent contrary to his actual authority, (6) that in present case, defendant, as a matter of law, had breached contract implied in normal banking relationship with plaintiff and thus had been negligent in its treatment of plaintiff's funds, (7) that plaintiff had not been aware of defendant's conduct in allowing accountant to divert part of proceeds of plaintiff's checks to accountant's use, (8) that plaintiff had not knowingly assented to defendant's practice of treating checks payable to defendant's order as bearer paper if both drawer and bearer were known to defendant's teller, (9) that defendant's negligence in disbursing plaintiff's funds also could not be successfully defended, either under either UCC § 3-406 (dealing with negligence contributing to alteration or unauthorized signature) or UCC § 4-406 (dealing with customer's duty to discover and report unauthorized signature or alteration), on ground that plaintiff had been negligent in signing some checks in blank and not checking accountant's examination of plaintiff's monthly bank statements, since defendant had been negligent as a matter of law in paying proceeds of checks to accountant, and (10) that UCC § 3-406 and § 4-406(2) and (4) were also inapplicable because plaintiff was not asserting unauthorized signature or alteration against defendant. *Bank of S. Md. v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

Where stock brokerage firm, in dealing with attorney as agent for plaintiff, failed to ascertain or verify the scope of attorney's authority and placed checks in his hands on four separate occasions in 6

months period in violation of its own rules and Rules of New York Stock Exchange and principles of sound and prudent business practices, the firm's conduct was not enough to constitute a "substantial factor" in bringing about the forgery of plaintiff's signature and payment of checks over that unauthorized signature. *Bagby v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 491 F.2d 192 (8th Cir. Mo. 1974).

Where blank checks were left in unlocked drawer of barber shop, where plaintiffs never inquired among themselves as to missing check blanks, where plaintiffs did not inquire among themselves or of bank as to unusual absence of statement and cancelled checks, plaintiffs were precluded by their own negligence from recovering from bank which had paid out on checks under skilled forged endorsements. *Terry v. Puget Sound Nat'l Bank*, 80 Wash. 2d 157, 492 P.2d 534 (1972).

Depositor was negligent as matter of law where she failed to inquire of bank as to lack of receipt of monthly statements and cancelled checks after she was informed that bank's records indicated that she had no money in her account; held, depositor's negligence precluded her from asserting bank's lack of authority to pay allegedly forged checks. *Myrick v. National Sav. & Trust Co.*, 268 A.2d 526 (D.C. 1970).

Where employee fraudulently caused employer to draw checks payable to fictitious suppliers, forged indorsements of fictitious payees, cashed checks at bank, and converted proceeds for which bank charged employer's account, bank was protected in suit by employer for allegedly illegally charging account with amount paid on forged indorsements, by Code § 3-405(1)(c). *May Dep't Stores Co. v. Pittsburgh Nat'l Bank*, 374 F.2d 109 (3d Cir. Pa. 1967).

Where a buyer of logs follows the practice of making out checks to the order of the suppliers on the basis of delivery slips executed by the hauler bringing the logs to its mill, and allow the hauler to have access to blank forms, and then made out the checks on the basis of such forms without question of their accuracy when in fact the slips showed fictitious deliver-

ies, and the buyer then entrusted the hauler with the checks so that he could deliver them to the payee suppliers, whereupon the hauler forged the names of the latter, there was such negligence on the part of the buyer as to bar it from recovering from the bank on which the checks were drawn. *Thompson Maple Prods., Inc. v. Citizens Nat'l Bank*, 211 Pa. Super. 42, 234 A.2d 32, 1967.

Bank which paid forged checks drawn on the trust account of a church payable to the order of the forger, many of which checks bore the endorsement of a company operating a race track, was put on inquiry as to whether the sums represented by the checks were being withdrawn for unauthorized purposes, and was guilty of negligence for failing to inquire. *Jackson v. First Nat'l Bank, Inc.*, 55 Tenn. App. 545, 403 S.W.2d 109 (1966).

Where the drawer of a check caused it to be sent to one bearing the same name as the intended payee and the recipient cashed it at the drawee bank and payment was thereafter stopped by the drawer who subsequently compounded his error by issuing another check in the same amount, sending it again to the same wrong addressee, the drawer was guilty of negligence contributed to the indorsement of the check by an unauthorized party and was required to reimburse the drawee for the sum paid out by it. *Park State Bank v. Arena Auto Auction, Inc.*, 59 Ill. App. 2d 235, 207 N.E.2d 158 (2d Dist. 1965).

17. Reasonable commercial standards.

Where (1) plaintiff bank issued ten cashier's checks for purchase of automobile leases and conditional sales contracts presumably entered into between payee of checks (an existing automobile sales firm) and certain specified third persons, (2) such leases and contracts actually were fictitious, since they involved nonexistent automobiles, lessees, and purchasers, and also unauthorized signatures of such "lessees" and "purchasers," (3) such documents were presented to plaintiff by employee of intended payee of checks and such employee, after receiving checks from plaintiff, which he had authority to do, indorsed each check with words "Sumner Motors," rather than "Sumner

Motors, Inc.," which was payee's true name, (4) employee by his indorsement also made checks payable to order of defendant bank, and defendant, on such unauthorized indorsements, permitted checks to be deposited in account maintained by employee with defendant, (5) defendant indorsed each check, thus guaranteeing employee's prior indorsement, and presented them to plaintiff, which paid them, and (6) plaintiff, on discovering fictitious nature of documents for which checks were issued, demanded payment from defendant of unpaid balance on such documents, court held (1) that defendant breached its warranty of good title under UCC § 4-207(1)(a) when it presented checks to plaintiff for payment and received payment thereon, (2) that defendant could not avoid liability under "padding payroll" defense of UCC § 3-405(1)(c) because employee of firm that was intended payee of checks did not indorse them in payee's exact name, (3) that defense of UCC § 3-405(1)(c) also was not available to defendant because such employee, in supplying plaintiff with name of payee of checks, did not act as plaintiff's agent, (4) that negligence defense of UCC § 3-406 could not be used by defendant, since it had not acted in accordance with reasonable commercial standards where it accepted and deposited the improperly indorsed checks in account of payee's employee, (5) that since defendant had not acted in accordance with reasonable commercial banking standards, it could not contend that plaintiff had duty under UCC § 4-406(1) to discover the unauthorized indorsements on checks, and (6) that plaintiff could not complain of trial court's failure to award it attorneys' fees under UCC § 4-207(3), since allowance of such fees is discretionary. *Seattle-First Nat'l Bank v. Pacific Nat'l Bank*, 22 Wash. App. 46, 587 P.2d 617 (1978).

Where bank which was authorized depository of plaintiff company failed to investigate authority of plaintiff's manager to treat as his own 17 checks made payable to plaintiff and to deposit such checks in manager's personal account, bank did not follow reasonable commercial standards of banking business so as to be entitled under UCC § 3-406 to assert, in

suit by plaintiff for conversion of such checks, defense of plaintiff's allegedly substantial contributory negligence. *Mott Grain Co. v. First Nat'l Bank & Trust Co.*, 259 N.W.2d 667 (N.D. 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers' savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977).

Specific act of delivering check to someone who was not payee did not necessarily constitute negligence within meaning of UCC § 3-406 nor could plaintiff's actions

in trusting person to whom delivery was made be said to have substantially contributed to subsequent forgery nor did payor-drawee bank pay instrument in accordance with reasonable commercial standards where it was readily apparent that first indorsement was by someone other than named payee. *Twellman v. Lindell Trust Co.*, 534 S.W.2d 83, 93 A.L.R.3d 943 (Mo. Ct. App. 1976).

Under UCC § 3-406, insurance company was not precluded from asserting forgery against drawee bank where, on death of its insured, insurance drew check payable to beneficiary of policy and mailed it to insurance broker who forged name of beneficiary, and where check was subsequently paid by drawee bank; sending of check to broker was pursuant to usual practice of giving broker goodwill advantage of delivering check to beneficiary and there was no evidence of prior defalcation by broker or of any prior acts which would have put insurance company on notice of possible misappropriation of funds. *Guardian Life Ins. Co. of Am. v. Chemical Bank*, 47 A.D.2d 608 (1st Dep't 1975).

Bank that accepted forged checks for collection acted in accordance with reasonable commercial standards under UCC § 3-406, notwithstanding checks were endorsed with typewritten name of payee bank, since checks were regular on their face and bore purported endorsement of named payee; collecting bank was not required to obtain holographic signature of one of payee bank's officers, and written evidence of his authority to endorse, before accepting checks for collection. Furthermore, typewritten endorsement which identified payee bank met requirements of UCC § 4-206, governing transfers between banks. *West Penn Admin., Inc. v. Union Nat'l Bank*, 233 Pa. Super. 311, 335 A.2d 725 (1975).

In action arising when employee of plaintiff bank secured execution of numerous checks by employer bank as drawer against itself as drawee and payable to defendant bank which, as payee, indorsed them for collection, received payment of funds, and credited them to account held by plaintiff's employee, defendant bank was not protected by UCC § 3-405 where payee's indorsements were genuine and

where defendant bank received proceeds of checks and disbursed them to its depositor without inquiry of drawer-owner as to their proper disposition, despite absence of any showing of entitlement to checks or their proceeds on part of depositor, whose name appeared nowhere on instruments; nor was affirmative defense of failure to exercise proper control and supervision over its employees available to defendant bank under UCC §§ 3-406 and 4-406 since checks at issue involved neither unauthorized signatures nor alterations. *Federal Ins. Co. v. Groveland State Bank*, 44 A.D.2d 182 (4th Dep't 1974), modified, 37 N.Y.2d 252, 372 N.Y.S.2d 18, 333 N.E.2d 334 (1975), reargument denied, 37 N.Y.2d 924 (1975).

Bank which honored unauthorized indorsements by embezzler of employer's checks could not assert UCC § 3-406 defense of contributory negligence against employer where bank failed to comply with reasonable commercial standards of banking business. *Hermetic Refrigeration Co. v. Central Valley Nat'l Bank, Inc.*, 493 F.2d 476 (9th Cir. Cal. 1974).

In action arising out of "joint pay agreement" between general contractor, subcontractor, and supplier in which bank paid check without endorsement of both payees, under UCC § 3-406 drawer's negligence substantially contributed to improper payment where it failed to advise bank of "joint pay agreement" and failed to draw check so as to make it properly payable to joint payees; nor did bank violate reasonable commercial standards where bank employee who handled transaction made inquiries regarding named payee and received reasonable explanation, there was nothing on face of check to justifiably arouse suspicion, and there was no other irregularity in transaction. *Dominion Constr., Inc. v. First Nat'l Bank*, 271 Md. 154, 315 A.2d 69 (1974).

Section referred to as example of explicit requirement that party exercise more than "honesty in fact." *Industrial Nat'l Bank v. Leo's Used Car Exch. Inc.*, 362 Mass. 797, 291 N.E.2d 603 (1973).

Because of bank's negligence in not insisting on written instructions from depositor before canceling unendorsed treasurer's check and transferring funds to

another bank upon instructions contained in letter from person claiming to be agent for depositor, depositor was not precluded in action to recover funds represented by treasurer's check from asserting agent's lack of authority. *Taylor v. Equitable Trust Co.*, 269 Md. 149, 304 A.2d 838 (1973).

Bank is not negligent in exchanging cashier's check made out to named payee for personal check drawn by its customer to same payee bearing unauthorized endorsement; and bank that issued cashier's check may recover against bank that cashes it upon unauthorized endorsement. *Thieme v. Seattle-First Nat'l Bank*, 7 Wash. App. 845, 502 P.2d 1240 (1972).

Under UCC § 3-406, a negligent depositor is not precluded from asserting a claim if he establishes that the bank's payment of the forged checks was not in accordance with reasonable commercial standards. *Exchange Bank & Trust Co. v. Kidwell Constr. Co.*, 472 S.W.2d 117 (Tex. 1971).

18. Practice and procedure.

Finding that bank had not been negligent in paying checks on which depositor's signature as drawer had been forged by depositor's bookkeeper, and that bank in defending suit by depositor could therefore utilize affirmative defenses afforded by UCC § 3-406 and UCC § 4-406, would not be upset on appeal where such finding was supported by substantial evidence in record. *Parsons Travel, Inc. v. Hoag*, 18 Wash. App. 588, 570 P.2d 445 (1977).

Contributory negligence of drawer of checks was not defense to cause of action against bank for conversion nor suffice as finding of proximate cause on common law defense of contributory negligence. *DoAll Dallas Co. v. Trinity Nat'l Bank*, 498 S.W.2d 396 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Jan. 30, 1974).

Bank certified check which had blank spaces and amount thereof could easily be raised; held, bank was "person" and payee of checks was "holder in due course" entitled to recover if bank's negligence substantially contributed to raising of check; summary judgment precluded. *Brower v. Franklin Nat'l Bank*, 311 F. Supp. 675 (S.D.N.Y. 1970).

Because neither payee nor their attorney was required to anticipate that, as result of escrow mailing, co-payee might

appropriate draft and forge endorsements thereon, defense that payee had substantially contributed to making of unauthorized signature was not supported by evidence and should not have been submitted to jury. *Gast v. American Cas. Co.*, 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

The Code does not attempt to define what is sufficient negligence to bar a per-

son from claiming that there has been a forgery other than to require that it substantially contributes to the making of an unauthorized signature, and beyond that the question is one to be determined by the trier of fact in each case. *Thompson Maple Prods., Inc. v. Citizens Nat'l Bank*, 211 Pa. Super. 42, 234 A.2d 32, 1967.

RESEARCH REFERENCES

ALR. Liability of check printer for errors in identification or routing codes printed on check. 18 A.L.R.4th 923.

Liability of bank for diversion to benefit of presenter or third party of proceeds of

check drawn to bank's order by drawer not indebted to bank. 69 A.L.R.4th 778.

Construction and effect of "padded payroll" rule of UCC § 3-405. 45 A.L.R.5th 389.

§ 75-3-407. Alteration.

(a) "Alteration" means (i) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (ii) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party.

(b) Except as provided in subsection (c), an alteration fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms.

(c) A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (i) according to its original terms, or (ii) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

SOURCES: Former § 75-3-407: Codes, 1942, § 41A:3-407; Laws, 1966, ch. 316, § 3-407; Laws, 1992, ch. 420, § 45, eff from and after January 1, 1993.

JUDICIAL DECISIONS

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23. Decisions under Code 1942 § 166.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-3. [Reserved for future use].

4. Completion of incomplete instrument.

Bank could not engage in self-help to remedy its mistake of not including Chapter 13 debtor's backhoe as security for note by simply adding the backhoe to the note without notifying the debtor and seeking debtor's ratification; thus, bank did not have security interest in the equipment. *Courtney v. Merchants & Mfrs. Bank*, 680 So. 2d 866 (Miss. 1996).

5.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-407.

11. In general.

Dates placed on demand note which related to time when interest would be due did not constitute extension of instrument's due date within meaning of UCC § 3-407(1), dealing with material alteration of instruments (stating that demand note, by its very nature, lacks any specified date of maturity and that demand for payment fixes date of maturity). *Citizens Bank v. Landers*, 570 S.W.2d 756 (Mo. Ct. App. 1978).

Law as to the burden of explaining the alteration of a negotiable instrument was not changed by the provisions of § 3-307 or of § 3-407. In *re Abercrombie Estate*, 20 Pa. D. & C.2d 496, 9 Fiduc. Rep. 539 (1960).

12. Physical alteration requirement.

Claim in suit to cancel combination note, security agreement, and disclosure statement, which alleged that amount not agreed on was fraudulently inserted in note signed in blank, raised issue that was primarily controlled by UCC § 3-115, which deals with incomplete instruments, and UCC § 3-407, which deals with alteration of instruments. *First Am. Bank v. Bishop*, 239 Ga. 809, 239 S.E.2d 19 (1977).

Where loan application spelled out what part of \$80,000 loan would be for stock in cooperative lending association and what part for fees, loan of \$60,000 plus amount necessary for fees did not constitute material alteration in terms of obligation imposed upon comakers on face of note, allegedly because note was unconditional on its face, while comakers were held accountable for stock purchases and additional loan fees. *Turfers, Inc. v. Frederick Prod. Credit Ass'n*, 265 Md. 679, 291 A.2d 643 (1972).

13. Materiality; number or relation of parties.

Striking name of copayee-bank from notes was not material or fraudulent alteration and notes might be enforced by holder as altered without joinder of bank. *Katski v. Boehm*, 249 Md. 568, 241 A.2d 129 (1968).

14. Completion of incomplete instrument.

Where parties to security agreement indicated their intent that paragraph covering debtor's inventory was to be applicable by including under this printed paragraph typewritten statement, "all petroleum products, tires and other motor vehicle supplies, now owned or after-acquired," secured party's alteration of instrument by insertion of "x" in box prefacing paragraph showing coverage of debtor's inventory was authorized. *First Nat'l Bank v. Hull*, 189 Neb. 581, 204 N.W.2d 90 (1973).

Seller does not have authority to sign purchaser's name to altered contract under UCC § 3-407, even where purpose of alteration is to give purchaser benefit of lower interest rate and lower monthly payments. *T.G. Blackwell Chevrolet Co. v. Eshee*, 261 So. 2d 481 (Miss. 1972).

Where written contract for sale which provided authority for completion of note set term of note at 2 years and made no mention of periodic instalment payments, and president of payee bank added provisions for 7 instalment payments over approximately 16 months, president's completion of note in terms varying authorized time and manner of payment was unauthorized and constituted material alteration; and suit on note filed 10 months

prior to maturity date "as authorized" was premature. *Bank of New Effington v. Thompson*, 502 P.2d 978 (Colo. Ct. App. 1972).

Check was legally complete when certified even though there were spaces on check making alteration by forger possible; held, certifying bank was not liable to payee for raised amount of check. *Wallach Sons v. Bankers Trust Co.*, 62 Misc. 2d 19 (1970).

Where the makers of a note, who were inexperienced in even ordinary business affairs, were induced by a salesman to enter into a home improvement contract supposedly with one business concern but without notice to, or consent of, the makers, and after the signing thereof, the name of the concern with whom makers intended to deal was clipped from one copy of the contract and the name of another concern stamped thereon, and makers innocently signed a property loan application in blank, the makers were entitled to the benefit of the rules governing incomplete instruments and alteration of instruments. *Fidelity Trust Co. v. Gardiner*, 191 Pa. Super. 17, 155 A.2d 405 (1959).

15. Writing as signed.

In suit on promissory note, payee's addition to note of acknowledgment of signature of maker and notarization thereof was not material alteration within meaning of UCC § 3-407(1) since it did not change contract of parties, materially affect form of document, time of payment, or sum payable; furthermore, there was no showing that payee acted fraudulently so as to discharge maker under UCC § 3-407(2); rather, addition was ineffectual attempt by payee to acquire security for debt. *Thomas v. Osborn*, 13 Wash. App. 371, 536 P.2d 8, 88 A.L.R.3d 898 (1975).

Where "at 6%" is added after the words "with interest" there is no material change to the instrument when that is the rate which is applied without such additional notation. *Epstein v. Paskow & Epstein*, 4 U.C.C. Rep. Serv. 1066 (1968, NY Sup).

Insertion of word "at" in note before printed name of bank, where insertion did not add place of payment but merely repeated effect of words "at its banking house" already and otherwise contained in

note, was not material alteration. *Holliday v. Anderson*, 428 S.W.2d 479 (Tex. Civ. App. 1968).

There is no alteration where the final payment due on a note is changed from \$41,000.00 to \$42,000.00 where the balance of the note showed that this was the correct amount and that the changed figure had been merely an arithmetical mistake. *National State Bank v. Kleinberg*, 4 U.C.C. Rep. Serv. 100 (1967, NY Sup).

This section is not applicable unless the alteration made by the holder of a note was fraudulent, and where the alterations consisted of striking out the amount of the note and inserting in pencil a lesser figure, which was the balance remaining after a payment was made and was the amount for which judgment was entered for the holder, and of a red line drawn across the face of the note to indicate that it had been examined by a bank examiner, they were immaterial and did not serve to discharge the makers. *Bank of N.M. v. Rice*, 78 N.M. 170, 429 P.2d 368 (1967).

Where by endorsement the makers of a promissory note confessed judgment in favor of the payee, and the note was subsequently altered to include confession of judgment in favor of an assignee, such an alteration was not material in that it did not in any way change the obligation of the makers to pay the note, nor did it adversely affect the assignee's rights as a holder in due course. *Navitsky v. Gregas*, 39 Pa. D. & C.2d 143 (1966).

Where a promissory note in the body thereof provided a due date, and in the upper left hand corner but not in the body of the note, had a box filled out "due 12/21/63" and this date had been marked through in ink and above the box was written in ink "Nov. 15, 1964", such alleged alteration is not material as it did not affect the contract in any manner. *M.B. Dale, Inc. v. Dawson County Bank*, 112 Ga. App. 560, 145 S.E.2d 619 (1965).

16. Discharge.

For a discharge to occur, there must be an alteration by the holder of the note, which is both fraudulent and material. *New Britain Nat'l Bank v. Baugh*, 31 A.D.2d 898 (1st Dep't 1969).

17. —Fraud requirement.

Where a note, as executed, contained a clause granting the maker an option for

an extension on the instrument, and where the holder, on receiving such note, lined through the extension option, such change was a material change in the instrument under UCC § 3-407(1)(c). However, since UCC § 3-407(2) provides that the only material change that discharges any party to the instrument is a change that is also fraudulent, the question as to whether the holder's lining out the extension option was a fraudulent alteration was one of fact for the jury and precluded the granting of summary judgment in favor of the note's guarantor. *Sewell v. Akins*, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

Contention of maker of note that change by holder of place of payment of instrument was material alteration that, by itself, discharged maker from liability was untenable, since UCC § 3-407(2)(a) provides that for alteration of instrument to discharge maker, alteration must be both material and fraudulent. *Central State Bank v. Powar & Ferraioli Enters., Ltd.*, 90 Misc. 2d 457 (1977).

There is no "alteration" because there is no fraud when a pencil line is run through the amount of the note after part payment has been made and the then current balance is written in pencil or where a red line is drawn across the face of the note to indicate that the bank examiner had examined the note. *Bank of N.M. v. Rice*, 78 N.M. 170, 429 P.2d 368 (1967).

In the absence of a showing of fraud a material alteration does not void a promissory note. *Van Norden v. Auto Credit Co.*, 109 Ga. App. 208, 135 S.E.2d 477 (1964).

18. —Ratification.

In action for recovery of mobile home covered by retail instalment contract, even assuming contract had been altered subsequent to its execution, payment by buyers subsequent to receipt of "altered" contract constituted ratification under UCC § 3-407. *Morrisette v. Commercial Credit Corp.*, 345 So. 2d 298 (Ala. Civ. App. 1977).

19. Rights of holder in due course.

In action by cashing bank to recover from drawer and indorser of two checks drawn on insufficient funds, where defen-

dant indorser stole, completed, and cashed at plaintiff bank (where indorser was customer) two checks which had been signed in blank by defendant drawer and delivered by drawer to her husband, and where plaintiff bank had no notice of any defenses against, or claims to, such checks by any person, plaintiff under UCC § 3-302 was holder in due course of such checks and could, under UCC § 3-407 and UCC § 3-115, enforce them as completed. *Central State Bank v. Kilroy*, 57 A.D.2d 940 (2d Dep't 1977).

Where at the time a note was negotiated to a bank it was overdue as originally drafted, the bank might still claim the status of a holder in due course and enforce the note if it came to the bank in such a condition that the alteration of the maturity date was not noticeable. *Unadilla Nat'l Bank v. McQueer*, 27 A.D.2d 778 (3d Dep't 1967).

A payee may be a holder in due course even though the note was incomplete as to amount when signed, and where the blanks are filled in and an otherwise incomplete instrument is completed, the loss is placed upon the party who left the instrument incomplete and permitted the holder to enforce it in its completed form. *Waterbury Sav. Bank v. Jaroszewski*, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

The fact that an instrument is incomplete when signed does not prevent a holder from being a holder in due course and such holder may enforce the instrument according to its completed terms. *Waterbury Sav. Bank v. Jaroszewski*, 4 Conn. Cir. Ct. 620, 238 A.2d 446 (1967).

A material alteration of a promissory note is no defense against a holder in due course seeking to enforce an incomplete instrument as completed, where the alleged alteration was the filling in of the blanks in the instruments after the makers had signed it. *First Nat'l Bank v. Anderson*, 7 Pa. D. & C.2d 661 (1956).

20. Liability of bank; risk of alteration.

Bank held not liable for payment of certified check, the amount of which had been altered subsequent to certification, except to the extent of the amount of such certified check at the time it was drawn.

Sam Goody, Inc. v. Franklin Nat'l Bank, 57 Misc. 2d 193 (1968).

Holder of check who procures certification warrants to bank that check has not been materially altered, although bank runs risk of loss if check is certified after alteration and then passes to holder in due course, under Code § 3-417. Sam Goody, Inc. v. Franklin Nat'l Bank, 57 Misc. 2d 193 (1968).

21. Practice and procedure.

Change of date of demand note executed by partnership, which had been indorsed by all eight partners as individuals on date of instrument's execution, from November 11, 1971 to March 27, 1973 at instance of bank which advanced funds represented by note did not constitute material alteration of instrument under UCC § 3-407(1)(c), even though only two of the eight indorsers were aware of and consented to such change of date, where suit on instrument was commenced within three years of date originally placed thereon and nonconsenting indorsers would therefore not have been able to interpose plea of limitations even if original date had not been changed (stating that court's opinion did not reach question whether such change of date would have been material if action had been commenced more than three years after date originally placed on instrument). Placido v. Citizens Bank & Trust Co., 38 Md. App. 33, 379 A.2d 773 (1977).

Granting of summary judgment in favor of creditor bank on promissory notes executed by principal of defendant guarantors was not error, as against defendants' contention that notes had been materially altered by bank within meaning of UCC § 3-407(1), where (1) evidence introduced by bank, including notes themselves, showed only that bank officials had made certain administrative notations on back of notes for bank's use only, (2) such notations did not change contract of any party to instruments in any respect, and (3) defendants in their turn failed to introduce any evidence which showed that factual dispute existed on issue of alteration. Johnson v. First Nat'l Bank, 143 Ga. App. 384, 238 S.E.2d 747 (1977).

Notwithstanding that promissory note was materially altered, promisor was not

discharged under UCC § 3-407 where no issue was requested or submitted to jury as to who altered the note and where promisor failed to establish, in face of conflicting testimony, to jury's satisfaction that intent existed to defraud promisor. Lawler v. FDIC, 538 S.W.2d 245 (Tex. Civ. App. 1976), ref. n.r.e (Dec. 1, 1976).

UCC § 3-407 relating to alteration could not justify the instruction that "Defendants had a legal right to alter the original installment purchase contract executed by the Plaintiff to give the Plaintiff the benefit of a lower interest rate and of lower monthly payments, if such alteration was not made for a fraudulent purpose"; such instruction was erroneous. T.G. Blackwell Chevrolet Co. v. Eshee, 261 So. 2d 481 (Miss. 1972).

Alleged addition to signature on note of words "Fidelity Enterprises, Incorporated, D/B/A" was material alteration or change raising questions of fact with regard to fraudulent or non-fraudulent nature of alteration, precluding summary judgment for bank in action against guarantor on promissory note. Peppers v. Citizens & S. Nat'l Bank, 127 Ga. App. 16, 192 S.E.2d 409 (1972).

Where blank logging slips, similar to blank checks were readily available to employees and two pads of such slips were given to employee charged with forgery, there was sufficient evidence to support finding of employer's negligence "substantially contributing" to alleged forgery. Thompson Maple Prods., Inc. v. Citizens Nat'l Bank, 211 Pa. Super. 42, 234 A.2d 32, 1967.

When a note is signed in blank it becomes a question of fact whether the instrument was filled in in accordance with the authorization of the makers. Golden Dawn Foods, Inc. v. Cekuta, 1 Ohio App. 2d 464, 205 N.E.2d 121 (1964).

III. DECISIONS UNDER FORMER STATUTES.

22. Decisions under Code 1942 § 165.

A plea of alteration after execution is an affirmative defense which defendant has the burden of proving by clear and convincing evidence. Tate v. Rouse, 247 Miss. 545, 156 So. 2d 217 (1963).

Where a note is payable with interest, insertion by the payee of the legal rate after its execution, does not vitiate it. *Tate v. Rouse*, 247 Miss. 545, 156 So. 2d 217 (1963).

That the rate of interest was inserted on a different typewriter than was used in filling other blanks in a note, is insufficient to show that it was subsequent to its execution. *Tate v. Rouse*, 247 Miss. 545, 156 So. 2d 217 (1963).

Where the blank spaces in a conditional sales contract and a note sued on were filled in before the instruments were assigned to a purchaser for value in due course, the conditional purchaser could not defend the action upon the ground that the contract when signed by him specified monthly payments totaling less than the balance shown to be due on the contract as filled out. *Garnett v. Associates Dist. Corp.*, 233 Miss. 849, 103 So. 2d 368 (1958).

Holder in due course of instrument which has been materially altered may recover according to its original tenor. *Gibbons v. Longino & Reid*, 153 Miss. 749, 121 So. 490 (1929).

Holder in due course of note, materially altered by blank date of payment being filled in, can recover on it according to original tenor. *Wilson v. Stark*, 146 Miss. 498, 112 So. 390 (1927).

23. Decisions under Code 1942 § 166.

Where defendant alleges and has the burden of proving an alteration vitiating an instrument, he must establish both the fact of alteration and its vitiating character. *Tate v. Rouse*, 247 Miss. 545, 156 So. 2d 217 (1963).

A maker's oral statement denied by the payee, that blank spaces for rate of interest were not filled in when he executed notes in suit, are not sufficient to make a jury issue. *Tate v. Rouse*, 247 Miss. 545, 156 So. 2d 217 (1963).

Where the trial court was warranted in finding that the name of the payee in two demand notes sued upon had been changed by the indorser at the instance of the indorsee and without the consent of one of the makers, this was a material alteration and voided the instrument insofar as such maker was concerned, but a different rule applied as to the indorser. *Boxwell v. Champagne*, 229 Miss. 355, 91 So. 2d 256 (1956).

The guarantor is released or discharged of liability if, without his consent, the contract of obligation by which the principal therefore is bound to the creditor or obligee has been materially altered in respect of its terms or the manner of execution thereof. *Tower Underwriters v. Culley*, 211 Miss. 788, 53 So. 2d 94 (1951).

Where there was a contract for operation of a loan business, under which the claimant guaranteed all loans made by the agency and notes were payable at a certain office, the removal of the broker with whom claimant had such contract, after discovery of shortages, to another location with all the records without claimant's consent, relieved the claimant from any liabilities of guarantor because the contract was materially altered by change of place of payment. *Tower Underwriters v. Culley*, 211 Miss. 788, 53 So. 2d 94 (1951).

§ 75-3-408. Drawee not liable on unaccepted draft.

A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it.

SOURCES: Former § 75-3-408: Codes, 1942, § 41A:3-408; Laws, 1966, ch. 316, § 3-408; Laws, 1992, ch. 420, § 46, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-409.

11. In general.
12. Check as promise of future payment.
13. Revocation; stop payment order.
14. —Applicability to bank money order.
15. Drawee's liability; acceptance.
16. Liability under other obligation.
17. Practice and procedure.

III. DECISIONS UNDER FORMER STATUTES.

18. Decisions Under Code 1942 § 168.
19. Decisions under Code 1942 § 230.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-409.

11. In general.

Under UCC § 3-409, check or draft does not operate as assignment of any funds; basic reason for rule is to permit unaccepting drawee to avoid disputes with other than drawer; statement on check that funds are payable at bank does not create obligation on part of drawee to pay check. *Atlantic Cement Co. v. South Shore Bank*, 730 F.2d 831 (1st Cir. Mass. 1984).

The provisions of subsection (1) of the instant section are in line with § 189 of the old Negotiable Instruments Act of 1901. *Commonwealth v. Cohen*, 203 Pa. Super. 34, 199 A.2d 139 (1964); cert. denied, 379 U.S. 902, 85 S. Ct. 191, 13 L. Ed. 2d 176 (1964), cert. denied, 379 U.S. 970, 85 S. Ct. 668, 13 L. Ed. 2d 562 (1965).

12. Check as promise of future payment.

Issuance of check to auto repairman did not operate as assignment of funds and did not extinguish mechanics lien; underlying obligation was resurrected upon dishonor of draft. *Leavitt v. Charles R.*

Hearn, Inc., 19 Ill. App. 3d 980, 312 N.E.2d 806 (1st Dist. 1974).

Where the parties have not, by agreement, made an assignment of funds by the issuance of a check, a garnishment served on the drawee bank before the check is presented for payment gives priority to the garnishment. *State Bank v. Stallings*, 19 Utah 2d 146, 427 P.2d 744 (1967).

A check can be a negotiable instrument without constituting immediate payment, and unless the parties agree otherwise, a check is not payment until presented and paid. *Kensil v. Ocean City*, 89 N.J. Super. 342, 215 A.2d 43 (App. Div. 1965).

13. Revocation; stop payment order.

Payee had no interest in cashier's check which had been typed and signed but which was cancelled when bank learned that drawer company was being placed in bankruptcy since, under UCC § 3-409, check itself did not operate as assignment of funds and payee, who never took possession of check, could not qualify as holder under UCC § 1-201(2). *Rex Smith Propane, Inc. v. National Bank of Commerce*, 372 F. Supp. 499 (N.D. Tex. 1974).

Receipt of check which was to be applied on note owed by corporation and indorsed by stockholder did not of itself operate as assignment of funds in hands of drawee bank and therefore was conditional payment only, which became nullity when payment was stopped, and did not relieve indorsee from liability on note, notwithstanding fact that bank had assured him that amount of check had been paid on note. *Del State Bank v. Patton*, 513 P.2d 868 (Okla. 1973).

A check does not of itself operate as an assignment of any part of the drawer's funds deposited with the bank upon which it is drawn, but is merely an order upon a bank to pay from the drawer's account, and it may be revoked at any time prior to certification, acceptance or payment. *Lambeth v. Lewis*, 114 Ga. App. 191, 150 S.E.2d 462 (1966).

14. —Applicability to bank money order.

A bank money order which does not require the signature of the issuer is sub-

ject to a stop-payment order. *Krom v. Chemical Bank N.Y. Trust Co.*, 38 A.D.2d 871 (3d Dep't 1972).

Money orders purchased from bank which, when issued, had the amount written on them, but were blank as to date, payee and name and address of maker, and which had printed thereon the bank's name and address, were subject to stop-payment order. *Krom v. Chemical Bank N.Y. Trust Co.*, 38 A.D.2d 871 (3d Dep't 1972).

A so-called "Personal Money Order-Register Check" (an instrument issued by a bank for the amount of the sum of money deposited with it by the check's purchaser, and showing the name of the bank as drawee but with the names of the drawer and payee left blank) creates the same debtor-creditor relationship between the bank and its customer which any ordinary deposit of funds would create; and the purchaser of the check who, under his contract with the bank, is the sole person who may draw on the fund deposited, and he has a clear right to stop payment prior to the check's acceptance by the bank. *Garden Check Cashing Serv., Inc. v. First Nat'l City Bank*, 25 A.D.2d 137 (1st Dep't 1966), *aff'd*, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

15. Drawee's liability; acceptance.

UCC § 3-409(1) means that until a check drawn on a bank is accepted, the bank is not liable thereon. *Willow City Farmers Elevator v. Vogel, Vogel, Brantner & Kelly*, 268 N.W.2d 762 (N.D. 1978).

Under UCC § 3-409(1), drawee of check is not liable on instrument until he accepts it, and such acceptance is required by UCC § 3-410(1) to be written on the instrument (holding, where check presented to drawee bank was not accepted because of insufficient funds in drawer's account, that drawee bank was not liable to payee because drawee's employee had previously informed payee by telephone that drawer's account contained sufficient funds). *Groos Nat'l Bank v. Shaw's of San Antonio, Inc.*, 555 S.W.2d 492 (Tex. Civ. App. 1977), *writ ref'd n.r.e.*, (Jan. 18, 1978).

Certification of check constitutes acceptance, and this acceptance is bank's

signed engagement to pay check upon presentment when properly endorsed; and where certified check was made payable to order of joint payees, and only one payee endorsed check, refusal of bank to pay check was not breach of its obligation on instrument and bank's release of funds which had been held from drawer's account for payment of certified check created no new liability on part of bank. *Clinger v. Clinger*, 503 P.2d 363 (Colo. Ct. App. 1972).

Only drawer bank is liable on bank draft until accepted by drawee; although cashier's check is accepted upon issuance there is only one bank involved and therefore only one party bound, as compared with certified check on which both drawer and drawee are bound. *Perry v. West*, 110 N.H. 351, 266 A.2d 849 (1970).

Unlike a cashier's check or a traveller's check, both of which are signed by the issuer prior to their issuance, a so-called "Personal Money Order-Register Check" at no time bears the signature of the drawee, who enters into no contract relations with the holder unless and until the instrument is accepted; and a bank issuing such a check is under no obligation to accept or pay the same to a holder, innocent or otherwise, after receipt of a stop-payment order from the purchaser of the check. *Garden Check Cashing Serv., Inc. v. First Nat'l City Bank*, 25 A.D.2d 137 (1st Dep't 1966), *aff'd*, 18 N.Y.2d 941, 277 N.Y.S.2d 141, 223 N.E.2d 566 (1966).

16. Liability under other obligation.

The fact that a check is not an assignment and does not impose liability on the drawee until it is accepted, does not preclude the liability of the bank for failing to honor its obligation to disperse building funds held by it in escrow. *Mid-Continent Cas. Co. v. Jenkins*, 431 P.2d 349 (Okla. 1967).

17. Practice and procedure.

Complaint by beneficiary of letter of credit against issuer stated cause of action where it alleged that issuer had breached oral agreement to honor "envelope draft" as presented by beneficiary, which was defective for lack of proper signature of drawer, since UCC § 3-409(2) and Comment 3 to such section, and also under

UCC § 3-410(2) and Comment 3 thereto, issuer could be precluded from raising issue of conformity of draft to letter's terms on grounds of waiver or estoppel. *North Valley Bank v. National Bank*, 437 F. Supp. 70 (N.D. Ill. 1977).

Payee could not bring action to recover amount of check from drawee bank, where any claim with respect to setoff by drawee bank against balance in bankrupt drawer's checking account belonged to bankrupt's estate on behalf of all creditors, not just payee of check. *Dube v. Manufacturers Hanover Trust Co.*, 39 A.D.2d 684 (1st Dep't 1972), *aff'd*, 33 N.Y.2d 739, 349 N.Y.S.2d 1001, 304 N.E.2d 569 (1973).

Since draft is not assignment under UCC § 3-409(1), check held by payee and drawn by bankrupt was subject to drawee bank's setoff rights. *Dube v. Manufacturers Hanover Trust Co.*, 39 A.D.2d 684 (1st Dep't 1972), *aff'd*, 33 N.Y.2d 739, 349 N.Y.S.2d 1001, 304 N.E.2d 569 (1973).

Where drawee bank had not accepted check either voluntarily or involuntarily, it was entitled, without incurring liability to payee, to set off matured indebtedness against funds in drawer's account. *Conn v. Bank of Clarendon Hills*, 53 Ill. 2d 33, 289 N.E.2d 425 (1972).

The statute of limitations does not run from the time of delivery of the check but begins to run at the time the check is presented for cashing; or if not presented promptly, within a reasonable time after the delivery of the check, whichever occurs first. *Commonwealth v. Cohen*, 203 Pa. Super. 34, 199 A.2d 139 (1964), *cert. denied*, 379 U.S. 902, 85 S. Ct. 191, 13 L. Ed. 2d 176 (1964), *cert. denied*, 379 U.S. 970, 85 S. Ct. 668, 13 L. Ed. 2d 562 (1965).

The two-year statute of limitations applicable to a conspiracy prosecution in which the cashing of a check was an overt

act did not begin to run from the time of the delivery of the check but began to run at the time the check was presented for cashing, and prosecution was not barred where an indictment charging the offense was returned within two years of the time the check was cashed. *Commonwealth v. Cohen*, 203 Pa. Super. 34, 199 A.2d 139 (1964), *cert. denied*, 379 U.S. 902, 85 S. Ct. 191, 13 L. Ed. 2d 176 (1964), *cert. denied*, 379 U.S. 970, 85 S. Ct. 668, 13 L. Ed. 2d 562 (1965).

III. DECISIONS UNDER FORMER STATUTES.

18. Decisions Under Code 1942 § 168.

Drafts do not, of themselves, operate as an assignment of funds of a drawee in the hands of the bank and as result the bank therefore could not pay them until they were accepted by the drawee even though the bank had prepared a check for delivery to the forwarding bank, if there should be acceptance. *Thack v. First Nat'l Bank & Trust Co.*, 206 F.2d 180, 39 A.L.R.2d 1290 (5th Cir. 1953).

19. Decisions under Code 1942 § 230.

Check, returned to payee bank by drawee bank's correspondent bank after receiving notice of drawee bank's liquidation, held not paid when presented at clearing house, so that drawer could not recover amount thereof from correspondent bank. *Campbell v. Love*, 168 Miss. 75, 150 So. 780 (1933).

There is no assignment pro tanto, where check is not drawn on particular fund or does not show on face it is assignment of particular fund. *Federal Land Bank v. Collins*, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

Check not assignment of maker's funds in bank. *Wileman v. King*, 120 Miss. 392, 82 So. 265, 5 A.L.R. 584 (1919).

§ 75-3-409. Acceptance of draft; certified check.

(a) "Acceptance" means the drawee's signed agreement to pay a draft as presented. It must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person.

(b) A draft may be accepted although it has not been signed by the drawer, is otherwise incomplete, is overdue, or has been dishonored.

(c) If a draft is payable at a fixed period after sight and the acceptor fails to date the acceptance, the holder may complete the acceptance by supplying a date in good faith.

(d) "Certified check" means a check accepted by the bank on which it is drawn. Acceptance may be made as stated in subsection (a) or by a writing on the check which indicates that the check is certified. The drawee of a check has no obligation to certify the check, and refusal to certify is not dishonor of the check.

SOURCES: Former § 75-3-409: Codes, 1942, § 41A:3-409; Laws, 1966, ch. 316, § 3-409; Laws, 1992, ch. 420, § 47, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-410, 75-3-411.

11. In general; necessity that acceptance be written.
12. Certification as acceptance.
13. Issuance of instrument as acceptance.
14. —Effect on subsequent attempts to stop payment.
15. Other matters.

III. DECISIONS UNDER FORMER STATUTES.

16. Decisions under Code 1942 § 173.
17. Decisions under Code 1942 § 202.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-410, 75-3-411.

11. In general; necessity that acceptance be written.

Under UCC § 3-409(1), drawee of check is not liable on instrument until he accepts it, and such acceptance is required by UCC § 3-410(1) to be written on the instrument (holding, where check presented to drawee bank was not accepted because of insufficient funds in drawer's account, that drawee bank was not liable to payee because drawee's employee had previously informed payee by telephone that drawer's account contained sufficient

funds). *Groos Nat'l Bank v. Shaw's of San Antonio, Inc.*, 555 S.W.2d 492 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Jan. 18, 1978).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts, under UCC § 3-413, plaintiff did not admit genuineness or presence of payees' endorsements by its acceptance of drafts. *Phoenix Assurance Co. v. Davis*, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

Requirements for acceptance as set forth in UCC § 3-410 are fulfilled by affixing of signature by agent of issuing bank. *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (L. Div. 1970).

The acceptance of a check must be in writing, and purported acceptance by means of a telephone conversation is invalid. *Georgia Bank & Trust Co. v. Hadarits*, 111 Ga. App. 195, 141 S.E.2d 172 (1965), rev'd on other grounds, 221 Ga. 125, 143 S.E.2d 627 (1965), conformed

to, 112 Ga. App. 143, 144 S.E.2d 118 (1965).

12. Certification as acceptance.

Where (1) buyer tendered check to seller for less than amount due and attached statement to check which (a) showed reason for deduction from amount owed, and (b) stated that check constituted "payment in full," (2) seller took check, but told buyer that he was not taking it as payment in full, and (3) seller subsequently had check certified, court held that seller had accepted check in full payment of buyer's debt, inasmuch as (1) under UCC § 3-411(1), certification of check constituted acceptance thereof, and (2) such certification is equivalent of collecting or cashing check, in that check's amount is thus placed under creditor's exclusive control and debtor is completely deprived of his money with no right to stop payment on check. *Sherwin-Williams Co. v. Sarrett*, 419 So. 2d 1332, 42 A.L.R.4th 89 (Miss. 1982).

A creditor's certification of a debtor's checks constituted acceptance thereof within the meaning of § 75-3-411(1) and operated as an accord and satisfaction of the debt, where the creditor certified such checks with full knowledge of statements on the checks listing deductions and stating that the amounts tendered constituted payment in full of the amounts due. *Sherwin-Williams Co. v. Sarrett*, 419 So. 2d 1332, 42 A.L.R.4th 89 (Miss. 1982).

Under UCC § 3-411(1), certification of check is acceptance by drawee but § 3-411(1) did not apply where payee of check procured its certification. *Post Rd. Realty, Inc. v. Zee-Bar, Inc.*, 117 N.H. 136, 370 A.2d 282 (1977).

Where lessor received check from lessee which stated, on reverse side, that acceptance and endorsement of check constituted full and final settlement of any obligation by lessee to lessor under lease agreement, and where lessor had check certified by issuing bank, act of having check certified constituted acceptance of payment under terms specified on check and lessee was released from further obligation to lessor notwithstanding lessor did not endorse check. *Kersh v. Manis Whsle. Co.*, 135 Ga. App. 943, 219 S.E.2d 604 (1975).

Argument that since certification constituted acceptance under § 3-411, drawer was discharged from any further liability with respect to payment of underlying obligation, and trial court therefore erred in awarding interest on amount of check was without merit where, because of restriction on check that indorsement would amount to acknowledgment that check was in full payment of all claims, payee could not cash check but could only obtain certification. *August Bohl Contracting Co. v. Depot Constr. Corp.*, 42 A.D.2d 812 (3d Dep't 1973).

Certification of check constitutes acceptance, and this acceptance is bank's signed engagement to pay check upon presentment when properly endorsed; and where certified check was made payable to order of joint payees, and only one payee endorsed check, refusal of bank to pay check was not breach of its obligation on instrument and bank's release of funds which had been held from drawer's account for payment of certified check created no new liability on part of bank. *Clinger v. Clinger*, 503 P.2d 363 (Colo. Ct. App. 1972).

13. Issuance of instrument as acceptance.

A cashier's check is a draft drawn by a bank, and under UCC § 3-410(1), it is deemed to have been accepted in advance by the mere act of issuance. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

A note, unlike a draft, is not covered by UCC § 3-410(1) and cannot be deemed to have been accepted by the mere act of issuance. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

A bank money order is essentially the same as a cashier's check. It is a bill of exchange drawn by a bank on itself and accepted in advance by the act of issuance, and under UCC § 3-410 and § 4-303, it is not subject to countermand by either its purchaser or the issuing bank. When purchased for adequate consideration, a bank money order, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank and is equivalent to a negotiable promissory note of the bank. *Thompson Poultry, Inc. v. First Nat'l Bank*, 199 Neb. 8, 255 N.W.2d 856 (1977).

Under UCC §§ 3-413(1); 3-410(1); 4-303(1)(a), cashier's check is accepted by mere act of issuance when it becomes primary obligation of bank, rather than purchaser, to pay it from its own assets upon demand, and purchaser had no authority to countermand cashier's check because of fraud allegedly practiced on purchaser by payee. *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14 (Mo. 1976).

14. —Effect on subsequent attempts to stop payment.

The defendant bank, which issued an official, or cashier's, check to the plaintiff in exchange for the personal check of its customer, cannot stop payment on the official check because of its customer's stop order on the personal check; the bank cannot assert the defense of failure of consideration since a cashier's check is deemed accepted in advance by the mere act of issuance. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

Where (1) customer, which had had its tractor-trailer repaired, gave repairman check for repairs, (2) repairman took check to defendant bank, cashed it, used proceeds to purchase official bank check payable to repairman's business firm, and then released tractor-trailer to customer, (3) customer, after dispute with repairman about quality of repairs, attempted to place stop-order on customer's check, and (4) defendant bank, which was unable to implement such stop-order, refused to honor bank check that it had issued to repairman, asserting failure of consideration therefor in repairman's action on such check, court held (1) that bank check in issue was a cashier's check that defendant was obligated to pay on demand, (2) that such check was deemed under UCC § 3-410(1) to have been accepted in advance by mere act of its issuance, and (3) that defendant had no right under UCC § 4-303(1)(a) to terminate its duty to pay it. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

Since under Code § 3-410 cashier's check is accepted when issued, Code § 4-303 has effect of preventing bank from stopping payment on cashier's check once it has been issued. *Wertz v. Richardson*

Heights Bank & Trust, 495 S.W.2d 572 (Tex. 1973).

Bank held not liable for payment of certified check, the amount of which had been altered subsequent to certification, except to the extent of the amount of such certified check at the time it was drawn. *Sam Goody, Inc. v. Franklin Nat'l Bank*, 57 Misc. 2d 193 (1968).

15. Other matters.

Analogous use of concepts such as finality of checks once "accepted" under UCC §§ 3-410, 4-303 would support irrevocability of electronic funds transfer at time of transfer. *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047 (2d Cir. N.Y. 1979).

Complaint by beneficiary of letter of credit against issuer stated cause of action where it alleged that issuer had breached oral agreement to honor "envelope draft" as presented by beneficiary, which was defective for lack of proper signature of drawer, since UCC § 3-409(2) and Comment 3 to such section, and also under UCC § 3-410(2) and Comment 3 thereto, issuer could be precluded from raising issue of conformity of draft to letter's terms on grounds of waiver or estoppel. *North Valley Bank v. National Bank*, 437 F. Supp. 70 (N.D. Ill. 1977).

When bank certified check for holder it created novation in which drawer was released and bank was substituted as primary debtor. *Jefferies & Co. v. Arkus-Duntov*, 357 F. Supp. 1206 (S.D.N.Y. 1973).

A drawer cannot stop payment on a check after it had been certified, regardless of who had obtained the certification. *Maintenance Serv., Inc. v. Royal Nat'l Bank*, 4 U.C.C. Rep. Serv. 766 (1967, NY Sup).

Prior to its acceptance by the drawee bank a check in the possession of the payee is subject to garnishment under Wisconsin law. *Skalecki v. Frederick*, 31 Wis. 2d 496, 143 N.W.2d 520 (1966).

The words "upon acceptance" in a draft or bill of exchange do not render the instrument conditional, since presentment for acceptance may be required for any check or bill of exchange. *Merson v. Sun Ins. Co.*, 44 Misc. 2d 131 (1964).

III. DECISIONS UNDER FORMER STATUTES.

Collins, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

16. Decisions under Code 1942 § 173.

Bank's payment of check on unauthorized indorsement and charging it to drawer does not constitute acceptance. Federal Land Bank v. Collins, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

Payee could not sue drawee paying check on unauthorized indorsement without notice of defect. Federal Land Bank v.

17. Decisions under Code 1942 § 202.

Chattel mortgagee who was prevented by illness from presenting check of mortgagor until garnishment proceedings against bank prevented its payment, held not precluded from foreclosing mortgage. Wileman v. King, 120 Miss. 392, 82 So. 265, 5 A.L.R. 584 (1919).

RESEARCH REFERENCES

ALR. Provision in draft or note directing payment "on acceptance" as affecting negotiability. 19 A.L.R.4th 1268.

Application of UCC § 1-207 to avoid

discharge of disputed claim upon qualified acceptance of check tendered as payment in full. 37 A.L.R.4th 358.

§ 75-3-410. Acceptance varying draft.

(a) If the terms of a drawee's acceptance vary from the terms of the draft as presented, the holder may refuse the acceptance and treat the draft as dishonored. In that case, the drawee may cancel the acceptance.

(b) The terms of a draft are not varied by an acceptance to pay at a particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at that bank or place.

(c) If the holder assents to an acceptance varying the terms of a draft, the obligation of each drawer and indorser that does not expressly assent to the acceptance is discharged.

SOURCES: Former § 75-3-410: Codes, 1942, § 41A:3-410; Laws, 1966, ch. 316, § 3-410; Laws, 1992, ch. 420, § 48, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-412.

11. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-412.

11. In general.

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second

collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts: (1) Plaintiff's claim based on breach of warranty of good title was not barred by contributory negligence; (2) warranty of good title was imposed by law even in absence of endorsement, and collecting banks were subject to it; (3) negotiable instrument made payable to payees jointly may be assigned, but not negotiated, without endorsement of all payees and, thus, depositor, collecting banks and plaintiff were assignees, not holders of drafts, who held them subject to rights and claims of real owners; by obtaining payment from plaintiff, second collecting bank became liable to plaintiff on warranty of good title, and when first collecting bank obtained payment from second collecting bank, and depositor received payment from first collecting bank, first collecting bank became liable to second collecting bank and depositor became liable to first collecting bank on similar warranties; (4) under UCC § 3-413, plaintiff did not admit genuineness or presence of payees' endorsements by its acceptance of drafts; (5) under UCC § 4-406, plaintiff had duty to examine drafts for forgeries of its signatures as drawer and any attempts to alter, such as raising amount of draft, but it did not breach any duty it had to check for endorsements and, hence, had no duty to give second collecting bank notice of missing endorsement; (6) second collecting bank was not relieved of liability under UCC § 4-203 on grounds that it acted in accordance with instructions of plaintiff as its transferor since first collecting bank was its transferor and plaintiff its transferee; (7) first collecting bank was not relieved of liability on ground that second collecting bank, as holder of drafts,

assented to acceptance by plaintiff which varied terms of drafts and thus discharged first collecting bank under UCC § 3-412(3) since second collecting bank was not "holder" of drafts within meaning of that section; (8) however, since plaintiff waited for 10 weeks after being notified of defendants' breach of warranty and since during interim depositor closed his account with first collecting bank, thus depriving first collecting bank of opportunity to offset loss against depositor's account, under UCC § 4-207(4) plaintiff delayed unreasonably in giving notice and first collecting bank was entitled to offset loss it suffered thereby against plaintiff's claim. *Phoenix Assurance Co. v. Davis*, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

In action by plaintiff to recover against 2 collecting banks for negligence and breach of warranty of good title under UCC § 4-207, where plaintiff issued 2 drafts payable "through" second collecting bank to order of joint payees, and where one payee deposited drafts in his account with first collecting bank without endorsement of payee entitled to proceeds, first collecting bank forwarded drafts to second collecting bank and second collecting bank presented drafts to plaintiff for acceptance, plaintiff accepted drafts and authorized payment against its account with second collecting bank, and where plaintiff, after being notified that second payee had not received proceeds, issued substitute drafts, first collecting bank was not relieved of liability on ground that second collecting bank, as holder of drafts, assented to acceptance by plaintiff which varied terms of drafts and thus discharged first collecting bank under UCC § 3-412(3) since second collecting bank was not "holder" of drafts within meaning of that section. *Phoenix Assurance Co. v. Davis*, 126 N.J. Super. 379, 314 A.2d 615 (L. Div. 1974).

§ 75-3-411. Refusal to pay cashier's checks, teller's checks, and certified checks.

(a) In this section, "obligated bank" means the acceptor of a certified check or the issuer of a cashier's check or teller's check bought from the issuer.

(b) If the obligated bank wrongfully (i) refuses to pay a cashier's check or certified check, (ii) stops payment of a teller's check, or (iii) refuses to pay a dishonored teller's check, the person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment and may recover consequential damages if the obligated bank refuses to pay after receiving notice of particular circumstances giving rise to the damages.

(c) Expenses or consequential damages under subsection (b) are not recoverable if the refusal of the obligated bank to pay occurs because (i) the bank suspends payments, (ii) the obligated bank asserts a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument, (iii) the obligated bank has a reasonable doubt whether the person demanding payment is the person entitled to enforce the instrument, or (iv) payment is prohibited by law.

SOURCES: Former § 75-3-411: Codes, 1942, § 41A:3-411; Laws, 1966, ch. 316, § 3-411; Laws, 1992, ch. 420, § 49, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-410, 75-3-411.

11. In general; necessity that acceptance be written.
12. Certification as acceptance.
13. Issuance of instrument as acceptance.
14. —Effect on subsequent attempts to stop payment.
15. Other matters.

III. DECISIONS UNDER FORMER STATUTES.

16. Decisions under Code 1942 § 173.
17. Decisions under Code 1942 § 202.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-410, 75-3-411.

11. In general; necessity that acceptance be written.

Under UCC § 3-409(1), drawee of check is not liable on instrument until he accepts it, and such acceptance is required by UCC § 3-410(1) to be written on the

instrument (holding, where check presented to drawee bank was not accepted because of insufficient funds in drawer's account, that drawee bank was not liable to payee because drawee's employee had previously informed payee by telephone that drawer's account contained sufficient funds). *Groos Nat'l Bank v. Shaw's of San Antonio, Inc.*, 555 S.W.2d 492 (Tex. Civ. App. 1977), writ ref'd n.r.e., (Jan. 18, 1978).

Requirements for acceptance as set forth in UCC § 3-410 are fulfilled by affixing of signature by agent of issuing bank. *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, 268 A.2d 327 (L. Div. 1970).

The acceptance of a check must be in writing, and purported acceptance by means of a telephone conversation is invalid. *Georgia Bank & Trust Co. v. Hadarits*, 111 Ga. App. 195, 141 S.E.2d 172 (1965), rev'd on other grounds, 221 Ga. 125, 143 S.E.2d 627 (1965), conformed to, 112 Ga. App. 143, 144 S.E.2d 118 (1965).

12. Certification as acceptance.

Under UCC § 3-411(1), certification of check is acceptance by drawee but § 3-411(1) did not apply where payee of check procured its certification. *Post Rd. Realty, Inc. v. Zee-Bar, Inc.*, 117 N.H. 136, 370 A.2d 282 (1977).

Where lessor received check from lessee which stated, on reverse side, that acceptance and endorsement of check constituted full and final settlement of any obligation by lessee to lessor under lease agreement, and where lessor had check certified by issuing bank, act of having check certified constituted acceptance of payment under terms specified on check and lessee was released from further obligation to lessor notwithstanding lessor did not endorse check. *Kersh v. Manis Whsle. Co.*, 135 Ga. App. 943, 219 S.E.2d 604 (1975).

Argument that since certification constituted acceptance under § 3-411, drawer was discharged from any further liability with respect to payment of underlying obligation, and trial court therefore erred in awarding interest on amount of check was without merit where, because of restriction on check that indorsement would amount to acknowledgment that check was in full payment of all claims, payee could not cash check but could only obtain certification. *August Bohl Contracting Co. v. Depot Constr. Corp.*, 42 A.D.2d 812 (3d Dep't 1973).

Certification of check constitutes acceptance, and this acceptance is bank's signed engagement to pay check upon presentment when properly endorsed; and where certified check was made payable to order of joint payees, and only one payee endorsed check, refusal of bank to pay check was not breach of its obligation on instrument and bank's release of funds which had been held from drawer's account for payment of certified check created no new liability on part of bank. *Clinger v. Clinger*, 503 P.2d 363 (Colo. Ct. App. 1972).

13. Issuance of instrument as acceptance.

A cashier's check is a draft drawn by a bank, and under UCC § 3-410(1), it is deemed to have been accepted in advance by the mere act of issuance. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

A note, unlike a draft, is not covered by UCC § 3-410(1) and cannot be deemed to have been accepted by the mere act of issuance. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

A bank money order is essentially the same as a cashier's check. It is a bill of exchange drawn by a bank on itself and accepted in advance by the act of issuance, and under UCC § 3-410 and § 4-303, it is not subject to countermand by either its purchaser or the issuing bank. When purchased for adequate consideration, a bank money order, unlike an ordinary check, stands on its own foundation as an independent, unconditional, and primary obligation of the bank and is equivalent to a negotiable promissory note of the bank. *Thompson Poultry, Inc. v. First Nat'l Bank*, 199 Neb. 8, 255 N.W.2d 856 (1977).

Under UCC §§ 3-413(1); 3-410(1); 4-303(1)(a), cashier's check is accepted by mere act of issuance when it becomes primary obligation of bank, rather than purchaser, to pay it from its own assets upon demand, and purchaser had no authority to countermand cashier's check because of fraud allegedly practiced on purchaser by payee. *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14 (Mo. 1976).

14. —Effect on subsequent attempts to stop payment.

The defendant bank, which issued an official, or cashier's, check to the plaintiff in exchange for the personal check of its customer, cannot stop payment on the official check because of its customer's stop order on the personal check; the bank cannot assert the defense of failure of consideration since a cashier's check is deemed accepted in advance by the mere act of issuance. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

Where (1) customer, which had had its tractor-trailer repaired, gave repairman check for repairs, (2) repairman took check to defendant bank, cashed it, used proceeds to purchase official bank check payable to repairman's business firm, and then released tractor-trailer to customer, (3) customer, after dispute with repairman about quality of repairs, attempted to place stop-order on customer's check, and (4) defendant bank, which was unable to implement such stop-order, refused to honor bank check that it had issued to repairman, asserting failure of consideration therefor in repairman's action on such check, court held (1) that bank check

in issue was a cashier's check that defendant was obligated to pay on demand, (2) that such check was deemed under UCC § 3-410(1) to have been accepted in advance by mere act of its issuance, and (3) that defendant had no right under UCC § 4-303(1)(a) to terminate its duty to pay it. *Taboada v. Bank of Babylon*, 95 Misc. 2d 1000 (1978).

Since under Code § 3-410 cashier's check is accepted when issued, Code § 4-303 has effect of preventing bank from stopping payment on cashier's check once it has been issued. *Wertz v. Richardson Heights Bank & Trust*, 495 S.W.2d 572 (Tex. 1973).

Bank held not liable for payment of certified check, the amount of which had been altered subsequent to certification, except to the extent of the amount of such certified check at the time it was drawn. *Sam Goody, Inc. v. Franklin Nat'l Bank*, 57 Misc. 2d 193 (1968).

15. Other matters.

Analogous use of concepts such as finality of checks once "accepted" under UCC §§ 3-410, 4-303 would support irrevocability of electronic funds transfer at time of transfer. *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047 (2d Cir. N.Y. 1979).

Complaint by beneficiary of letter of credit against issuer stated cause of action where it alleged that issuer had breached oral agreement to honor "envelope draft" as presented by beneficiary, which was defective for lack of proper signature of drawer, since UCC § 3-409(2) and Comment 3 to such section, and also under UCC § 3-410(2) and Comment 3 thereto, issuer could be precluded from raising issue of conformity of draft to letter's terms on grounds of waiver or estoppel. *North Valley Bank v. National Bank*, 437 F. Supp. 70 (N.D. Ill. 1977).

When bank certified check for holder it created novation in which drawer was released and bank was substituted as primary debtor. *Jefferies & Co. v. Arkus-Duntov*, 357 F. Supp. 1206 (S.D.N.Y. 1973).

A drawer cannot stop payment on a check after it had been certified, regardless of who had obtained the certification. *Maintenance Serv., Inc. v. Royal Nat'l Bank*, 4 U.C.C. Rep. Serv. 766 (1967, NY Sup).

Prior to its acceptance by the drawee bank a check in the possession of the payee is subject to garnishment under Wisconsin law. *Skalecki v. Frederick*, 31 Wis. 2d 496, 143 N.W.2d 520 (1966).

The words "upon acceptance" in a draft or bill of exchange do not render the instrument conditional, since presentment for acceptance may be required for any check or bill of exchange. *Merson v. Sun Ins. Co.*, 44 Misc. 2d 131 (1964).

III. DECISIONS UNDER FORMER STATUTES.

16. Decisions under Code 1942 § 173.

Bank's payment of check on unauthorized indorsement and charging it to drawer does not constitute acceptance. *Federal Land Bank v. Collins*, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

Payee could not sue drawee paying check on unauthorized indorsement without notice of defect. *Federal Land Bank v. Collins*, 156 Miss. 893, 127 So. 570, 69 A.L.R. 1068 (1930).

17. Decisions under Code 1942 § 202.

Chattel mortgagee who was prevented by illness from presenting check of mortgagor until garnishment proceedings against bank prevented its payment, held not precluded from foreclosing mortgage. *Wileman v. King*, 120 Miss. 392, 82 So. 265, 5 A.L.R. 584 (1919).

RESEARCH REFERENCES

ALR. Application of UCC § 1-207 to avoid discharge of disputed claim upon

qualified acceptance of check tendered as payment in full. 37 A.L.R.4th 358.

§ 75-3-412. Obligation of issuer of note or cashier's check.

The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation is owed to a person entitled to enforce the instrument or to an indorser who paid the instrument under Section 75-3-415.

SOURCES: Former § 75-4-412: Codes, 1942, § 41A:3-412; Laws, 1966, ch. 316, § 3-412; Laws, 1992, ch. 420, § 50, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

Maker of note is obligated to pay same and agreement by grantee of mortgaged premises to assume and pay mortgage debt does not release grantor-mortgagor of mortgaged premises from liability as maker and maker's status as principal on note is not affected. *West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n*, 506 So. 2d 241 (Miss. 1986).

Under UCC § 3-413(1), a promissory note is an unconditional contract of the maker to pay the holder according to the tenor of the instrument. Since the note is an unconditional promise, the contract is complete as written, and parole evidence may not be used to impose conditions that are not apparent on the face of the instrument. For example, an oral agreement

between the parties, made contemporaneously with the execution of the note or prior thereto, which relates to a condition not expressed in the note itself, is incompetent to change the contract as represented on the face of the note (where guarantor of note alleged that payee had not obtained another person's signature to note and also had not obtained title to certain automobiles which were to be security for defendant's guaranty). *Whiteside v. Douglas County Bank*, 145 Ga. App. 775, 245 S.E.2d 2 (1978).

Under UCC §§ 3-413(1); 3-410(1); 4-303(1)(a), cashier's check is accepted by mere act of issuance when it becomes primary obligation of bank, rather than purchaser, to pay it from its own assets upon demand, and purchaser had no authority to countermand cashier's check because of fraud allegedly practiced on purchaser by payee. *State ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14 (Mo. 1976).

Where automobile dealer owed insurance agent \$10,000 and gave check to agent for \$5,000 in partial satisfaction of debt, transaction did not alter fact that dealer was still indebted to agent for \$10,000; under UCC § 3-413(1), it simply changed form of part of debt and check was evidence that maker of check was indebted to payee in amount of \$5,000. *Chrysler Credit Corp. v. Malone*, 502 S.W.2d 910 (Tex. Civ. App. 1973).

§ 75-3-413. Obligation of acceptor.

(a) The acceptor of a draft is obliged to pay the draft (i) according to its terms at the time it was accepted, even though the acceptance states that the draft is payable "as originally drawn" or equivalent terms, (ii) if the acceptance varies the terms of the draft, according to the terms of the draft as varied, or (iii) if the acceptance is of a draft that is an incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation is owed to a person entitled to enforce the draft or to the drawer or an indorser who paid the draft under Section 75-3-414 or 75-3-415.

(b) If the certification of a check or other acceptance of a draft states the amount certified or accepted, the obligation of the acceptor is that amount. If (i) the certification or acceptance does not state an amount, (ii) the amount of the instrument is subsequently raised, and (iii) the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course.

SOURCES: Former § 75-3-413: Codes, 1942, § 41A:3-413; Laws, 1966, ch. 316, § 3-413; Laws, 1992, ch. 420, § 51, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

I. DECISIONS UNDER CURRENT LAW.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

Certification of check constitutes acceptance, and this acceptance is bank's

signed engagement to pay check upon presentment when properly endorsed; and where certified check was made payable to order of joint payees, and only one payee endorsed check, refusal of bank to pay check was not breach of its obligation on instrument and bank's release of funds which had been held from drawer's account for payment of certified check created no new liability on part of bank. *Clinger v. Clinger*, 503 P.2d 363 (Colo. Ct. App. 1972).

RESEARCH REFERENCES

ALR. Application of UCC § 1-207 to avoid discharge of disputed claim upon qualified acceptance of check tendered as payment in full. 37 A.L.R.4th 358.

Am Jur. 6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Forms 3:581 et seq. (contract obligations of parties; acceptor).

§ 75-3-414. Obligation of drawer.

(a) This section does not apply to cashier's checks or other drafts drawn on the drawer.

(b) If an unaccepted draft is dishonored, the drawer is obliged to pay the draft (i) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (ii) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation is owed to a person entitled to enforce the draft or to an indorser who paid the draft under Section 75-3-415.

(c) If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained.

(d) If a draft is accepted and the acceptor is not a bank, the obligation of the drawer to pay the draft if the draft is dishonored by the acceptor is the same as the obligation of an indorser under Section 75-3-415(a) and (c).

(e) If a draft states that it is drawn "without recourse" or otherwise disclaims liability of the drawer to pay the draft, the drawer is not liable under subsection (b) to pay the draft if the draft is not a check. A disclaimer of the liability stated in subsection (b) is not effective if the draft is a check.

(f) If (i) a check is not presented for payment or given to a depository bank for collection within thirty (30) days after its date, (ii) the drawee suspends payments after expiration of the 30-day period without paying the check, and (iii) because of the suspension of payments, the drawer is deprived of funds maintained with the drawee to cover payment of the check, the drawer to the extent deprived of funds may discharge its obligation to pay the check by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds.

SOURCES: Former § 75-3-414: Codes, 1942, § 41A:3-414; Laws, 1966, ch. 316, § 3-414; Laws, 1992, ch. 420, § 52, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-413.

11. In general.

An award of summary judgment in fa-

vor of plaintiff is affirmed where defendant insurer delivered to its insured a draft drawn on itself and payable through its bank in an attempt to honor its apparent obligation under an automobile theft policy, which draft was payable also to plaintiff due to plaintiff's security interest in the insured vehicle, and plaintiff deposited the draft in its bank account after the insured indorsed the check over to plaintiff thereby extinguishing plaintiff's security interest in the vehicle, following which defendant stopped payment on the draft upon learning that its insured's claim was fraudulent, at which time plaintiff's account was debited with the

amount of the dishonored draft and plaintiff demanded of the defendant payment of the draft. Since the check was drawn by the drawer on itself as drawee, payable through its bank, the bank was not authorized to pay the draft, but was merely designated as a collecting bank to present the draft to the drawer-drawee for payment (Uniform Commercial Code, § 3-120), and because the draft was not drawn without recourse, and there was no drawee other than defendant itself who accepted responsibility for it, defendant remained liable thereon (Uniform Commercial Code, § 3-413, subd [2]); although the draft was principally issued to the insured, plaintiff's name was added as payee only to protect its duly filed security interest in the insured vehicle, and upon issuance of the draft defendant acknowledged its insured's claim that the vehicle had been stolen, thus entitling plaintiff to rely upon that representation and to accept the draft as a holder in due course in payment and release of its lien on the vehicle, constituting the giving of value for the draft (Uniform Commercial Code, § 3-302, subd [1]; § 3-303, subds [b], [c]); after defendant stopped payment on the draft it remained liable on it to plaintiff as a holder in due course. *GMAC v. General Accident Fire & Life Assurance Corp.*, 67 A.D.2d 316 (4th Dep't 1979).

In action under UCC § 3-413(2) against drawer of dishonored check, where (1) drawer wrote check on his account at drawee bank, payable to contractor for building a house, (2) payee deposited check in his account at plaintiff depository bank, (3) plaintiff cashed check, covered overdrafts on payee's account, credited main part of check's proceeds to such account, and paid payee remainder in cash, (4) after plaintiff had cashed check, drawer filed stop-payment order on it, resulting in its dishonor, and (5) plaintiff, despite its normal practice of withholding credit on a check until five days after its deposit, waived such waiting period as to check in suit because it believed drawer to be responsible person and because it had also obtained verification from drawee bank that check was good at that time, court held (1) that plaintiff was holder in due course under UCC § 3-302(1)(b) and

(c), since at time it cashed check, it had no notice of any defenses thereto and also no reason to believe that drawer would not honor it, (2) that in such circumstances, plaintiff's extension of immediate credit on the check did not manifest bad faith, since the Uniform Commercial Code, although not requiring a depository bank to give immediate credit on a check, encourages such practice by granting the bank rights against drawer of check on which immediate credit is extended, and (3) that since plaintiff was holder in due course, it therefore, under UCC § 3-305(2), took check in suit free from all but a limited number of defenses to it. *Frantz v. First Nat'l Bank*, 584 P.2d 1125 (Alaska 1978).

Lack of acceptance by drawee bank was not defense to action by payee against drawer to recover on dishonored draft, since UCC § 3-507 gave holder immediate right of recourse against drawer upon drawee's refusal to accept draft and since drawer engaged under UCC § 3-413 to pay draft upon dishonor. *Baum v. Cotton States Mut. Ins. Co.*, 141 Ga. App. 636, 234 S.E.2d 178 (1977).

Notwithstanding checks clearly named corporation represented, were drawn on corporate account, and each check was stamped with corporation's "check protector," corporate officer who signed checks was personally liable under UCC §§ 3-403 and 3-413 to payee upon checks' dishonor where, inter alia, checks did not reveal capacity in which officer signed checks and payee's testimony indicated that he was not aware of signer's representative capacity when he received checks in payment for his work as subcontractor. *Griffin v. Ellinger*, 538 S.W.2d 97, 97 A.L.R.3d 791 (Tex. 1976).

Where depository bank, as holder of check which defendant drew in favor of bank's depositor and then stopped payment thereon, brought suit on drawer's contract under UCC § 3-413(2), "defenses" which drawer was entitled to assert under UCC § 3-306(b) included only those defenses connected with instrument itself, and did not include setoff based on separate and distinct transactions between drawer and original payee. *Bank of Wyandotte v. Woodrow*, 394 F. Supp. 550 (W.D. Mo. 1975).

Payees of drafts issued by title company were holders in due course of drafts and were entitled to enforce them against title company, notwithstanding drafts were issued through escrow to payees as creditors of person who funded escrow with forged certified check, where there was no evidence to indicate that payees were not bona fide creditors or that they ought to have been suspicious of title company draft; nor were payees subject to personal defenses under UCC § 3-305(2) on grounds that payees dealt with title company since payees did not participate in immediate transaction by which title company gave out its draft, that is, exchange of forged cashier's check for draft. *Chicago Title & Trust Co. v. Walsh*, 34 Ill. App. 3d 458, 340 N.E.2d 106 (1st Dist. 1975).

As holder in due course of check upon which payment was later stopped, bank

had right to recover from drawer amount withdrawn from account opened by deposit of check. *People v. Lombardi*, 13 Ill. App. 3d 754, 301 N.E.2d 70 (1st Dist. 1973).

The drawee is entitled to accept the date of the check as true where there is nothing to indicate the contrary since the date on an instrument is "presumed to be correct." *Newman v. Manufacturers Nat'l Bank*, 7 Mich. App. 580, 152 N.W.2d 564 (1967).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account, and permitting him to withdraw the full amount thereof prior to notice of dishonor, is a holder of the check, taking for value, and entitled to recover from the drawer thereon. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

§ 75-3-415. Obligation of indorser.

(a) Subject to subsections (b), (c), and (d) and to Section 75-3-419(d), if an instrument is dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the terms of the instrument at the time it was indorsed, or (ii) if the indorser indorsed an incomplete instrument, according to its terms when completed, to the extent stated in Sections 75-3-115 and 75-3-407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a subsequent indorser who paid the instrument under this section.

(b) If an indorsement states that it is made "without recourse" or otherwise disclaims liability of the indorser, the indorser is not liable under subsection (a) to pay the instrument.

(c) If notice of dishonor of an instrument is required by Section 75-3-503 and notice of dishonor complying with that section is not given to an indorser, the liability of the indorser under subsection (a) is discharged.

(d) If a draft is accepted by a bank after an indorsement is made, the liability of the indorser under subsection (a) is discharged.

(e) If an indorser of a check is liable under subsection (a) and the check is not presented for payment, or given to a depository bank for collection, within thirty (30) days after the day the indorsement was made, the liability of the indorser under subsection (a) is discharged.

SOURCES: Former § 75-3-415: Codes, 1942, § 41A:3-415; Laws, 1966, ch. 316, § 3-415; Laws, 1992, ch. 420, § 53, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-414.

11. In general; indorser's obligation to pay.
12. —Dishonor.
13. Discharge from liability.
14. Drawing without recourse.
15. Order of liability.
16. Practice and procedure.

III. DECISIONS UNDER FORMER STATUTES.

17. Decisions under Code 1942 § 79.
18. Decisions under Code 1942 § 107.
19. Decisions under Code 1942 § 108.
20. Decisions under Code 1942 § 109.
21. Decisions Under Code 1942 § 233.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-414.

11. In general; indorser's obligation to pay.

Under UCC § 3-414(1), one who indorses a check warrants that on dishonor of the instrument and relevant notice thereof, he will pay the instrument according to its tenor at the time of his indorsement. Consequently, dishonor and notice of dishonor are prerequisites to an indorser's liability. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

Where decedent signed two promissory notes either as co-maker or endorser, both notes contained clause which accelerated payment on death of any of signators of notes, and both notes contained clause under which subscribing party waived presentment, demand for payment and notice of dishonor, upon decedent's death, two notes became due at option of bank that held them and all subscribers of notes were liable for balance due; thus, when life insurance company paid over to bank proceeds of decedent's life insurance

policy, under which bank had been named as beneficiary to secure loan to decedent, bank was at liberty to apply proceeds of policy toward payment of notes. In re Estate of Gruder, 89 Misc. 2d 477 (1977).

Under UCC § 3-414(1), accommodation party, by indorsing check drawn by another, agrees that on dishonor of check and any necessary notice of dishonor and protest, she will pay instrument according to its tenor at time of her indorsement. *Nevada State Bank v. Fischer*, 93 Nev. 317, 565 P.2d 332 (1977).

Where indorsers of note indorsed instrument without clear indication of capacity or intention to qualify status, such signatory became indorser by virtue of UCC § 3-402 and liable for payment of instrument upon dishonor by its payor under UCC § 3-414(1); where note provided that "presentment for payment and notice of nonpayment are hereby waived", indorsers automatically waived presentment or notice pursuant to UCC § 3-511(2). *First New Haven Nat'l Bank v. Clarke*, 33 Conn. Supp. 179, 368 A.2d 613 (1976).

In class action, brought by purchasers of promissory notes secured by mortgages, against seller's reorganization trustee, notes met definition of "note" as defined by UCC § 3-104 and were negotiable and unconditional under UCC §§ 3-105, 3-112 and 3-119; purchasers were holders in due course for value under UCC §§ 3-302 and 3-303 and notes were properly negotiated by bankrupt by endorsement and delivery under UCC § 3-202; under UCC § 3-414 reorganization trustee was bound on endorser's contract. *Hall v. Security Planning Serv., Inc.*, 371 F. Supp. 7 (D. Ariz. 1974).

There is no requirement that holder of promissory note attempt to collect against collateral before proceeding against indorsers or maker. *Hurt v. Citizens Trust Co.*, 128 Ga. App. 224, 196 S.E.2d 349 (1973).

Indorsement of notes "with recourse" created legal liability to discharge obligation of notes according to tenor. *Laukhuf v. Associates Disct. Corp.*, 443 S.W.2d 725 (Tex. Civ. App. 1969).

Where note provided for payment of attorneys fees, indorsers of note assumed this obligation, and trial court was bound to ascertain such fees. *Wiener v. Van Winkle*, 273 Cal. App. 2d 774 (2d Dist. 1969).

In a case where it was determined that indorsers upon a note given by a conditional buyer to a conditional seller were not discharged by the seller's assent to an assignment for benefit of creditors by the buyer nor by the seller's repossession and sale of the property, it was said that the liability of the indorsers was governed by subsection (i) of this section. *Priggen Steel Bldgs. Co. v. Parsons*, 350 Mass. 62, 213 N.E.2d 252 (1966).

12. —Dishonor.

Endorser of forged check warrants that all signatures and certification on check are genuine and authorized and becomes obligated, upon dishonor, to pay instrument according to its tenor. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's midnight deadline, (3) that as a result of such final payment, plaintiff, under UCC §§ 4-213(1)(d) and 4-301(1), could not send check back or dishonor it, (4) that since dishonor and notice of dishonor are prerequisites under UCC § 3-414(1) to an indorser's liability, plaintiff's failure to dishonor check or give timely notice of its dishonor completely discharged defendant of liability on his indorsement contract, (5) that since plaintiff had made final payment of check and not given notice of dishonor by its midnight deadline, plaintiff also could not recover from defendant indorser on theory of a bank's right to charge back or obtain a refund under UCC § 4-212(3), (6) that since defendant in-

dorser had had no knowledge that drawer's signature was unauthorized, plaintiff could not recover judgment against defendant for breach of his presentment warranties set forth in UCC §§ 3-417(1)(b) and 4-207(1)(b), and (7) since company against whose account check was drawn without authorization was not "drawer or maker" of check under UCC § 4-407(c), plaintiff was not subrogated to such company's rights against defendant. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

Indorser contracts to pay instrument only if dishonored; drawee who mistakenly pays check has recourse only against drawer; warranties made to drawee by presenter and prior transferors of check do not include warranty that drawer of check has sufficient funds on deposit to cover check. *Kirby v. First & Merchants Nat'l Bank*, 210 Va. 88, 168 S.E.2d 273 (1969).

13. Discharge from liability.

Warranties of §§ 75-3-414, 4-207 may be modified or waived by agreement of parties in accordance with §§ 75-1-102, 75-4-1023; nothing in Uniform Commercial Code suggests that warranties may be waived or lost by violation of duties imposed under §§ 75-4-202, 75-4-204. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985).

Where currency exchange, on request of accommodation indorser, cashed cashier's check made out to named payee whose indorsement of check was forged, (1) accommodation indorser was not liable to currency exchange under UCC § 3-414 on his contract as indorser because drawee bank's payment of check discharged accommodation indorser's liability; (2) since currency exchange was only transferee and not payor or acceptor of such check, warranties contained in UCC § 3-417(1) did not run to currency exchange; and (3) since accommodation indorser did not receive any consideration for his indorsement, he did not warrant currency exchange under UCC § 3-417(2) that he had good title to check. *Oak Park Currency Exch., Inc. v. Maropoulos*, 48 Ill. App. 3d 437, 363 N.E.2d 54 (1st Dist. 1977).

14. Drawing without recourse.

Used car dealer's endorsements of notes given to finance broker were not specified

to be "without recourse"; held, dealer guaranteed by endorsement that he would pay note upon dishonor. *Brown v. Pilini*, 128 Vt. 324, 262 A.2d 479 (1970).

When a banking law provides that where a note is given to finance payment of insurance premiums the indorsement by the insurance broker shall be deemed without recourse unless the contrary is expressly stated, such provision applies over the terms of the Uniform Commercial Code under which the "silent" indorsement would be deemed to be with recourse. *Standard Premium Plan Corp. v. Wolf*, 56 Misc. 2d 522 (1968).

15. Order of liability.

Under UCC § 3-414, liability of payee of promissory note, as endorser of note, was separate and distinct from that of maker or accommodation party; thus, payee-endorser was not indispensable party in action by holder of note against maker and accommodation party, but merely proper party who could be joined at holder's option and whose nonjoinder would not result in prejudice to any party. *Inland-Western Inv. Co. v. Winkler Realty Corp.*, 65 F.R.D. 515 (S.D.N.Y. 1975).

Indorser liability, absent disclaimer thereof, is secondary only because of rights of presentment and dishonor, notice of dishonor, and protest, which are specifically provided for by UCC § 3-414. However, under UCC § 3-511, such rights can be expressly waived by language on face of instrument. *Bankers Trust of S.C. v. Culbertson*, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

Where bank made loan on condition that debtor-corporation's officers personally endorse notes and that creditor-corporations guarantee payments, and where endorsements of creditor-corporation preceded endorsements of officers of debtor-corporation, endorsees were not liable in order in which they endorsed under presumption raised by UCC § 3-414(2), but were jointly and severally liable under UCC § 3-118(e) in that creditor-corporations signed in same capacity as accommodation parties and as a part of same transaction. *Zapp Nat'l Bank v. Metropolitan Planning & Redevelopment Corp.*, 308 Minn. 309, 242 N.W.2d 96 (1976).

Under UCC § 3-414, second endorser of note was not liable to first endorser and presumption that endorsers were liable in order in which their signatures appeared on note was not overcome even if both endorsers signed note "as a part of the same transaction" under UCC § 3-118, where there was no agreement by second endorser to be jointly liable with first endorser. *Wilson v. Turner*, 29 N.C. App. 101, 223 S.E.2d 539 (1976), review denied, 290 N.C. 311, 225 S.E.2d 832 (1976).

Where a prior indorser of a note signed it solely as an accommodation to a subsequent indorser to facilitate the latter securing bank acceptance of the loan, and it was understood between them that the prior indorser would not be liable to the accommodated indorser the estate of the latter indorser who had redeemed the note during his lifetime could not recover from the accommodating party. *Niebergall v. A.B.A. Contracting & Supply Co.*, 24 A.D.2d 799 (3d Dep't 1965).

The estate of a subsequent indorser who redeemed a promissory note during his lifetime cannot recover from a prior indorser where the evidence revealed that the latter signed the note solely as an accommodation for the subsequent indorser to facilitate his securing a loan, and it was understood between them that the prior indorser would not be liable to the accommodated party in the event of default. *Niebergall v. A.B.A. Contracting & Supply Co.*, 24 A.D.2d 799 (3d Dep't 1965).

16. Practice and procedure.

Under UCC § 3-414, liability of payee of promissory note, as endorser of note, was separate and distinct from that of maker or accommodation party; thus, payee-endorser was not indispensable party in action by holder of note against maker and accommodation party, but merely proper party who could be joined at holder's option and whose nonjoinder would not result in prejudice to any party. *Inland-Western Inv. Co. v. Winkler Realty Corp.*, 65 F.R.D. 515 (S.D.N.Y. 1975).

Bank that gave purchasers of cashier's checks timely notice of dishonor of indorsed draft used by purchasers in payment for cashier's checks thereby preserved its right to charge purchasers on their contract of indorsement and their

coextensive warranties of transfer, so as to permit offset of any liability by bank to purchasers for wrongful stoppage of payment on cashier's checks. *Munson v. American Nat'l Bank & Trust Co.*, 484 F.2d 620 (7th Cir. Ill. 1973).

Trial judge was free to find on conflicting evidence, including at least two documents signed by defendant, that defendant had agreed to indemnify third-party defendant against liability on note and thus had not indorsed note as accommodation to third-party defendant. *City Bank & Trust Co. v. Siagel*, 1 Mass. App. Ct. 804, 294 N.E.2d 447 (1973).

Corporate officer, who indorsed note to law firm as partial payment of attorney's fees previously incurred by corporation and who contended that he indorsed note individually and not as agent for corporation through unilateral mistake by reason of his lack of legal training, could not testify as to his unilateral mistake of intent and could not escape liability on the note, in absence of allegation that note holder had any knowledge of corporate officer's mistake or that there existed any element of misrepresentation or fraud on part of holder of note or mutual mistake of parties. *Bottoms v. Lyons*, 487 S.W.2d 813 (Tex. Civ. App. 1972).

III. DECISIONS UNDER FORMER STATUTES.

17. Decisions under Code 1942 § 79.

An indorsement "without recourse" does not impair the negotiable character of a promissory note. *Nash v. Homeowners Mtg. Corp.*, 194 So. 2d 211 (Miss. 1967).

A qualified indorser warrants that the signature of the maker of an instrument is not a forgery, and is liable to the indorsee for damages in case of a breach of such warranty. *Securities Inv. Co. v. Williams*, 193 So. 2d 719 (Miss. 1967).

The assignor of a promissory note who transferred it without recourse is, nevertheless, liable to the assignee for its genuineness, and where the note is a forgery transferor may rescind the sale and recover the purchase price from assignor. *Securities Inv. Co. v. Williams*, 193 So. 2d 719 (Miss. 1967).

The two statutory provisions regarding qualified indorsement and indorsement

generally must be read together. *Divelbiss v. Burns*, 161 Miss. 724, 138 So. 346 (1931).

Indorser intending to qualify indorsement without using words "without recourse" must use words clearly expressing such intention. *Divelbiss v. Burns*, 161 Miss. 724, 138 So. 346 (1931).

Indorsement on note reading "this is to certify that I have this day sold all my right, title and interest to the within note and mortgage" held "general indorsement in due course." *Divelbiss v. Burns*, 161 Miss. 724, 138 So. 346 (1931).

18. Decisions under Code 1942 § 107.

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed same for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was filed such bank had not reimbursed its depositor. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

Payee of note who indorsed it before maturity for transfer by his signature, preceded by the words "for value received I hereby transfer to" indorsee, was liable thereon as indorser. *Perry v. Consumers Lumber & Supply Co.*, 182 Miss. 112, 180 So. 385 (1938).

Indorser was not relieved of liability on note because of continuance of case against maker during which maker became insolvent, where same firm of attorneys represented maker and indorser, and indorser was informed but made no objection to continuance. *Perry v. Consumers Lumber & Supply Co.*, 182 Miss. 112, 180 So. 385 (1938).

Transfer of nonnegotiable note and deed of trust did not amount to "general indorsement." *Allen v. Smith & Brand*, 160 Miss. 303, 133 So. 599 (1931).

19. Decisions under Code 1942 § 108.

Check payable to attorney or bearer, indorsed by attorney and delivered to plaintiff, was a "bill of exchange," on which drawer was primarily liable and attorney secondarily liable. *Parrish v. Feldman*, 182 Miss. 77, 180 So. 610 (1938), error overruled, 182 Miss. 81, 181 So. 336 (1938).

20. Decisions under Code 1942 § 109.

An indorser is not primarily liable, but only secondarily liable. *Fish Meal Co. v. Brondum*, 242 Miss. 573, 135 So. 2d 825 (1961).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. *Citi-*

zens Bank v. Miller, 194 Miss. 557, 11 So. 2d 457 (1943).

Where chancery court authorized receiver of bank to release first indorser on note, upon payment of certain sum, decree discharging first indorser and holding second indorser, held unauthorized where without second indorser's consent. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

21. Decisions Under Code 1942 § 233.

Where the holder of accommodation paper, collateral for the note of the accommodated party, extended the time of payment of the latter's note by a binding agreement, without the knowledge or consent of the maker of the accommodation paper, the holder knowing the actual character of the paper at the time of the extension, the accommodation maker could not be held liable, notwithstanding that the accommodated party gave a cross note to the accommodation maker, since the latter was merely given to evidence the transaction. *Hederman v. Cox*, 188 Miss. 21, 193 So. 19 (1940).

Liability as endorser of note as collateral security for another, not having matured at endorser's death, need not be probated as claim. *Sledge & Norfleet Co. v. Dye*, 140 Miss. 779, 106 So. 519 (1926).

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§ 75-3-416. Transfer warranties.

(a) A person who transfers an instrument for consideration warrants to the transferee and, if the transfer is by indorsement, to any subsequent transferee that:

- (1) The warrantor is a person entitled to enforce the instrument;
- (2) All signatures on the instrument are authentic and authorized;
- (3) The instrument has not been altered;
- (4) The instrument is not subject to a defense or claim in recoupment of any party which can be asserted against the warrantor; and
- (5) The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer.

(b) A person to whom the warranties under subsection (a) are made and who took the instrument in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the instrument plus expenses and loss of interest incurred as a result of the breach.

(c) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(d) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: Former § 75-3-416: Codes, 1942, § 41A:3-416; Laws, 1966, ch. 316, § 3-416; Laws, 1992, ch. 420, § 54, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-417.

11. In general.
12. Authorized signatures.
13. Warranty of good title.
14. Forged instrument or indorsements.
15. Particular cases.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-417.

11. In general.

A payor bank cannot rely on the warranties set forth in UCC §§ 3-417(2) and 4-207(2) because those warranties do not run to payors. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

UCC §§ 4-207 and 3-417 are parallel provisions. Section 4-207 fixes the same warranties for the collection of items through the banking system that § 3-417 establishes for the transfer of commercial paper not collected through the banking system. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

A party is not liable for breach of a warranty as to the genuineness of an indorsement unless it is shown that the claimant would not have suffered a given loss if the indorsement had been genuine. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

12. Authorized signatures.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depository bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depository bank, and (4) depository bank then sued drawer-drawee for payment of draft, court held that depository bank was not entitled to recover because (1) under UCC § 3-201(1), depository bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depository bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depository bank could not negotiate draft or

become holder or holder in due course thereof, and (4) depository bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. *Foremost Ins. Co. v. First City Sav. & Loan Ass'n*, 374 So. 2d 840 (Miss. 1979).

Unlike the presentment warranties regarding unauthorized signatures in UCC §§ 3-417(1)(b) and 4-207(1)(b), the transferor warranties in UCC § 3-417(2)(b) and 4-207(2)(b) delete any reference to knowledge on the part of the transferor. In other words, UCC §§ 3-417(1)(b) and 4-207(1)(b) provide that the person or customer warrants that he has no knowledge that the maker's or drawer's signature is unauthorized, while UCC §§ 3-417(2)(b) and 4-207(2)(b) provide that the transferor warrants that all signatures are authorized. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's midnight deadline, (3) that as a result of such final payment, plaintiff, under UCC §§ 4-213(1)(d) and 4-301(1), could not send check back or dishonor it, (4) that since dishonor and notice of dishonor are prerequisites under UCC § 3-414(1) to an indorser's liability, plaintiff's failure to dishonor check or give timely notice of its dishonor completely discharged defendant of liability on his indorsement contract, (5) that since plaintiff had made final payment of check and not given notice of dishonor by its midnight deadline, plaintiff also could not recover from defendant indorser on theory of a bank's right to charge back or obtain a refund under UCC § 4-212(3), (6) that since defendant indorser had had no knowledge that draw-

er's signature was unauthorized, plaintiff could not recover judgment against defendant for breach of his presentment warranties set forth in UCC §§ 3-417(1)(b) and 4-207(1)(b), and (7) since company against whose account check was drawn without authorization was not "drawer or maker" of check under UCC § 4-407(c), plaintiff was not subrogated to such company's rights against defendant. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. *National Bank v. Refrigerated Trans. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn on corporation's checking account, each in excess of \$300 and each signed by corporation president alone in violation of agreement between corporation and bank

that checks in amounts in excess of \$300 should bear signature of two specified signatories, fact that bank failed to comply with signature card requiring two signatories on checks in question, was not sufficient to establish lack of good faith on part of bank, so as to preclude bank's assertion that as to those checks of which corporation was actual payee, corporation breached UCC § 3-417 (1)(b)'s warranty that it had no knowledge that signatures were unauthorized. *Neo-Tech Sys. v. Provident Bank*, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

13. Warranty of good title.

The warranty of good title under UCC § 3-417(1)(a) and § 4-207(1)(a) involves an inquiry as to whether the instrument presented contains all necessary indorsements and whether such indorsements are genuine or otherwise effective. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

In action by drawer to recover funds embezzled by employee, where (1) during three-year period, employee prepared nine checks for signature of officer of drawer, each check being made out for small sum supposedly owed to defendant bank, and drawer's officer signed such checks, (2) employee then raised amount of all such checks, (3) defendant bank, although named payee of all such checks, nevertheless allowed checks' proceeds to be deposited in employee's personal account with defendant, (4) checks were then presented by defendant as payee to second bank where plaintiff drawer had its account, and such bank paid checks and charged plaintiff's account for face amount thereof, and (5) plaintiff, which did not discover employee's fraud until June 23, 1973 (over three months after the last check had been altered), sued defendant on March 4, 1974 on theories of mistake, fraudulent misrepresentation, negligence, breach of warranty against material alteration, and breach of warranty of title in order to recover total amount of raised checks, court held (1) that since plaintiff was an "other payor" under UCC § 4-207(1) and "a person who in good faith pays" under UCC § 3-417(1), it could maintain action against defendant based on warranties contained in

such code sections, (2) that plaintiff's counts for breach of warranty of good title under UCC § 4-207(1)(a) and § 3-417(1)(a) failed to state cause of action because plaintiff did not allege facts constituting breach of such warranties, (3) that allegation that checks, although payable to defendant, had been irregularly negotiated by plaintiff's employee for her own benefit, if proved, would show sufficient notice on part of defendant to prevent it from being holder in due course that had acted in good faith and thus would render not sustainable defendant's demurrer that it was excepted under UCC § 4-207(1)(c) and § 3-417(1)(c) from warranting that checks had not been materially altered, (4) that since plaintiff challenged negotiation of checks in their raised amounts and not amounts for which they were originally drawn, proper measure of recovery would be difference between raised amounts and amounts for which checks were originally drawn, (5) that plaintiff was barred by one-year statute of limitations in UCC § 4-406(4) from asserting alteration of first eight checks in suit, since each of those checks had been issued sufficiently in advance of filing of action to compel inference that it had been negotiated and returned to plaintiff with accompanying monthly bank statement more than one year before action was commenced, (6) that alleged negotiation of ninth check was within such one-year period, since under UCC § 4-406(4), a new one-year period began to run with each check, (7) that plaintiff's cause of action for negligence for defendant's failure to inquire about checks was maintainable under three-year statute of limitations for negligence actions instead of one-year period prescribed by UCC § 4-406(4), and that suit on first three checks was barred by such three-year statute, (8) that plaintiff's cause of action for mistake of fact (issuing checks in mistaken belief that it owed defendant amounts for which checks were drawn) was not barred by plaintiff's failure to examine its monthly bank statements, as required by UCC § 4-406(1), (9) that since plaintiff's negligence had prevented it from discovering such mistake within three years from issuance of first three checks, recovery could not be had on such checks, although plaintiff could recover full amount of

checks four through nine, and (10) that plaintiff's allegations as to fraudulent misrepresentation failed to state cause of action, since they did not sufficiently declare that defendant knew that both it and plaintiff's employee had had no right to negotiate checks. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

14. Forged instrument or indorsements.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depository bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depository bank, and (4) depository bank then sued drawer-drawee for payment of draft, court held that depository bank was not entitled to recover because (1) under UCC § 3-201(1), depository bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depository bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depository bank could not negotiate draft or become holder or holder in due course thereof, and (4) depository bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. *Foremost Ins. Co. v. First City Sav. & Loan Ass'n*, 374 So. 2d 840 (Miss. 1979).

The narrowly circumscribed right of a payor bank to recover its payment of a check with a forged drawer's signature is the result of a policy decision traditionally anchored in the presumption that the payor bank knows, or should know, the signature of its drawer customer (see UCC § 3-417 and Official Comment 4) and thus is in a superior position to detect a forgery before making payment. A further justification for the payor bank's limited right is

that it is highly desirable to end a transaction on an instrument when it is paid, rather than to reopen and upset a series of commercial transactions at a later date when the forgery is discovered (see UCC § 3-418 and Official Comment 1). Accordingly, the legislature has determined that the risk of loss with respect to an instrument with a forged drawer's signature generally should lie with the payor bank after payment has been made, and that such risk is a cost incidental to doing business as a bank. *Marine Midland Bank v. UMBER*, 96 Misc. 2d 835 (1978).

A drawer of a check has no right of action against a collecting bank, albeit a depository bank, when a forged indorsement is involved, the drawer's remedy being to proceed against the drawee bank. *Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank*, 61 A.D.2d 628 (1st Dep't 1978), *aff'd*, 46 N.Y.2d 459, 414 N.Y.S.2d 298, 386 N.E.2d 1319 (1979).

Where currency exchange, on request of accommodation indorser, cashed cashier's check made out to named payee whose indorsement of check was forged, (1) accommodation indorser was not liable to currency exchange under UCC § 3-414 on his contract as indorser because drawee bank's payment of check discharged accommodation indorser's liability; (2) since currency exchange was only transferee and not payor or acceptor of such check, warranties contained in UCC § 3-417(1) did not run to currency exchange; and (3) since accommodation indorser did not receive any consideration for his indorsement, he did not warrant to currency exchange under UCC § 3-417(2) that he had good title to check. *Oak Park Currency Exch., Inc. v. Maropoulos*, 48 Ill. App. 3d 437, 363 N.E.2d 54 (1st Dist. 1977).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genuineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of

thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). *Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank*, 82 Misc. 2d 1013 (1975).

A bank which gives out money for cashier's checks deposited with it and bearing forged indorsements is liable to the payor bank and to any transferee on its warranty that it has good title to the instruments. *Society Nat'l Bank v. Capital Nat'l Bank*, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

Drawer of check can directly sue collecting bank which makes payment on check bearing forged signature of payee, where amount of check is charged to account of drawer. *Prudential Ins. Co. of Am. v. Marine Nat'l Exch. Bank*, 315 F. Supp. 520 (E.D. Wis. 1970).

A forged indorsement gives rise to a cause of action in the drawee bank only if the drawer has the right to and does set up forgery as a bar to charging the drawer's account with the amount of the check. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

15. Particular cases.

In action by endorser of promissory note against its maker where plaintiff alleged that he was manager of branch office of life insurance company, that defendant purchased insurance contract for which he executed and delivered note payable to bank, and that plaintiff endorsed note as accommodation party, where note was endorsed without recourse and was signed "Duane S. Wolfram (Manager)", and where plaintiff alleged that he paid note when defendant defaulted at due date, although endorsement "without recourse" absolved endorser from liability on instrument, it did not insulate him from liability based on breach of warranties contained in UCC § 3-417 and, thus, plaintiff may have had obligation to discharge debt notwithstanding his qualified endorsement. *Wolfram v. Holloway*, 46 Ill. App. 3d 1045, 361 N.E.2d 587 (1st Dist. 1977).

Collecting bank which guaranteed indorsement on checks drawn to nonexistent corporation was liable to drawee bank which paid check in reliance on such indorsement and which was required in prior action to recredit drawer's account. *First Bank & Trust Co. v. County Nat'l Bank*, 281 So. 2d 515 (Fla. App. 1973).

RESEARCH REFERENCES

ALR. Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by drawer not indebted to bank. 69 A.L.R.4th 778.

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-417. Presentment warranties.

(a) If an unaccepted draft is presented to the drawee for payment or acceptance and the drawee pays or accepts the draft, (i) the person obtaining payment or acceptance, at the time of presentment, and (ii) a previous transferor of the draft, at the time of transfer, warrant to the drawee making payment or accepting the draft in good faith that:

(1) The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft;

(2) The draft has not been altered; and

(3) The warrantor has no knowledge that the signature of the drawer of the draft is unauthorized.

(b) A drawee making payment may recover from any warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover damages under this subsection is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from any warrantor for breach of warranty the amounts stated in this subsection.

(c) If a drawee asserts a claim for breach of warranty under subsection (a) based on an unauthorized indorsement of the draft or an alteration of the draft, the warrantor may defend by proving that the indorsement is effective under Section 75-3-404 or 75-3-405 or the drawer is precluded under Section 75-3-406 or 75-4-406 from asserting against the drawee the unauthorized indorsement or alteration.

(d) If (i) a dishonored draft is presented for payment to the drawer or an indorser or (ii) any other instrument is presented for payment to a party obliged to pay the instrument, and (iii) payment is received, the following rules apply:

(1) The person obtaining payment and a prior transferor of the instrument warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the instrument, a person entitled to enforce the instrument or authorized to obtain payment on behalf of a person entitled to enforce the instrument.

(2) The person making payment may recover from any warrantor for breach of warranty an amount equal to the amount paid plus expenses and loss of interest resulting from the breach.

(e) The warranties stated in subsections (a) and (d) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within thirty (30) days after the claimant has reason to know of the breach and the identity of the warrantor, the liability of the warrantor under subsection (b) or (d) is discharged to the extent of any loss caused by the delay in giving notice of the claim.

(f) A cause of action for breach of warranty under this section accrues when the claimant has reason to know of the breach.

SOURCES: Former § 75-3-417: Codes, 1942, § 41A:3-417; Laws, 1966, ch. 316, § 3-417; Laws, 1992, ch. 420, § 55, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-417.

11. In general.

12. Authorized signatures.
13. Warranty of good title.
14. Forged instrument or indorsements.
15. Particular cases.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-417.

11. In general.

A payor bank cannot rely on the warranties set forth in UCC §§ 3-417(2) and 4-207(2) because those warranties do not run to payors. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

UCC §§ 4-207 and 3-417 are parallel provisions. Section 4-207 fixes the same warranties for the collection of items through the banking system that § 3-417 establishes for the transfer of commercial paper not collected through the banking system. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

A party is not liable for breach of a warranty as to the genuineness of an indorsement unless it is shown that the claimant would not have suffered a given loss if the indorsement had been genuine. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

12. Authorized signatures.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depository bank, (2) other copayee's indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depository bank, and (4) depository bank then sued drawer-drawee for payment of draft, court held that depository bank was not entitled to recover because (1) under UCC § 3-201(1), depository bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft's entire proceeds, (2) depository bank did not sustain its burden of proof under UCC § 3-307(1)

concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depository bank could not negotiate draft or become holder or holder in due course thereof, and (4) depository bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. *Foremost Ins. Co. v. First City Sav. & Loan Ass'n*, 374 So. 2d 840 (Miss. 1979).

Unlike the presentment warranties regarding unauthorized signatures in UCC §§ 3-417(1)(b) and 4-207(1)(b), the transferor warranties in UCC § 3-417(2)(b) and 4-207(2)(b) delete any reference to knowledge on the part of the transferor. In other words, UCC §§ 3-417(1)(b) and 4-207(1)(b) provide that the person or customer warrants that he has no knowledge that the maker's or drawer's signature is unauthorized, while UCC §§ 3-417(2)(b) and 4-207(2)(b) provide that the transferor warrants that all signatures are authorized. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's midnight deadline, (3) that as a result of such final payment, plaintiff, under UCC §§ 4-213(1)(d) and 4-301(1), could not send check back or dishonor it, (4) that since dishonor and notice of dishonor are prerequisites under UCC § 3-414(1) to an indorser's liability, plaintiff's failure to dishonor check or give timely notice of its dishonor completely discharged defendant of liability on his indorsement contract, (5) that since plaintiff had made final payment of check and not given notice of dishonor by its midnight deadline, plaintiff also could not recover from defendant

indorser on theory of a bank's right to charge back or obtain a refund under UCC § 4-212(3), (6) that since defendant indorser had had no knowledge that drawer's signature was unauthorized, plaintiff could not recover judgment against defendant for breach of his presentment warranties set forth in UCC §§ 3-417(1)(b) and 4-207(1)(b), and (7) since company against whose account check was drawn without authorization was not "drawer or maker" of check under UCC § 4-407(c), plaintiff was not subrogated to such company's rights against defendant. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

In corporation's action for defendant bank's conversion of checks accepted by defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. *National Bank v. Refrigerated Trans. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978).

In action by corporation against its bank, in which corporation sought to recover proceeds of series of checks drawn

on corporation's checking account, each in excess of \$300 and each signed by corporation president alone in violation of agreement between corporation and bank that checks in amounts in excess of \$300 should bear signature of two specified signatories, fact that bank failed to comply with signature card requiring two signatories on checks in question, was not sufficient to establish lack of good faith on part of bank, so as to preclude bank's assertion that as to those checks of which corporation was actual payee, corporation breached UCC § 3-417 (1)(b)'s warranty that it had no knowledge that signatures were unauthorized. *Neo-Tech Sys. v. Provident Bank*, 43 Ohio Misc. 31, 335 N.E.2d 395 (1974).

13. Warranty of good title.

The warranty of good title under UCC § 3-417(1)(a) and § 4-207(1)(a) involves an inquiry as to whether the instrument presented contains all necessary indorsements and whether such indorsements are genuine or otherwise effective. *Sun'n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

In action by drawer to recover funds embezzled by employee, where (1) during three-year period, employee prepared nine checks for signature of officer of drawer, each check being made out for small sum supposedly owed to defendant bank, and drawer's officer signed such checks, (2) employee then raised amount of all such checks, (3) defendant bank, although named payee of all such checks, nevertheless allowed checks' proceeds to be deposited in employee's personal account with defendant, (4) checks were then presented by defendant as payee to second bank where plaintiff drawer had its account, and such bank paid checks and charged plaintiff's account for face amount thereof, and (5) plaintiff, which did not discover employee's fraud until June 23, 1973 (over three months after the last check had been altered), sued defendant on March 4, 1974 on theories of mistake, fraudulent misrepresentation, negligence, breach of warranty against material alteration, and breach of warranty of title in order to recover total amount of raised checks, court held (1) that since plaintiff was an "other payor"

under UCC § 4-207(1) and “a person who in good faith pays” under UCC § 3-417(1), it could maintain action against defendant based on warranties contained in such code sections, (2) that plaintiff’s counts for breach of warranty of good title under UCC § 4-207(1)(a) and § 3-417(1)(a) failed to state cause of action because plaintiff did not allege facts constituting breach of such warranties, (3) that allegation that checks, although payable to defendant, had been irregularly negotiated by plaintiff’s employee for her own benefit, if proved, would show sufficient notice on part of defendant to prevent it from being holder in due course that had acted in good faith and thus would render not sustainable defendant’s demurrer that it was excepted under UCC § 4-207(1)(c) and § 3-417(1)(c) from warranting that checks had not been materially altered, (4) that since plaintiff challenged negotiation of checks in their raised amounts and not amounts for which they were originally drawn, proper measure of recovery would be difference between raised amounts and amounts for which checks were originally drawn, (5) that plaintiff was barred by one-year statute of limitations in UCC § 4-406(4) from asserting alteration of first eight checks in suit, since each of those checks had been issued sufficiently in advance of filing of action to compel inference that it had been negotiated and returned to plaintiff with accompanying monthly bank statement more than one year before action was commenced, (6) that alleged negotiation of ninth check was within such one-year period, since under UCC § 4-406(4), a new one-year period began to run with each check, (7) that plaintiff’s cause of action for negligence for defendant’s failure to inquire about checks was maintainable under three-year statute of limitations for negligence actions instead of one-year period prescribed by UCC § 4-406(4), and that suit on first three checks was barred by such three-year statute, (8) that plaintiff’s cause of action for mistake of fact (issuing checks in mistaken belief that it owed defendant amounts for which checks were drawn) was not barred by plaintiff’s failure to examine its monthly bank statements, as required by UCC

§ 4-406(1), (9) that since plaintiff’s negligence had prevented it from discovering such mistake within three years from issuance of first three checks, recovery could not be had on such checks, although plaintiff could recover full amount of checks four through nine, and (10) that plaintiff’s allegations as to fraudulent misrepresentation failed to state cause of action, since they did not sufficiently declare that defendant knew that both it and plaintiff’s employee had had no right to negotiate checks. *Sun’n Sand, Inc. v. United Cal. Bank*, 21 Cal. 3d 671, 582 P.2d 920 (1978).

14. Forged instrument or indorsements.

Where (1) draft issued to two copayees by insurance company, as drawer-drawee, was deposited by one copayee in depository bank, (2) other copayee’s indorsement on draft was forged or unauthorized, (3) drawer-drawee, after paying draft when it was processed through banking channels, learned of such forged indorsement, and amount of draft was charged back through banking channels to depository bank, and (4) depository bank then sued drawer-drawee for payment of draft, court held that depository bank was not entitled to recover because (1) under UCC § 3-201(1), depository bank had only rights of its transferor in draft, which were worthless because copayee whose signature had been forged had lien on draft’s entire proceeds, (2) depository bank did not sustain its burden of proof under UCC § 3-307(1) concerning genuineness of forged indorsement on draft, (3) since one necessary indorsement on draft was missing, depository bank could not negotiate draft or become holder or holder in due course thereof, and (4) depository bank had breached its presentment warranty under UCC § 3-417(1)(a) because it claimed through forged or unauthorized indorsement of copayee who had interest in funds represented by draft. *Foremost Ins. Co. v. First City Sav. & Loan Ass’n*, 374 So. 2d 840 (Miss. 1979).

The narrowly circumscribed right of a payor bank to recover its payment of a check with a forged drawer’s signature is the result of a policy decision traditionally anchored in the presumption that the

payor bank knows, or should know, the signature of its drawer customer (see UCC § 3-417 and Official Comment 4) and thus is in a superior position to detect a forgery before making payment. A further justification for the payor bank's limited right is that it is highly desirable to end a transaction on an instrument when it is paid, rather than to reopen and upset a series of commercial transactions at a later date when the forgery is discovered (see UCC § 3-418 and Official Comment 1). Accordingly, the legislature has determined that the risk of loss with respect to an instrument with a forged drawer's signature generally should lie with the payor bank after payment has been made, and that such risk is a cost incidental to doing business as a bank. *Marine Midland Bank v. Ueber*, 96 Misc. 2d 835 (1978).

A drawer of a check has no right of action against a collecting bank, albeit a depository bank, when a forged indorsement is involved, the drawer's remedy being to proceed against the drawee bank. *Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank*, 61 A.D.2d 628 (1st Dep't 1978), *aff'd*, 46 N.Y.2d 459, 414 N.Y.S.2d 298, 386 N.E.2d 1319 (1979).

Where currency exchange, on request of accommodation indorser, cashed cashier's check made out to named payee whose indorsement of check was forged, (1) accommodation indorser was not liable to currency exchange under UCC § 3-414 on his contract as indorser because drawee bank's payment of check discharged accommodation indorser's liability; (2) since currency exchange was only transferee and not payor or acceptor of such check, warranties contained in UCC § 3-417(1) did not run to currency exchange; and (3) since accommodation indorser did not receive any consideration for his indorsement, he did not warrant to currency exchange under UCC § 3-417(2) that he had good title to check. *Oak Park Currency Exch., Inc. v. Maropoulos*, 48 Ill. App. 3d 437, 363 N.E.2d 54 (1st Dist. 1977).

In action against collecting bank by payee of check which had been stolen by thief, indorsed by forged payee's signature, and ultimately negotiated to collecting bank, for breach of warranties of genu-

ineness of prior indorsement contained in UCC §§ 3-417(2) and 4-207(2): (1) where payee was suing not as payee but as drawee's assignee, payee was invulnerable to attack by payor bank under UCC §§ 4-406(5) and 3-406; however, (2) where payee had or should have had knowledge of theft and forgery of own check and of thief's identity, three year delay in bringing action on check against collecting bank as assignee of drawee bank for breach of warranty was not "reasonable" under UCC § 4-207(4). *Lewittes Furn. Enters., Inc. v. Peoples Nat'l Bank*, 82 Misc. 2d 1013 (1975).

Drawee bank which paid a forged instrument was not entitled to retain amount paid to it by collecting bank which mistakenly believed it had a legal obligation to reimburse drawee, and which further mistakenly believed that collecting bank's depositor would not object to being charged with funds represented by a forged check. *Valley Bank v. Bank of Commerce*, 74 Misc. 2d 195 (1973), *aff'd* in part and *rev'd* in part, 13 U.C.C. Rep. Serv. (Callaghan) 515 (N.Y. App. Term 1973).

A bank which gives out money for cashier's checks deposited with it and bearing forged indorsements is liable to the payor bank and to any transferee on its warranty that it has good title to the instruments. *Society Nat'l Bank v. Capital Nat'l Bank*, 30 Ohio App. 2d 1, 281 N.E.2d 563 (1972).

Drawer of check can directly sue collecting bank which makes payment on check bearing forged signature of payee, where amount of check is charged to account of drawer. *Prudential Ins. Co. of Am. v. Marine Nat'l Exch. Bank*, 315 F. Supp. 520 (E.D. Wis. 1970).

A forged indorsement gives rise to a cause of action in the drawee bank only if the drawer has the right to and does set up forgery as a bar to charging the drawer's account with the amount of the check. *First Pa. Banking & Trust Co. v. Montgomery County Bank & Trust Co.*, 29 Pa. D. & C.2d 596 (1962).

15. Particular cases.

In action by endorser of promissory note against its maker where plaintiff alleged that he was manager of branch office of life insurance company, that defendant

purchased insurance contract for which he executed and delivered note payable to bank, and that plaintiff endorsed note as accommodation party, where note was endorsed without recourse and was signed “Duane S. Wolfram (Manager)”, and where plaintiff alleged that he paid note when defendant defaulted at due date, although endorsement “without recourse” absolved endorser from liability on instrument, it did not insulate him from liability based on breach of warranties contained in UCC § 3-417 and, thus, plaintiff may

have had obligation to discharge debt notwithstanding his qualified endorsement. *Wolfram v. Holloway*, 46 Ill. App. 3d 1045, 361 N.E.2d 587 (1st Dist. 1977).

Collecting bank which guaranteed indorsement on checks drawn to nonexistent corporation was liable to drawee bank which paid check in reliance on such indorsement and which was required in prior action to recredit drawer’s account. *First Bank & Trust Co. v. County Nat’l Bank*, 281 So. 2d 515 (Fla. App. 1973).

§ 75-3-418. Payment or acceptance by mistake.

(a) Except as provided in subsection (c), if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that (i) payment of the draft had not been stopped pursuant to Section 75-4-403 or (ii) the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. Rights of the drawee under this subsection are not affected by failure of the drawee to exercise ordinary care in paying or accepting the draft.

(b) Except as provided in subsection (c), if an instrument has been paid or accepted by mistake and the case is not covered by subsection (a), the person paying or accepting may, to the extent permitted by the law governing mistake and restitution, (i) recover the payment from the person to whom or for whose benefit payment was made or (ii) in the case of acceptance, may revoke the acceptance.

(c) The remedies provided by subsection (a) or (b) may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This subsection does not limit remedies provided by Section 75-3-417 or 75-4-407.

(d) Notwithstanding Section 75-4-215, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under subsection (a) or (b), the instrument is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument.

SOURCES: Former § 75-3-418: Codes, 1942, § 41A:3-418; Laws, 1966, ch. 316, § 3-418; Laws, 1992, ch. 420, § 56, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-418.

11. In general.

12. Forged instruments or signatures.
13. Money orders.
14. Certification.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-418.

11. In general.

When payor bank has paid a check by failing to return it by bank's midnight deadline, bank may be entitled to relief under UCC § 3-418. Under this statute, payment of a check is final only in favor of holder in due course or one who in good faith has changed his position in reliance on such payment. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

Where defendant bank received check from plaintiff's employee, drawn by plaintiff and made payable to defendant, applied check to discharge employee's personal indebtedness to defendant, and released collateral for loan to employee, under UCC § 3-418 payment of check in favor of defendant was final since defendant was holder in due course and had changed its position in good faith reliance on payment of check. *Richardson Co. v. First Nat'l Bank*, 504 S.W.2d 812 (Tex. Civ. App. 1974), *ref. n.r.e.* (Apr. 3, 1974).

Payment by drawee bank of check bearing signature of fictitious payee was final within meaning of § 3-418, and drawee could not recover back payment from collecting bank which guaranteed indorsement, so that collecting bank's voluntary refund or payment was not insured loss. *Aetna Life & Cas. Co. v. Hampton State Bank*, 497 S.W.2d 80 (Tex. Civ. App. 1973), *writ ref'd n.r.e.*, (Oct. 10, 1973).

When a note is given subsequent to the making of the loan, the antecedent application is sufficient to make the later note binding. *Epstein v. Paskow & Epstein*, 4 U.C.C. Rep. Serv. 1066 (1968, NY Sup.).

Where the drawee of drafts maintained a checking account in a collector bank and made a check payable to the bank's order in purported payment of the drafts which were stamped "paid" and surrendered to the drawee, delivery of the check consti-

tuted payment just as effectively as if cash had been given. The payment to the collecting bank was equivalent to payment of the owner of the instrument, a holder in due course. *F & M Nat'l Bank v. Boardwalk Nat'l Bank*, 101 N.J. Super. 528, 245 A.2d 35 (App. Div. 1968), certification denied, 52 N.J. 492, 246 A.2d 452 (1968).

12. Forged instruments or signatures.

In prosecution of union treasurer for embezzling and converting union funds, where (1) checking-account contract between union and bank required that checks be signed by both accused and union president, (2) on 23 occasions, accused signed his own name on check, forged union president's signature, and presented check to bank for payment, and (3) bank failed to detect such forgeries, honored checks, paid proceeds to accused, and debited union's account, defendant could not successfully contend that his check-forging activities constituted conversion of bank's funds, rather than union's funds, under common-law doctrine of *Price v. Neal* (now codified in UCC §§ 3-418, 4-213, and 4-401) that drawee bank pays its own funds, instead of funds of its depositor, when it honors a forged check because (1) when forged checks were completed by accused and ready for presentation, they constituted commercial paper belonging to union and by appropriating such checks, accused converted union funds, (2) union funds were also converted to accused's use when bank debited union's account after each forged check was honored, and (3) fact that such reductions in union's funds were temporary did not exonerate accused from liability, even though under UCC § 4-406(2)(b) it was ultimately unlikely that union would be able to recover from bank in view of its delay in discovering forgeries and reporting them to bank (construing Wisconsin UCC; holding that common-law doctrine relied on by accused did not place his conduct outside federal statute on which indictment was based). *United States v. Pavloski*, 574 F.2d 933 (7th Cir. Wis. 1978).

The narrowly limited rights of a payor bank to recover its payment of a check with a forged drawer's signature, the payor bank being bound by its payment if

no warranties are applicable or if payment was made to a holder in due course or to a person who had in good faith changed his position in reliance on the payment (Uniform Commercial Code, § 3-418), thereby generally placing the risk of loss with respect to such an instrument upon the payor bank as a cost incident to doing business as a bank, are the results of a policy decision anchored in the presumption that the payor bank knows or should know the signature of its customer, the drawer, and is, therefore, in a superior position to detect a forgery before making a payment, and may also be justified on the ground that it is highly desirable to end the transaction on an instrument when it is paid rather than to reopen and upset a series of commercial transactions at a later date when the forgery is discovered. *Marine Midland Bank v. UMBER*, 96 Misc. 2d 835 (1978).

On plaintiff payor bank's motion for summary judgment in action to recover from indorser amount paid out on check on which drawer's signature had been forged, court held (1) that under UCC § 3-418, plaintiff was bound by its payment if no warranties were applicable and defendant indorser was either holder in due course or one who had in good faith changed his position in reliance on such payment; (2) that since record in case contained no allegations as to defendant's knowledge of forgery of drawer's signature, court could not determine whether defendant had breached its warranty under UCC § 4-207(1)(b) to plaintiff; (3) that record also contained insufficient information as to whether defendant was holder in due course or one who had in good faith changed his position in reliance on plaintiff's payment; and (4) that plaintiff's contention that it was subrogated under UCC § 4-407(c) to rights of drawer of check in suit against holder thereof, because plaintiff had paid check under circumstances giving drawer right to object to such payment, lacked merit since customer's limited warranty under UCC § 4-207(1)(b) that he had no knowledge that drawer's signature was unauthorized is not even given to drawer with respect to drawer's own signature by customer who is holder in due course and has acted in good faith

(see UCC § 4-207(1)(b)(ii)) (holding that summary judgment could not be granted to either plaintiff or defendant). *Marine Midland Bank v. UMBER*, 96 Misc. 2d 835 (1978).

Where forger, using stolen preprinted checks belonging to plaintiff construction company and utilizing plaintiff's facsimile check signature machine (or perfect copy of signature produced by such machine), drew checks in plaintiff's name to order of two probably fictitious sole proprietorships, and where unknown person subsequently deposited such checks, after indorsing them with probably fictitious name in individual and not representative capacity, and then withdrew such funds from depositary bank, (1) plaintiff's loss was forged check loss and not indorsement loss; (2) indorsements, whether genuine or fictitious, on checks were effective under UCC § 3-405(1)(b), since named payees were not intended to have any interest in checks; (3) indorser's failure to indorse checks in representative capacity did not shift plaintiff's loss to depositary, collecting, and drawee banks under theories of improper payment, breach of title warranty, and conversion, since there were no true payees to demand payment and thus subject plaintiff to double liability; and (4) depositary and collecting banks, on satisfying requirement of final payment rule in UCC § 3-418 as to being holders in due course, could assert protection of such rule against plaintiff's causes of action for common-law negligence and restitution in connection with banks' handling of forged checks, despite incomplete indorsements on such checks. *Perini Corp. v. First Nat'l Bank*, 553 F.2d 398 (5th Cir. Ga. 1977), reh'g denied, 557 F.2d 823 (5th Cir. Ga. 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had

never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers' savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977).

13. Money orders.

While a postal domestic money order is not similar in all respects to a negotiable instrument because such an order contains a prohibition against more than one indorsement of the order, it sufficiently

resembles a negotiable instrument so that the rule of finality of payment embodied in the instant section should be applied to it. Where, therefore, a bank cashed forged postal money orders and received money from the Government, the amounts so paid could not be recovered back by the Government from the bank. *United States v. First Nat'l Bank*, 263 F. Supp. 298 (D. Mass. 1967).

14. Certification.

Where customer of bank deposited check drawn on another bank in his account with instructions to wire proceeds to third party, depositary bank obtained certification of check from drawee bank, drawee bank subsequently notified depositary bank that it was rescinding its certification, but depositary bank never wired funds in accordance with customer's instructions, gave no consideration for check, and did not change its position as result of cancellation or dishonor, depositary bank was not "holder in due course" under UCC § 4-209 notwithstanding customer owed money to depositary bank and bank had right to set-off such indebtedness against customer's account; since check was "deposited in an account" and since credit given was never withdrawn or applied, depositary bank had no security interest in check under UCC § 4-208 and hence it had not given value under UCC § 3-303 or 4-209 at time it received notice of defense, it was not holder in due course under UCC § 4-209 and certification was not final in favor of depositary bank under UCC § 3-418. *Rockland Trust Co. v. South Shore Nat'l Bank*, 366 Mass. 74, 314 N.E.2d 438 (1974).

RESEARCH REFERENCES

ALR. Liability of bank for diversion to benefit of presenter or third party of proceeds of check drawn to bank's order by

drawer not indebted to bank. 69 A.L.R.4th 778.

§ 75-3-419. Instruments signed for accommodation.

(a) If an instrument is issued for value given for the benefit of a party to the instrument ("accommodated party") and another party to the instrument ("accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given

for the instrument, the instrument is signed by the accommodation party “for accommodation.”

(b) An accommodation party may sign the instrument as maker, drawer, acceptor, or indorser and, subject to subsection (d), is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation.

(c) A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous indorsement or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument. Except as provided in Section 75-3-605, the obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when the instrument was taken by that person that the accommodation party signed the instrument for accommodation.

(d) If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if (i) execution of judgment against the other party has been returned unsatisfied, (ii) the other party is insolvent or in an insolvency proceeding, (iii) the other party cannot be served with process, or (iv) it is otherwise apparent that payment cannot be obtained from the other party.

(e) An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party. An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party.

SOURCES: Former § 75-3-419: Codes, 1942, § 41A:3-419; Laws, 1966, ch. 316, § 3-419; Laws, 1992, ch. 420, § 57, eff from and after January 1, 1993.

JUDICIAL DECISIONS

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I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-415.

11. In general.

Effect of assumption agreement is to make parties thereto liable on promissory note. *West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n*, 506 So. 2d 241 (Miss. 1986).

Parties who sign guaranty agreement are sureties on promissory note because of that agreement. *West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n*, 506 So. 2d 241 (Miss. 1986).

To determine whether party is accommodation maker of note under UCC § 3-415(2), entire transaction should be viewed as a whole (where defendant was alleged accommodation maker of original note and also two renewal notes). *Stockwell v. Bloomfield State Bank*, 174 Ind. App. 307, 367 N.E.2d 42 (1977).

12. What constitutes accommodation maker.

Where sole stockholders of corporation signed promissory note in both personal and corporate capacity, loan was important to preservation of their interest in corporation and note contained clause stating that all signers were principals, individuals signed note in capacity of comakers and knowingly incurred personal liability; accordingly, defenses enumerated in UCC § 3-606 and, in particular, defense that there was unjustifiable impairment of collateral, was not available to them. *Wohlhuter v. St. Charles Lumber & Fuel Co.*, 25 Ill. App. 3d 812, 323 N.E.2d 134 (2d Dist. 1975), *aff'd*, 62 Ill. 2d 16, 338 N.E.2d 179, 93 A.L.R.3d 1278 (1975).

In action by payee against maker of promissory notes, payee was not entitled to recover where no consideration existed for maker's signature and maker signed and delivered notes so that payee could

make financial statement with which to get loan and settle up with maker; fact that maker's signing was not gratuitous was immaterial and fact that notes were not negotiated did not affect maker's accommodation status. *Darden v. Harrison*, 511 S.W.2d 925 (Tex. 1974).

Trial judge was free to find on conflicting evidence, including at least two documents signed by defendant, that defendant had agreed to indemnify third-party defendant against liability on note and thus had not indorsed note as accommodation to third-party defendant. *City Bank & Trust Co. v. Siagel*, 1 Mass. App. Ct. 804, 294 N.E.2d 447 (1973).

One might be accommodation maker of note even though note does not indicate that he signed it as accommodation maker. *Oregon Bank v. Baardson*, 256 Or. 454, 473 P.2d 1015 (1970).

Maker was not accommodation party where only parties to note were maker and payee. *Bank of Am. v. Superior Court*, 4 Cal. App. 3d 435 (4th Dist. 1970).

Purchaser who did not sign note could not have been accommodation party thereon where auto dealer was maker of note and former owner of auto was payee. *McIntosh v. White*, 447 S.W.2d 75 (Mo. Ct. App. 1969).

Although it appeared that corporate secretary was jointly liable with corporation as individual maker of note despite questions as to what, if anything, was established between parties and as to whether squiggle appearing under secretary's name could reasonably be understood to mean "secretary", secretary who had signed notes on back above corporate indorsement was also liable to holder as accommodation party. *Factors & Note Buyers, Inc. v. Green Lane, Inc.*, 102 N.J. Super. 43, 245 A.2d 223 (L. Div. 1968).

Where the two makers of a note owned all of the stock of a corporation which received the proceeds of the loan represented by the note it was properly held that the two were co-makers, as against the contention that one was an accommodation party, with the result that there was the right of contribution by the one paying the note against the other maker. *MacArthur v. Cannon*, 4 Conn. Cir. Ct. 208, 229 A.2d 372 (1967), certification

denied, 154 Conn. 748, 227 A.2d 562 (1967).

Payee of a promissory note who endorsed it to the order of note's purchaser at request of a third person became an accommodation party, as defined in subsec. (1). *James Talcott, Inc. v. Fred Ratowsky Assocs.*, 38 Pa. D. & C.2d 624 (1965).

13. —Party to note.

One cannot be accommodation party where party allegedly accommodated was not party to note. Reaching same result under both Florida and Pennsylvania law without deciding which is applicable. *Commerce Nat'l Bank v. Baron*, 336 F. Supp. 1125 (E.D. Pa. 1971).

Defendant in action on note could not claim status of accommodation party where person allegedly accommodated was not party to note. *Commerce Nat'l Bank v. Baron*, 336 F. Supp. 1125 (E.D. Pa. 1971).

Where original loan was made directly to sole shareholders of corporation individually, and not to corporation, entire amount of loan was received by them individually and then transferred to corporation, and corporation was not even party to loan, individual shareholder was not accommodation party and was not entitled to recover as such from corporation. *Jones v. San Angelo Nat'l Bank*, 518 S.W.2d 622 (Tex. Civ. App. 1974), writ ref'd n.r.e., (June 4, 1975).

Makers of notes could not be considered accommodation parties within meaning of UCC, where bank allegedly accommodated was not "another party" to note in question. *State Bank v. Sentel*, 10 Ill. App. 3d 86, 293 N.E.2d 444 (4th Dist. 1973).

14. —Spouses as accommodation makers.

Where wife of maker of 2 notes signed both notes as co-maker 30 days after notes were executed, at time when all transactions surrounding execution of notes had been completed and there was no factual change between parties except addition of her signature, wife was accommodation maker under UCC § 3-415 and was liable to holders who took notes for value, notwithstanding they were not holders in due course and there was no consideration for

wife's signature, since under UCC § 3-408 no consideration was necessary to make her liable as accommodation party. *Cissna Park State Bank v. Johnson*, 21 Ill. App. 3d 445, 315 N.E.2d 675 (4th Dist. 1974).

Wife was accommodation maker and liable on note which she cosigned to enable husband to get loan; consideration which supported her promise to pay was that moving to accommodated husband. *Seaboard Fin. Co. of Conn., Inc. v. Dorman*, 4 Conn. Cir. Ct. 154, 227 A.2d 441 (1966).

The instant section was referred to in *Rose v. Homsey* (1964) 347 Mass 259, 197 NE2d 603, 2 UCCRS 129, in connection with the proposition that under former c 107, § 52 a wife who signed a note executed by her husband, without personally receiving any consideration for it, to aid her husband in his business was an accommodation maker. *Rose v. Homsey*, 347 Mass. 259, 197 N.E.2d 603 (1964).

15. Liability of accommodation party as indorser.

Accommodation indorser of note, by waiving presentment, demand, protest, and notice of dishonor and also by virtue of language in note making each signer bound thereon as a principal and not as a surety, became primarily liable on note in the contractual sense, and creditor could have looked to him for payment of note in full. In addition, under UCC § 3-415(1) and Official Comment 1, such accommodation indorser, by virtue of his status as accommodation party, was surety of debtor and secondarily liable on note in sense that debtor should have paid note himself (holding that language in note in suit did not constitute waiver of accommodation indorser's suretyship status as to underlying agreement between accommodation indorser and debtor). *Warren v. Washington Trust Bank*, 19 Wash. App. 348, 575 P.2d 1077 (1978), modified on other grounds, 92 Wash. 2d 381, 598 P.2d 701 (1979).

Cosigners of a note are usually divided into two categories, principals and sureties. If one is a surety, he is usually termed an "accommodation party" (see UCC § 3-415(1)) or a "guarantor" (see UCC § 3-416). A surety (accommodation party) is primarily liable with the principal

(maker) to the payee of a note because he lends his name to the note as security (see UCC § 3-415(2)). However, the rights and obligations of a surety are different from those of a principal, one important difference being that if the surety pays the judgment, he stands in the shoes of the creditor and may sue on the judgment itself. In such a case, he has the burden of proving suretyship, and his burden is onerous, since it is presumed that one signs as a comaker unless the suretyship relation between the cosigners appears on the face of the note (holding that plaintiff, who alleged that he was merely surety on note, failed to rebut presumption that he had signed as comaker, since he did not make note part of his summary judgment proof and court thus could not ascertain whether surety relationship alleged actually appeared on face of note). *Caldwell v. Stevenson*, 567 S.W.2d 278 (Tex. Civ. App. 1978).

Person who signed corporate note in both representative capacity as president of such corporation and also in individual capacity could not escape liability on ground that he was mere accommodation maker who had neither borrowed nor received any money from holder, since under UCC § 3-415(1) accommodation party is always a surety and term "surety" includes a "guarantor." Thus, defendant stood in position of surety, even though he was primarily liable on instrument, since his liability was subject to no conditions precedent. *V.I.P. Com. Contractors v. Alkas*, 553 S.W.2d 656 (Tex. Civ. App. 1977).

Since accommodation party under UCC § 3-415(2) is liable in capacity in which he signed instrument, note executed by two persons as comakers, which contained nothing to show that one of them actually signed only as accommodation maker, subjected both under UCC § 3-118(e) to joint and several liability on such obligation. *Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719 (Tex. Civ. App. 1977), writ *ref'd n.r.e.*, (Sept. 27, 1977).

Where president of corporation signed promissory note as president of corporation and also signed note personally, under UCC § 3-402 president clearly and unambiguously did not sign promissory

note in representative capacity but as "accommodation party" under UCC § 3-415(1), making president personally liable on note. *Sullivan County Nat'l Bank v. Lieman*, 89 Misc. 2d 780 (1977).

Accommodation status of signer of note does not affect liability of signer to payee. *Bankers Trust of S.C. v. Culbertson*, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

Under UCC § 3-415, accommodation party, on indorsing check drawn by another, became liable on instrument in capacity in which she signed it. *Nevada State Bank v. Fischer*, 93 Nev. 317, 565 P.2d 332 (1977).

Holder of promissory note had no obligation to demand additional collateral from defaulting debtor before he proceeded against accommodation indorser; holder's failure to record note did not constitute "unjustifiable impairment of collateral" under UCC § 3-606(1)(b), relieving accommodation indorser of any further obligation on note, since recording of promissory note would not convert it into security interest in obligor's property, absent collateral, and no collateral accompanied note in question. *First State Bank v. Raiton*, 377 F. Supp. 859 (E.D. Pa. 1974).

Under UCC §§ 3-415(2) and 3-511(2), holder of 7 demand promissory notes made by corporate maker was entitled to enforcement against two individual accommodation indorsers without presentment, protest or notice of dishonor, where notes provided that maker and indorsers waived presentment, protest and notice of dishonor; there was nothing which permitted accommodation indorsers to escape from effect of waiver provision, which by its express terms was applicable to indorser, merely because they were accommodation indorsers; furthermore, individual accommodation indorsers were not entitled to assert defense of usury inasmuch as it was not available defense for corporate maker of notes. *Bank of Del. v. NMD Realty Co.*, 325 A.2d 108 (Del. Super. 1974).

Liability of accommodation indorser to parties other than one accommodated is same as though accommodation indorser was indorser for value. *Fairfield County Trust Co. v. Steinbrecher*, 5 Conn. Cir. Ct. 405, 255 A.2d 144 (1968).

Although purchaser of promissory note acquired it under an irregular endorsement which prevented him from becoming a holder, he was still a taker for value before maturity to whom an accommodation party is liable. *James Talcott, Inc. v. Fred Ratowsky Assocs.*, 38 Pa. D. & C.2d 624 (1965).

16. —Liability as maker.

Accommodation party who signed note and deed of trust as maker was bound on such instruments to same extent as his co-maker (see UCC § 3-415(2)). *Caito v. United Cal. Bank*, 20 Cal. 3d 694, 576 P.2d 466 (1978).

In action for balance due on promissory note, where defendant claimed that he was merely accommodation indorser of note and not a comaker but admitted, as note clearly indicated, that he had signed note in lower righthand corner instead of on back where spaces were expressly provided for indorsers, defendant was liable as comaker under UCC § 3-402. Moreover, in such suit defendant's alleged accommodation status was inconsequential, since accommodation maker under UCC § 3-415 is liable on instrument without any resort to his principal. *Bankers Trust of S.C. v. Culbertson*, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

Where corporation that signed note failed to show that holder induced it to become accommodation party or that holder actually agreed it would not be held liable as principal, but rather that other co-makers induced it to sign note, even if corporation could show by parol that it was accommodation maker, under UCC § 3-415(2) corporation would have no defense against holder in action on note. *First Pa. Bank v. Weber*, 240 Pa. Super. 593, 360 A.2d 715 (1976).

Woman who signed promissory note and pledged savings passbook as accommodation for her brother was liable to payee of note as accommodation maker, notwithstanding that as condition for signing note and pledging her collateral, plaintiff required her brother to obtain credit insurance for six-months term of note, note was thereafter extended without notice to her, and her brother died during extended term, where plaintiff voluntarily signed note as maker, without

being deceived in any way as to its contents or legal effect thereof, where in note she affirmatively agreed to continue use of her collateral in case of extension thereof and affirmatively agreed to extension or renewal of note without notice to her, and where she did not require, as condition for renewal of note, credit insurance also being extended or renewed. *Vinick v. Fourth Nat'l Bank*, 531 P.2d 327 (Okla. 1974).

17. Defenses; lack of consideration.

In action by insurance company to recover on renewal note, where both original note and renewal note in suit were executed for value by defendant as maker, plaintiff was payee of both notes, and no other persons were parties to such notes, defendant could not escape liability on renewal note by contending that he was mere "accommodation maker" who had lent his name to another party to an instrument within meaning of UCC § 3-415(1) and was not liable to party accommodated under UCC § 3-415(5), even though evidence showed that defendant did execute both notes to accommodate person who held controlling interest in plaintiff company. *Pioneer Ins. Co. v. Gelt*, 558 F.2d 1303 (8th Cir. Neb. 1977).

Under UCC § 3-415(2) and Official Comment 3, the obligation of accommodation party is supported by any consideration for which the instrument is taken before it is due. Thus, if two or more signed a note, the defense of no consideration is not available to the one who signed but did not receive any of the proceeds. In such case, the accommodation party is bound by the consideration moving to the other party. *Warren v. Washington Trust Bank*, 19 Wash. App. 348, 575 P.2d 1077 (1978), modified on other grounds, 92 Wash. 2d 381, 598 P.2d 701 (1979).

Under UCC § 3-415(2), only maker of note, and not accommodation maker, can assert failure of consideration as defense. An accommodation maker's consideration is the receipt by the primary obligor of the proceeds of the loan, and no separate consideration need run to the accommodation maker. *Stockwell v. Bloomfield State Bank*, 174 Ind. App. 307, 367 N.E.2d 42 (1977).

In action by bank against accommodation party on promissory notes, accommodation party was liable to bank under UCC § 3-415(2), since obligation of accommodation party was adequately supported by monetary consideration furnished to maker of notes, even though it was furnished prior to signature of accommodation party. *St. Charles Nat'l Bank v. Ford*, 39 Ill. App. 3d 291, 349 N.E.2d 430 (2d Dist. 1976).

Where wife of maker of 2 notes signed both notes as co-maker 30 days after notes were executed, at time when all transactions surrounding execution of notes had been completed and there was no factual change between parties except addition of her signature, wife was accommodation maker under UCC § 3-415 and was liable to holders who took notes for value, notwithstanding they were not holders in due course and there was no consideration for wife's signature, since under UCC § 3-408 no consideration was necessary to make her liable as accommodation party. *Cissna Park State Bank v. Johnson*, 21 Ill. App. 3d 445, 315 N.E.2d 675 (4th Dist. 1974).

In action by holder of note against makers who signed it as accommodation for payee: (1) fact that due date of first monthly installment was omitted did not make instrument incomplete in any "necessary respect" under UCC § 3-115(1) and instrument in which no time for payment was stated was payable on demand under UCC § 3-108; (2) holder's taking of note dated June 30, 1972, on July 14, 1972, was within "a reasonable length of time after its issue" under UCC § 3-304(3)(c); and (3) since note was not overdue when holder took it, lack of consideration was no defense under UCC §§ 3-304(4)(c) and 3-415(2). *Gill v. Commonwealth Nat'l Bank*, 504 S.W.2d 521 (Tex. Civ. App. 1973), writ ref'd n.r.e., (Apr. 3, 1974).

In action by bank, as payee of notes executed by used car purchasers, against used car dealer to recover unpaid balance due on notes after purchasers defaulted, where dealer had signed notes on back but was not otherwise party to instrument: (1) dealer's signature constituted indorsement of note under UCC § 3-402; (2) since indorsement was not in chain of title, dealer was accommodation indorser under

UCC § 3-415 and, since bank took notes with knowledge that he was accommodation indorser, dealer's liability was that of surety; (3) as such, dealer was entitled to such defenses to liability on notes as were afforded to sureties by statute, including UCC § 3-606. *First Nat'l Bank v. Hargrove*, 503 S.W.2d 856 (Tex. Civ. App. 1973).

An accommodation party cannot claim that there is no consideration for his accommodation as the value received by the principal debtor, the person accommodated, is the consideration for which the accommodation party lends his credit. *Hybertsen v. Reimann*, 262 Or. 116, 496 P.2d 917 (1972).

Plaintiff-assignee of note was not precluded from recovering on note from defendants-accommodation makers despite argument that plaintiff took assignment of note knowing that it was overdue, was not holder in due course and therefore took instruments subject to defense of want or failure of consideration arising but of contention that defendants received no consideration for adding their signatures to notes as accommodation makers. *Hybertsen v. Reimann*, 262 Or. 116, 496 P.2d 917 (1972).

Though note was made and indorsed as accommodation and without consideration, absence of consideration is not available as defense to accommodation maker or indorser when instrument is taken for value before it is due. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 60 Misc. 2d 499 (1969).

The fact that an accommodation party did not receive any consideration is immaterial. *Abby Fin. Corp. v. Weydig Auto Supplies Unlimited, Inc.*, 4 U.C.C. Rep. Serv. 858 (1967, NY Sup).

An accommodation maker may assert against the holder who is not a holder in due course any defense which an ordinary maker could assert. *County Nat'l Bank v. Mathey-Tissot Watch Co.*, 4 U.C.C. Rep. Serv. 490 (1967, NY Sup).

The fact that the maker of the note and not the accommodation maker received the consideration is not a defense to the accommodator. *Delbrook Assocs. v. Law*, 4 U.C.C. Rep. Serv. 88 (1967, NY Sup).

18. —Usury.

In action under usury statute by individual signers of corporate promissory note against bank to recover interest and penalty on allegedly usurious loan, whether note was usurious depended on construction of note in accordance with nature of parties' obligations as represented by their signatures and there was sufficient evidence to present disputed fact question as to capacity in which plaintiffs signed note, although five signatures on note were unqualified individual signatures and could leave those signing personally obligated under UCC § 3-403(2)(a), where bank claimed that they signed as guarantors of corporate loan and sought to introduce parole evidence under UCC § 3-415(3) to establish such claim and where there was evidence that it was understood by parties that interest rate being charged was not usurious interest because it was being charged to corporation and not individuals. *Pinemont Bank v. DuCroz*, 528 S.W.2d 877 (Tex. Civ. App. 1975), *ref. n.r.e.* (Jan. 28, 1976).

19. —Fraud.

Where evidence showed that accommodation maker to note was almost illiterate, that nature of transaction was not explained to him by bank, that he did not understand that he was assuming any financial responsibility when he signed the note, and that maker of note falsely and fraudulently misrepresented document, accommodation maker was entitled to present defense of fraud in the factum. *United Bank & Trust Co. v. Schaeffer*, 280 Md. 10, 370 A.2d 1138 (1977).

20. Discharge from obligation.

Notwithstanding accommodation party who signed note as maker would otherwise have been jointly and severally liable on note as co-maker under UCC § 3-118 and § 3-415, accommodation party was totally discharged under UCC §§ 3-606 and 9-306 by secured creditor's impairment of collaterals where collateral, which was not in possession of secured creditor, was sold by principal debtor with express authority of secured creditor and value of collateral exceeded value of debt. *Benefi-*

cial Fin. Co. v. Marshall, 551 P.2d 315 (Okla. Ct. App. 1976).

Evidence that defendant comaker of note signed as accommodation for other comaker, that he received no benefits from loan, and that note was paid off by second comaker supported conclusion that first comaker was accommodation party under UCC § 3-415(1), who was discharged under UCC §§ 3-601(1)(a) and 3-603 when instrument was paid, and that any contract which may have existed to sue the first comaker on note was, therefore, unenforceable. *Marcus v. Wilson*, 16 Ill. App. 3d 724, 306 N.E.2d 554 (1st Dist. 1973).

Payment of a note by the accommodation maker did not discharge the obligation which it evidenced, nor did it extinguish the lien of the real estate mortgage by which it was secured. *Simson v. Bilderbeck, Inc.*, 76 N.M. 667, 417 P.2d 803 (1966).

21. Liability to accommodated party.

The accommodated party may not sue the accommodation party nor foreclose a mortgage against him. *Ridings v. Motor Vessel "Effort"*, 387 F.2d 888 (2d Cir. N.Y. 1968).

The fact that the accommodated maker has been declared bankrupt does not relieve an accommodator who signs as co-maker as he has a primary liability to the holder. *Delbrook Assocs. v. Law*, 4 U.C.C. Rep. Serv. 88 (1967, NY Sup).

Whether a signature on a note providing that "makers, endorser and guarantors waive demand, presentment, protest, notice of nonpayment, and all defenses on the ground of extension of time for payment" was in an accommodation maker or accommodation endorser capacity was of no legal consequence, as the liability of an endorser was secondary only with respect to these rights which were waived. *Bankers Trust of S.C. v. Culbertson*, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

In action by guarantor of renewal and extension promissory notes against maker, maker could not claim that guarantor, because he was stockholder, director and secretary-treasurer of corporate comaker, and also guarantor of notes under separate instrument, was accommodated by maker's signing of notes and could not therefore hold accommodation

party (maker) liable under UCC § 3-415(5), because company was other party to notes, not guarantor, and maker lent his name, in execution of notes, to enable company, not guarantor, to obtain renewal and extension. *Blake v. Coates*, 292 Ala. 351, 294 So. 2d 433 (1974).

Although payee may derive incidental benefit from accommodation, that does not, ipso facto, make payee party accommodated; and where maker obtained extension of its obligation to repay bank as result of defendants' indorsement of its renewal note, mere fact that accommodation indorsement was made at request of bank did not alter maker's position as beneficiary of defendants' indorsement and as party accommodated in this transaction. *State Bank v. Owens*, 31 Colo. App. 351, 502 P.2d 965 (1972).

Evidence sustained finding that guaranty by individual defendant of two notes of corporate defendant was intended as accommodation for plaintiffs, and as such accommodating party is not liable on notes to party accommodated. *T.W. Sommer Co. v. Modern Door & Lumber Co.*, 293 Minn. 264, 198 N.W.2d 278 (1972).

Assuming that one signing a note as guarantor should be considered as an accommodation party to the instrument and the bank, to whom the note was given, had knowledge of the facts, his remedy after he makes payment is against his codefendants, and as to the bank he is liable in the capacity in which he signed and is estopped by public policy from asserting that the parties agreed that the instrument should not be enforced. *National Bank of N. Am. v. Around the Clock Truck Serv., Inc.*, 58 Misc. 2d 660 (1968).

Even if appellant signed a note only as an accommodation indorser and appellee had knowledge of his capacity, he would still not be relieved of liability. *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968).

The accommodation party is not liable to the party accommodated. *United Refrigerator Co. v. Applebaum*, 410 Pa. 210, 189 A.2d 253 (1963).

An accommodation party who signs a check for the accommodation of the payee is not liable on the check to the payee.

United Refrigerator Co. v. Applebaum, 410 Pa. 210, 189 A.2d 253 (1963).

22. Rights of accommodation party.

Although an accommodation maker may, on paying the note, recover from the party accommodated under UCC § 3-415(5), this is not his sole recourse, even where a judgment has intervened to extinguish the note by merger. In such a case, the accommodation maker, as the assignee of the judgment creditor, can enforce the judgment against the party accommodated. *Anna Nat'l Bank v. Wingate*, 63 Ill. App. 3d 676, 381 N.E.2d 19 (5th Dist. 1978).

Assignee of guarantor of promissory note, who paid amount due on note and concurrently received note from payee with payee's assignment endorsed thereon, was entitled to sue payor on instrument; UCC § 3-415 and UCC § 3-603 give both accommodation party and stranger to instrument, respectively, rights of recourse on instrument against payor after they have paid or satisfied note. *Collection Control Bureau v. Weiss*, 50 Cal. App. 3d 865 (2d Dist. 1975).

Contractor who was accommodation party to note executed to obtain his compensation under a contract had right of recourse under UCC § 3-415(5) against debtor who defaulted notwithstanding that direct action against debtor under the contract would have been barred by Contractor's Registration Act. *Ilg v. Andrews*, 10 Wash. App. 936, 520 P.2d 1385 (1974).

Evidence supported finding that non-stockholders who signed note to stockholders at request of bank, the non-stockholders having been given an exclusive contract by the corporation to secure permanent financing for construction of shopping center project, were accommodation endorsers with right of recourse to recover from signing stockholders any payments non-stockholders made on note. *Hanson v. Cheek*, 251 Ark. 897, 475 S.W.2d 526 (1972).

Accommodation maker does not have cause of action against party accommodated until accommodation maker pays instrument. *Garland v. Shepherd*, 445 S.W.2d 602 (Tex. Civ. App. 1969).

The instant section was referred to, for comparison purposes, in a case decided under the prior law in which it was held that an accommodation maker was not in the position of a surety so as to be discharged by an impairment of collateral by the payee. In the same case the court pointed out that under the Uniform Commercial Code "an accommodation party is always a surety" and that the "suretyship defenses ... are not limited to parties who are 'secondarily liable', but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so". *Rose v. Homsey*, 347 Mass. 259, 197 N.E.2d 603 (1964).

23. —Subrogation rights.

The drafters of UCC § 3-415 considered an accommodation maker to be a surety for the person accommodated. Thus, even apart from the remedy of UCC § 3-415(5), a surety may, after paying the underlying debt, take an assignment of the judgment against himself and the party assured and enforce the judgment against the party assured, thus satisfying the obligation created by payment of the debt. *Anna Nat'l Bank v. Wingate*, 63 Ill. App. 3d 676, 381 N.E.2d 19 (5th Dist. 1978).

Guarantor who paid notes was subrogated under UCC § 3-415 to rights of creditor and, thus, could sue debtor for reimbursement in county where debtor promised to discharge notes, notwithstanding debtor was resident of another county. *Seale v. Hudgens*, 538 S.W.2d 459 (Tex. Civ. App. 1976).

Plaintiff who signed notes as accommodation maker and who subsequently paid judgment on notes was entitled under UCC § 3-415 to subrogation interest in mortgages which secured notes. *Reimann v. Hybertsen*, 275 Or. 235, 550 P.2d 436 (1976), modified, 276 Or. 95, 553 P.2d 1064 (1976).

Accommodation party who pays on instrument is subrogated to rights of holder and should have recourse on instrument, regardless of whether accommodation party received value for his signature or note. In re *Appliance Packing & Warehousing Corp.*, 358 F. Supp. 84 (S.D.N.Y.

1972), aff'd, 475 F.2d 1011 (2d Cir. N.Y. 1973).

In the absence of any fraud or illegality, the accommodation maker of note who paid it and was assigned the note and real estate mortgage securing it became subrogated to the rights of the former holder and could sue the maker on the note and foreclose the mortgage. *Simson v. Bilderbeck, Inc.*, 76 N.M. 667, 417 P.2d 803 (1966).

24. Practice and procedure.

In action by accommodation maker against accommodated party to recover amount paid to holder of note, where holder, after such payment, stamped "paid" on note and delivered it to accommodation maker, (1) under UCC § 3-605(1)(a), holder's indorsement on face of note (by stamping "paid" on note) discharged accommodation maker's liability thereon, (2) such indorsement did not discharge accommodated party's obligation to accommodation maker, since such discharge was not apparent on face of instrument, (3) holder's delivery of note to accommodation maker also did not discharge accommodated party's obligation to accommodation maker under UCC § 3-605(1)(b), (4) under UCC § 3-415(5), accommodation maker, on paying note, had right of recourse thereon against accommodated party, and (5) since accommodation maker was entitled to proceed on the written instrument, trial court erred in applying three-year statute of limitations applicable to actions on oral contracts. *Payne v. Payne*, 219 Va. 12, 245 S.E.2d 133 (1978).

In action on promissory note, defendant's signature on note as borrower, testimony of bank officer relating to discussions with defendant in connection with loan, credit investigation of defendant conducted by plaintiff, completion of financial statement by defendant, and delivery of money to principal obligor supported finding that defendant was liable on note as accommodation party under UCC § 3-415, even though defendant did not receive any proceeds of loan itself. *Barber v. Corpus Christi Bank & Trust*, 506 S.W.2d 254 (Tex. Civ. App. 1974).

In action by bank on promissory note in which defendant showed he was accom-

moderation maker under UCC § 3-415, all written agreements executed at same time as part of same transaction were admissible in action between original parties under UCC § 3-119. *Berger v. Mercantile Nat'l Bank*, 231 Ga. 680, 203 S.E.2d 479 (1974).

When an accommodation party is sued he has the burden of proving that the plaintiff is the party who is accommodated, for otherwise the accommodation party is bound by his undertaking. *Phareb Assocs. Co. v. Benfari*, 4 U.C.C. Rep. Serv. 860 (N.Y. App. Term 1967).

25. —Parol evidence.

Payee of promissory note may be an accommodated party under UCC § 3-415(1); the accommodation party would not be liable under UCC § 3-415(5) to such payee and may, under UCC § 3-415(3), prove such accommodation agreement by parol evidence unless holder is holder in due course without notice of accommodation. *Gehrig v. Ray*, 332 So. 2d 703 (Fla. App. 1976).

Where corporation that signed note failed to show that holder induced it to become accommodation party or that holder actually agreed it would not be held liable as principal, but rather that other co-makers induced it to sign note, even if corporation could show by parol that it was accommodation maker, under UCC § 3-415(2) corporation would have no defense against holder in action on note. *First Pa. Bank v. Weber*, 240 Pa. Super. 593, 360 A.2d 715 (1976).

In action against maker of note by guarantors who paid note and took assignment, trial court erred in granting summary judgment against maker where maker alleged that he was accommodation maker and thus not liable to guarantors under UCC § 3-415(5). Since guarantors took instrument after it was due in that no payments had been made on it prior to that time, they were not holders in due course and oral proof concerning accommodation character of maker's execution of note could be shown under UCC § 3-415(2), (3). *Swida v. Adams*, 138 Ga. App. 347, 226 S.E.2d 139 (1976).

Where both principal and accommodation party are before court, it is inequitable to order judicial sale of security of

accommodation party if security of principal is adequate to satisfy claim of creditor. Thus, where grantor of tract of land signed notes merely as accommodation party and where proceeds of sale of property owned by principal debtor were sufficient to discharge liabilities on both notes, property which was security for accommodation obligation should not have been subjected to judicial sale notwithstanding there were secondary claims against property held by principal debtor. *Bartley v. Pikeville Nat'l Bank & Trust Co.*, 532 S.W.2d 446 (Ky. 1975).

While face of promissory note indicated that 3 parties signed as co-makers, in action between themselves, parties who signed note could show their respective liabilities and relationships by parol evidence under UCC § 3-415(3), and where defendant assumed role of guarantor toward plaintiff accommodation maker, defendant was liable to plaintiff for full amount which plaintiff had paid bank on defaulted note. *Brown v. Arcuri*, 43 A.D.2d 993 (3d Dep't 1974).

In action by bank as holder of promissory note against corporation and two individuals who signed note: (1) failure of bank to perfect purchase money security interest in collateral given as security for note by properly filing financing statement in manner prescribed by UCC § 9-401 was unjustifiable impairment of collateral as contemplated by UCC § 3-606; (2) however, discharge of party to negotiable instrument by reason of unjustifiable impairment of collateral was defense available only to secondary and accommodation parties; (3) where it was clear from face of instrument that individual signers intended to sign note other than as endorers but there was dispute as to which capacity, parol evidence was admissible to show intention of parties as to capacity in which instrument was signed; and (4) evidence that loan in present case was made directly to two individual signers as principal debtors (i.e., makers), together with evidence concerning structure of corporation, active solicitation of loan by individual signers, and fact that one individual signer was director of bank, was sufficient to show that individual signers signed note as makers rather than accom-

modation parties. *Peoples Bank v. Pied Piper Retreat, Inc.*, 158 W. Va. 170, 209 S.E.2d 573 (1974).

Where creditor-payee was urged by defendant indorser to forebear from carrying out replevin against goods of debtor-maker, and did so upon defendant's guarantee of payment and credit, creditor-payee was entitled to introduce parol evidence to establish intent of defendant in signing note, and to sue defendant directly and primarily on the notes not only as accommodation indorser-guarantor but also as de facto co-maker. *Jamaica Tobacco & Sales Corp. v. Ortner*, 70 Misc. 2d 388 (1972).

Parol evidence is admissible to show party's capacity as accommodation party; and, as payee, holder of instrument who has taken it for value has rights of holder in due course as against accommodation party who signed as maker, except where holder has induced maker to become accommodation party, as by actually agreeing that he should not be held liable as principal. *Philadelphia Bond & Mtg. Co. v. Highland Crest Homes, Inc.*, 221 Pa. Super. 89, 288 A.2d 916 (1972).

The accommodation party may not vary by parol evidence his liability as accommodation party. *Phareb Assocs. Co. v. Benfari*, 4 U.C.C. Rep. Serv. 860 (N.Y. App. Term 1967).

Parol evidence is not admissible to show that there was an agreement that the holder would never assert a claim against the accommodating party but would look only to the assets of the corporate borrower for payment. *Delbrook Assocs. v. Law*, 4 U.C.C. Rep. Serv. 88 (1967, NY Sup).

Where there has been no negotiation of an instrument, an accommodation party may show by parol what the understanding or agreement had been as to his capacity in signing. *Deems v. Wilson*, 114 Ga. App. 341, 151 S.E.2d 230 (1966).

III. DECISIONS UNDER FORMER STATUTES.

26. Decisions under Code 1942 § 70.

An indorser in blank of a note before its delivery is an accommodation endorser secondarily liable thereon, and is discharged to the extent that the payee re-

ceives payment on the note from the maker of it, from the proceeds of property conveyed to secure it, or from the proceeds of insurance of such property against fire with loss payable to such payee. *Wright v. North River Ins. Co.*, 23 F.2d 548 (5th Cir. 1928), cert. denied, 277 U.S. 604, 48 S. Ct. 601, 72 L. Ed. 1011 (1928).

Whether or not a person is simply an accommodation signer of the contract, is a question for the jury. *Universal C.I.T. Credit Corp. v. Turner*, 56 So. 2d 800 (Miss. 1952).

A corporation executing through one of its officers an accommodation note was not liable when so to do was beyond the scope of its corporate authority. *Ketcham v. Mississippi Outdoor Displays, Inc.*, 203 Miss. 52, 33 So. 2d 300 (1948).

An indorser, whether for accommodation or for value, guarantees the genuineness of previous indorsements upon a check which he negotiates. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

Where the proof showed that payee's name on depositor's check was forged, and that defendant indorsed same for accommodation, drawee bank was entitled to recover amount thereof from defendant, notwithstanding that at the time suit was filed such bank had not reimbursed its depositor. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

If it should be ascertained, even after payment of a bill, that any of the indorsements are forged, the drawee can recover back the amount of the bill from the person to whom he paid it; and so each preceding indorser may recover from the person who indorsed the bill to him. *Citizens Bank v. Miller*, 194 Miss. 557, 11 So. 2d 457 (1943).

Whether consideration passed from motor company to one signing conditional sale contract and purchase-money notes in blank as accommodation maker to enable such company to sell paper to credit company for value held immaterial; consideration passing between two companies being sufficient to bind him. *Universal Credit Co. v. Thomas*, 170 Miss. 21, 154 So. 272 (1934).

Benefit to accommodation indorsers under agreement for loan of money on stock

pending its sale constituted good and valuable consideration. *Fitzgerald v. Union & Planters' Bank & Trust Co.*, 153 Miss. 500, 121 So. 148 (1929).

Accommodation party is liable to holder for value only when he became such before maturity. *Rylee v. Wilkinson*, 134 Miss. 663, 99 So. 901 (1924).

27. Decisions under Code 1942 § 105.

An indorser is not primarily liable, but only secondarily liable. *Fish Meal Co. v. Brondum*, 242 Miss. 573, 135 So. 2d 825 (1961).

As between the indorsers on a note, the indorser whose name appeared first on back of note was liable first for payment of

note and his discharge by receiver of payee bank by authority of chancery court discharged indorser whose name appeared second on back of note. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

An indorser in blank of a note before its delivery is an accommodation indorser secondarily liable thereon, and is discharged to the extent that the payee receives payment on the note from the maker of it, from the proceeds of property conveyed to secure it, or from proceeds of insurance of such property against fire with loss payable to such payee. *Wright v. North River Ins. Co.*, 23 F.2d 548 (5th Cir. 1928), cert. denied, 277 U.S. 604, 48 S. Ct. 601, 72 L. Ed. 1011 (1928).

§ 75-3-420. Conversion of instrument.

(a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (i) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.

(b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.

(c) A representative, other than a depository bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

SOURCES: Laws, 1992, ch. 420, § 58, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE:

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-419.

11. In general.
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I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-419.

11. In general.
In corporation's action for defendant bank's conversion of checks accepted by

defendant for deposit into checking account of another corporation that plaintiff had employed as collection agency, but which plaintiff had not authorized to indorse, cash, or deposit checks made out to plaintiff, court held (1) that evidence showed that second corporation's indorsement of checks in suit was unauthorized; (2) that evidence did not show that plaintiff had ratified such indorsements or that it was precluded from denying them; (3) that defendant was not holder in due course under UCC § 3-302(1)(c), since checks were deposited by one who was not payee thereof and thus lacked valid indorsements; (4) that defendant could not utilize as defense exception contained in UCC § 3-419(3) because it had failed to act in good faith and in accordance with reasonable commercial standards applicable to banking business by failing to inquire as to second corporation's authority to indorse and deposit plaintiff's checks into second corporation's account; (5) that defendant could not escape its duty of inquiry by relying on word of its customer (second corporation); and (6) that fact that defendant could proceed against its customer (second corporation) under warranty provisions of UCC §§ 3-417 and 4-207 did not absolve it of its duty of inquiry. *National Bank v. Refrigerated Trans. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978).

Effect of Code § 3-419(3) providing that representative, including depository or collecting bank, who has in good faith and in accordance with reasonable commercial standards applicable to business of such representative dealt with instrument or its proceeds on behalf of one who was not true owner is not liable in conversion or otherwise to true owner beyond amount of any proceeds remaining in his hands is to make applicable to commercial paper general rule that person who deals in good faith with property of another is not liable for conversion. *Cooper v. Union Bank*, 103 Cal. Rptr. 610 (App. 1972), vacated, 9 Cal. 3d 371, 107 Cal. Rptr. 1, 507 P.2d 609 (1973).

12. Payment upon forged indorsement.

For purposes of a conversion suit, there is little, if any, difference between unau-

thorized endorsements and forged endorsements. *Delta Chem. & Petroleum, Inc. v. Citizens Bank of Byhalia*, — So. 2d —, 2000 Miss. App. LEXIS 203 (Miss. Ct. App. May 2, 2000).

The drawer of a check may sue a depository bank which accepts the check and pays out the proceeds in violation of a forged restrictive indorsement based on either money had and received or conversion where the indorsement, although forged by an employee of the drawer who supplied the drawer with the name of the payee intending the latter to have no interest in the instrument (Uniform Commercial Code, § 3-405, subd [1], par [c]), is nonetheless "effective", since in those cases where the forgery is effective, the depository bank may be deemed to have dealt with valuable property of the drawer, inasmuch as the check is both a valuable instrument and a valid instruction to the drawee to honor the check and debit the drawer's account accordingly; additionally, only a depository bank may be held liable for payment in disregard of a restrictive indorsement (Uniform Commercial Code, § 3-419, subd [4]; § 3-206, subd [2]) since that bank is in the best position to ensure that the restriction is satisfied. *Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank*, 46 N.Y.2d 459, 386 N.E.2d 1319 (1979).

Under UCC § 3-419(1)(c), the drawee bank's payment of a check on a forged indorsement constitutes conversion of the instrument as to the payee. *O.K. Moving & Storage Co. v. Eglin Nat'l Bank*, 363 So. 2d 160 (Fla. App. 1978).

Where (1) third person, between February and April, 1973, stole several checks drawn on plaintiff's account with defendant bank, forged plaintiff's signature on the checks, and cashed them at defendant bank, and (2) plaintiff sued bank in June, 1978, on theory of breach of contract for paying checks without plaintiff's consent, court held, on denying defendant's motion for summary judgment, (1) that under general (non-UCC) statute of limitations, action for breach of contract must ordinarily be commenced within six years, (2) that defendant had acted as plaintiff's drawee bank, (3) that while plaintiff might have initially sued defendant in

conversion under UCC § 3-419(1)(c), such action was barred when plaintiff filed its suit, (4) that plaintiff's contract action was timely, since it was filed within the six-year statutory period, and (5) that defendant could not effectively base its "affirmative defense" of statute of limitations on UCC § 4-406(4), which provides that customer who does not within one year after bank statement is made available to him discover and report his unauthorized signature on any item, or who does not within three years from time bank statement is available discover and report any unauthorized indorsement of any item, is precluded from asserting such unauthorized signature or indorsement against bank, since only real issue in case was whether plaintiff's discussing forgeries in suit with officer of defendant in spring of 1973 constituted "report" of such forgeries within time limits prescribed by UCC § 4-406(4), and such issue was one of fact. *American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co.*, 96 Misc.2d 715 (1978).

Where (1) money given to plaintiff wife in trust for her children was deposited in savings bank trust accounts at defendant savings bank, (2) plaintiff's husband forged plaintiff's signature on both bank signature cards and also on four withdrawal orders against such trust accounts, (3) defendant savings bank honored withdrawal orders by issuing as payment thereon four checks made payable to plaintiff which were drawn on defendant's own account at another bank, (4) plaintiff's husband forged plaintiff's indorsement on such checks and deposited them in his business account at still another bank, and (5) husband's bank then forwarded such checks to defendant's bank which accepted and paid them, in conversion action against defendant bank, plaintiff established prima facie case since defendant could not under UCC § 4-401 debit plaintiff's account for withdrawals made by plaintiff's husband without plaintiff's authorization and under UCC § 3-419(1)(c), instruments were converted when they were paid on forged indorsements. Payment of the four withdrawal orders bearing plaintiff's forged signature was made by defendant when

defendant's own bank accepted the four checks drawn by defendant and paid out on them on defendant's account, and fact that defendant did not pay cash over the counter on such withdrawal orders, but ordered its own bank to make payment thereon, did not alter legal effect of transaction. *Ahrens v. Westchester Fed. Sav. & Loan Ass'n*, 58 A.D.2d 799 (2d Dep't 1977).

Drawee bank which paid check made out to two joint payees, which had been indorsed without authority by one joint payee with signatures of both, was liable in conversion to joint payee whose signature had been wrongfully indorsed, since payment of check under forged indorsement constitutes specific act of conversion under UCC § 3-419(1)(c). *Equipment Distribs., Inc. v. Charter Oak Bank & Trust Co.*, 34 Conn. Supp. 606, 379 A.2d 682 (Super. Ct. 1977).

In customers' action against payor and collecting banks for wrongfully permitting improper charges to be made against customers' savings accounts in payor bank, where attorney of customers' guardian presented to payor bank two withdrawal slips bearing forged signatures of guardian and obtained two cashier's checks payable to guardian; where payor bank failed to compare signatures on withdrawal slips with guardian's signature and in fact had never obtained signature card from guardian; where attorney-forger then presented such cashier's checks bearing forged signatures of guardian, and also indorsements to attorney-forger as "trustee," to collecting bank, opened accounts with such bank and purchased two savings certificates from it, and later withdrew funds from such accounts and redeemed such certificates; and where collecting bank, after indorsing the cashier's checks, presented them to payor bank which honored them, (1) payor bank was liable for charging plaintiff-customers' savings accounts on basis of forged withdrawal slips under same rules which provide that bank paying forged check may not charge amount of check against account of person whose name is forged; (2) payor bank, which was both drawer and drawee of cashier's checks, was liable to payee thereof under UCC § 3-419 for paying checks on basis of forged indorsements

of payee; (3) collecting bank was liable on its warranties under UCC § 4-207 to payor bank for obtaining payment of cashier's checks bearing forged indorsements of customers' guardian; and (4) collecting bank could not escape its liability by invoking defenses set forth in UCC § 3-405, substantial negligence rule contained in UCC § 3-406, and final-payment rule set forth in UCC § 3-418. *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977).

Where payee of cashier's check specially endorsed check to order of specified corporation and individual, where endorsement of individual was forged, and where collecting bank accepted check and credited it to account of endorsee company, collecting bank could not stand in shoes of either holder or holder in due course, since endorsement of individual endorser was forged, and it was liable to owner of cashier's check (i. e., purchaser of check) under UCC § 3-419(1)(c) for conversion, notwithstanding fact that it placed funds received into account of corporate endorser. *Tubin v. Rabin*, 382 F. Supp. 193 (N.D. Tex. 1974), supplemented, 389 F. Supp. 787 (N.D. Tex. 1974), *aff'd*, 533 F.2d 255 (5th Cir. Tex. 1976).

Where draft, made payable to three parties, was paid over forged endorsement of one of the parties, under UCC § 3-116 drawer's debt was not discharged as to party whose endorsement was forged; payment of instrument by drawer-drawee constituted conversion of instrument for which drawer-drawee must respond in damages under UCC § 3-419. *Lee v. Skidmore*, 49 Ohio App. 2d 347, 361 N.E.2d 499 (1976).

Depository bank was liable to plaintiff insurance company under UCC § 3-419 for conversion of premium check which had been made payable to plaintiff and delivered to insurance agent representing plaintiff, but which was endorsed by agent with plaintiff's name and deposited in agent's account with depository bank, where agent did not have authority to endorse checks made payable to plaintiff and where plaintiff did not ratify agent's purported endorsement. *Hartford Accident & Indem. Co. v. South Windsor Bank & Trust Co.*, 171 Conn. 63, 368 A.2d 76 (1976).

Cashier's check, which established debtor-creditor relationship between drawee bank and payee, represented conditional payment, so that when neither check nor its proceeds ever reached payee or his lawful agent authorized to receive payment, and drawee bank paid check on forged indorsement, drawee bank as payor bank was liable to payee's administratrix for conversion. *Myers v. First Nat'l Bank*, 42 A.D.2d 657 (3d Dep't 1973).

Purchaser of cashier's checks lost them before delivery to named payees; issuing bank thereafter paid amount of checks on forged endorsements; held, issuing bank would be liable to purchaser or to named payees. *Jerman v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 7 Cal. App. 3d 882 (2d Dist. 1970).

When the drawee bank pays on a forged indorsement it converts the instrument and is liable for the face of the paper. *Gast v. American Cas. Co.*, 99 N.J. Super. 538, 240 A.2d 682 (App. Div. 1968).

Where check is paid on forged indorsement, payee of forged check has cause of action for conversion against drawee (payor) bank (change in pre-existing California law; recognizing rule; case involves collecting, not drawee, bank). *Harry H. White Lumber Co. v. Crocker-Citizens Nat'l Bank*, 253 Cal. App. 2d 368 (2d Dist. 1967).

13. —Forged restrictive indorsement.

The drawer of a check may sue a depository bank which accepts the check and pays out the proceeds in violation of a forged restrictive indorsement based on either money had and received or conversion where the indorsement, although forged by an employee of the drawer who supplied the drawer with the name of the payee intending the latter to have no interest in the instrument (Uniform Commercial Code, § 3-405, subd [1], par [c]), is nonetheless "effective", since in those cases where the forgery is effective, the depository bank may be deemed to have dealt with valuable property of the drawer, inasmuch as the check is both a valuable instrument and a valid instruction to the drawee to honor the check and debit the drawer's account accordingly; additionally, only a depository bank may be held liable for payment in disregard of

a restrictive indorsement (Uniform Commercial Code, § 3-419, subd [4]; § 3-206, subd [2]) since that bank is in the best position to ensure that the restriction is satisfied. *Underpinning & Found. Constructors, Inc. v. Chase Manhattan Bank*, 46 N.Y.2d 459, 386 N.E.2d 1319 (1979).

Under UCC § 3-206(3) and other sections of Uniform Commercial Code dealing with restrictive indorsements, depository bank that does not apply instrument consistently with restrictive indorsement thereon is liable in conversion, and any defense afforded by UCC § 3-419(3) would not be available to such bank. *C.S. Bowen Co. v. Maryland Nat'l Bank*, 36 Md. App. 26, 373 A.2d 30 (1977).

14. Liability of collecting bank to drawer.

While payee is entitled to sue depository bank in conversion for money paid to third party which should have been paid to him, drawer has no such right to sue depository or collecting bank for conversion. *Allied Concord Fin. Corp. v. Bank of Am.*, 275 Cal. App. 2d 1 (2d Dist. 1969).

15. Damages; face amount of instrument.

Under UCC § 3-419(1)(c), when drawee bank takes check without payee's indorsement, delivers cash in amount of check to one who is not authorized to receive it, and ultimately returns check to maker, bank has assumed complete control over check, dealt with it as its own, and withheld it from its rightful owner. Such dealings constitute tortious conversion of check, and payee is entitled to recover its value which, *prima facie*, is its face value (observing that under allegations of plaintiff's complaint, plaintiff as payee of draft issued by defendant stockbroker was victim of conversion of such draft when broker paid it on forged indorsement). *North Carolina Nat'l Bank v. McCarley & Co.*, 34 N.C. App. 689, 239 S.E.2d 583 (1977).

In action by plaintiff, as co-payee of checks, against defendant, a depository-collecting bank, to recover proceeds of checks allegedly converted by defendant, defendant having accepted checks for collection from its customer, the other co-payee of checks, either without plaintiff's indorsement or bearing forged indorse-

ment of plaintiff, plaintiff was not automatically entitled to damages equal to sum of face value of checks, nor was payment sole defense to conversion claim, and defendant was entitled to credit in mitigation of damages where checks were proceeds from sale of hogs, where plaintiff and other co-payee of checks were engaged in joint venture to raise such hogs, and where proceeds of checks were used to discharge liens to which hogs were subject. *Yeager & Sullivan, Inc. v. Farmers Bank*, 162 Ind. App. 15, 317 N.E.2d 792 (2d Dist. 1974).

16. Reasonable commercial standards.

A bank and its president were not entitled to a directed verdict in an action alleging a scheme to divert checks payable to two corporations into accounts opened by a part owner of the corporations at the bank in names that were similar to the names of the corporations as the bank president and the part owner were lifelong friends and the bank president admitted that checks made payable to the corporation and bearing the "Inc." name as proper payee should not have been deposited into "non-Inc." sole proprietorship accounts. *Delta Chem. & Petro., Inc. v. Citizens Bank*, 790 So. 2d 862 (Miss. Ct. App. 2001).

A directed verdict was erroneously granted with respect to the claims of the plaintiff corporations for conversion and negligence since sufficient evidence was presented to overcome any finding from the bench that the defendant bank had sustained the "reasonable commercial standard" defense where a bank officer admitted that checks made payable to a corporate entity and bearing the "Inc." name as proper payee should not be deposited into "non-Inc." sole proprietorship accounts. *Delta Chem. & Petroleum, Inc. v. Citizens Bank of Byhalia*, — So. 2d —, 2000 Miss. App. LEXIS 203 (Miss. Ct. App. May 2, 2000).

Nowhere does the Uniform Commercial Code state in so many words that a bank, whether a collecting bank or payor bank, is liable for negligently paying an item. Hints, however abound in the code. They start with § 1-103, providing that common-law rules of negligence still apply.

Section 3-419(3) limits recovery against collecting banks for conversion only if they acted in good faith and followed “reasonable commercial standards.” Section 3-406 precludes assertion of a material alteration or unauthorized signature against the party whose negligence substantially contributed to the wrongdoing, but only if the payor is a holder in due course or paid “in good faith and in accordance with the reasonable commercial standards of the drawee’s or payor’s business.” A bank is prohibited from disclaiming “responsibility for its own lack of good faith or failure to exercise ordinary care” under § 4-103(1), apparently on the assumption that such duties exist. Finally, a bank’s lack of care shifts the burden for paying over a forged signature or a materially altered item from its customer, who was negligent in discovering the wrongdoing, back to the bank under § 4-406(3). *Bank of S. Md. v. Robertson’s Crab House, Inc.*, 39 Md. App. 707, 389 A.2d 388 (1978).

Under UCC § 3-419(3), good faith and commercial reasonableness are separate requirements, both of which must be met to support reliance on the statute as a defense. *National Bank v. Refrigerated Trans. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978).

In action against bank for conversion of checks, bank could be exculpated under UCC § 3-419(3) only if it acted in good faith and in accordance with reasonable commercial standards applicable to banking business. *Siegel Trading Co. v. Coral Ridge Nat’l Bank*, 328 So. 2d 476 (Fla. App. 1976).

In action pursuant to UCC § 3-419 by co-payee of check for conversion of check by bank which cashed check with co-payee’s endorsement forged by other payee, co-payee, which was not a “customer” of bank within meaning of UCC §§ 4-104 and 4-406, was not equitably estopped by policy of commercial reasonableness under UCC §§ 1-102 and 1-203, notwithstanding that co-payee waited 10 months after it learned of forgery to inform bank, where (1) check, which was issued to co-payee “and” other payee, was properly payable under UCC § 3-116 only if it contained endorsement of both payees; (2) unauthorized endorsement was, in ab-

sence of ratification under UCC § 3-404, no endorsement under UCC §§ 3-202 and 3-404; (3) co-payee did not ratify unauthorized endorsement; and (4) bank’s failure to ascertain whether co-payee’s signature was authorized was not in accord with reasonable commercial standards of banking business under UCC § 3-419. *Atlas Bldg. Supply Co. v. First Indep. Bank*, 15 Wash. App. 367, 550 P.2d 26 (1976).

Where payee’s attorney forged payee’s endorsement on check and collecting bank accepted check, which was for large amount, although attorney never had substantial balance, collecting bank was not relieved of liability by UCC § 3-419(3) for amount of check since bank theoretically retained check proceeds for rightful owner and bank did not act “in good faith and in accordance with reasonable commercial standards.” *Sonnenberg v. Manufacturers Hanover Trust Co.*, 87 Misc. 2d 202 (1976).

Where three-man law partnership was dissolved when one partner left firm but other two partners continued practice under new partnership, where bank account of former partnership was kept open for purpose of depositing receivables of former firm, where check made payable to withdrawn partner and one of his former partners was received by new partnership, bookkeeper rubber-stamped check with indorsement of former partnership, bank deposited proceeds in former partnership account, and where new partnership subsequently withdrew money from former partnership account and withdrawn partner sued bank and former partner alleging conversion of check, judgment in favor of bank and former partner was upheld on two grounds: (1) Since indorsement may be made by agent under UCC § 3-403, and agent’s authority may be actual, implied or apparent under UCC § 1-201(43), there was sufficient evidence to support conclusion that apparent authority existed for affixing rubber stamp in lieu of withdrawn partner’s signature; (2) Record further supported defense predicated upon UCC § 3-419(3), since there was expert testimony to effect that under circumstances handling of check was in accord with reasonable commercial standards and, although bank knew former partnership had dissolved, it was

logical for its account to be kept open for purpose of depositing fees which were subsequently collected for services rendered by old firm. *Keane v. Pan Am. Bank*, 309 So. 2d 579 (Fla. App. 1975).

Collecting bank acted in commercially reasonable manner in dealing with cashier's check for \$7,200, though payee's endorsement was forged, where person from whom check was accepted was good customer of bank for 19 years. *Gillen v. Maryland Nat'l Bank*, 274 Md. 96, 333 A.2d 329 (1975).

In action by payee against bank which allowed collection of check payable to payee upon forged endorsement, affidavit of bank's employee that it had paid forged check "in usual course of business" was insufficient to satisfy UCC § 3-419(3) requirement that it act in good faith and in accordance with reasonable commercial standards. *Robert A. Sullivan Constr. Co. v. Wilton Manors Nat'l Bank*, 290 So. 2d 561 (Fla. App. 1974).

In action by insurance claimant against insurance carrier on uninsured motorist's coverage where insurer issued draft payable to claimant and her attorney, attorney without authority endorsed name of his client to draft, received payment therefor and absconded without accounting to client, and where claimant was permitted to recover from insurance company, insurance company was entitled to indemnity against collecting bank; collecting bank was liable to insurer as drawee of draft under its warranty of good title under UCC § 4-207(1)(a) and it was not entitled to assert defense of having acted in good faith and in accordance with reasonable commercial standards under UCC § 3-419(3). *First Nat'l Bank v. Progressive Cas. Ins. Co.*, 517 S.W.2d 226 (Ky. 1974).

Bank did not act in commercially reasonable manner, even though it may have acted in good faith, in paying entire proceeds of check to one of two jointly named payees without first obtaining endorsement of both payees, where bank had no authority to pay proceeds to one payee without first securing endorsement of both payees, and absence of one payee's endorsement could have been readily detected by examination of check; bank therefore could be held liable under UCC

§ 3-419(3) for conversion. *Berkheimers, Inc. v. Citizens Valley Bank*, 270 Or. 807, 529 P.2d 903 (1974).

Amounts which payor bank transfers to collecting bank on forged instrument do not constitute proceeds of instrument, unless true owner ratifies collection; and so, absent such ratification, proceeds remain in hands of payor bank, and payor bank is consequently liable for full amount of instrument notwithstanding Code § 3-419(3). *Cooper v. Union Bank*, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Bank which failed to inquire as to legality of copayee's signature on draft, treated draft as though it was negotiable bank check, and paid instrument although draft stated on its face "payable through" particular branch bank, failed to deal with this draft in accordance with reasonable commercial standards practiced in banking business and, therefore, had failed to establish defense to conversion under UCC § 3-419(3). *Montgomery v. First Nat'l Bank*, 265 Or. 55, 508 P.2d 428 (1973).

This section clearly implies that depository or collecting bank is liable in conversion when it deals with instrument or its proceeds on behalf of one who is not true owner without acting in accordance with "reasonable commercial standards", bank did not act in accordance with "reasonable commercial standards" where no inquiry was made as to authority of attorney to endorse check as trustee on behalf of estate and there was no honoring of prior restrictive endorsement of check "for deposit"; use of word "forged endorsement" as constituting conversion under Code § 3-419(1)(c) does not preclude finding of conversion, although unauthorized signature of fictitious trustee does not constitute forgery in strict sense. *Salsman v. National Community Bank*, 102 N.J. Super. 482, 246 A.2d 162 (1968), *aff'd*, 105 N.J. Super. 164, 251 A.2d 460 (1969).

17. Liability for remaining proceeds.

In conversion action by true owners of negotiable instruments against collecting bank to recover amounts of instruments handled by it on forged endorsements, Code § 3-419(3) would not shield bank from liability, since inasmuch as full amount of instrument remains in account

of drawer when bank pays on forged endorsement, bank manifestly does not part with proceeds of instrument but merely remits other funds from its own account. *Cooper v. Union Bank*, 9 Cal. 3d 371, 507 P.2d 609 (1973).

Where check was "payable through" bank, payee could not recover from bank on unauthorized endorsement, since bank was collecting bank within UCC § 3-120, and since UCC § 3-419(3) makes it clear that collecting banks bear no liability to the true owner of a draft or check, except for those proceeds which may remain in possession of said bank. *Messeroff v. Kantor*, 261 So. 2d 553 (Fla. App. 1972).

18. Practice and procedure.

When check is converted under UCC § 3-419(1)(c), payee-owner has sustained injury to property within meaning of general (non-UCC) statute prescribing three-year period of limitations for injuries to persons and property, and such statute begins to run when check is paid on the forged indorsement. *Continental Cas. Co. v. Huron Valley Nat'l Bank*, 85 Mich. App. 319, 271 N.W.2d 218 (1978).

The exception set forth in UCC § 3-419(3) is an affirmative defense, and the burden of proving it is on the bank. *National Bank v. Refrigerated Trans. Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978).

Question whether defendant savings and loan association had acted in accordance with reasonable commercial standards applicable to its business, within meaning of UCC § 3-419(3), presented question of fact that precluded granting of plaintiff's motion for summary judgment. *Holland Am. Cruises, Inc. v. Carver Fed. Sav. & Loan Ass'n*, 60 A.D.2d 545 (1st Dep't 1977).

In action by plaintiff to recover from payor and depository banks face amount of check on which plaintiff's indorsement as payee was forged, trial court erred in dismissing action as to payor bank and in granting summary judgment in favor of depository bank where copayee of check forged plaintiff's indorsement on check, deposited it to his account in depository bank, check was forwarded to and was paid by payor bank, and proceeds were credited to account of copayee, and where, although plaintiff admitted receiving pro-

ceeds of check, there was evidence that proceeds were applied toward payment of accounts different from that for which check was issued: (1) under UCC § 3-419(1)(c), check was converted by both banks rendering them liable to plaintiff in absence of valid defense; (2) although payee whose indorsement has been forged and who receives and retains proceeds of check, with knowledge of forgery, and with proceeds being applied to obligation which check was issued to pay, has suffered no damage and, accordingly, cannot recover against bank for paying such check, different rule applies where proceeds, even though received by payee, were not applied by forger to obligation which check was issued to discharge. *Conwed Corp. v. First-Citizens Bank & Trust Co.*, 262 S.C. 48, 202 S.E.2d 22 (1974).

19. —Statute of limitations.

Although a conversion action (Uniform Commercial Code, § 3-419, subd [1], par [c]) based on defendant bank's cashing of forged checks drawn on plaintiff's account is time-barred under the three-year time limitation (CPLR 214), a breach of contract action based upon defendant's withdrawal of plaintiff's funds without permission or consent of plaintiff is timely within the applicable six-year Statute of Limitations (CPLR 213, subd 2) since plaintiff need not be put to the task of electing the conversion action (CPLR 3002, subd [c]) to the preclusion of the contract action. *American Home Assurance Co. v. Scarsdale Nat'l Bank & Trust Co.*, 96 Misc. 2d 715 (1978).

An action by the payee of a check against a collecting bank for wrongfully collecting the instrument over a forged indorsement is timely if brought within six years of accrual, since prior to the enactment of the Uniform Commercial Code, the payee of a negotiable instrument possessed a valid cause of action against a bank which had collected the instrument over the payee's forged indorsement and such an action could be styled in either conversion or contract, the latter theory entitling the payee to the benefit of the six-year Statute of Limitations, and the enactment of the Uniform Commercial Code did not change this; section 3-419 (subd [1], par [c]), which

provides that an instrument is converted when it is paid on a forged indorsement, does not abolish the pre-code contract action against a collecting bank, restricting the payee's remedy to a suit in conversion with its three-year Statute of Limitations. *Hechter v. New York Life Ins. Co.*, 46 N.Y.2d 34, 385 N.E.2d 551 (1978).

Payee's action for conversion of check under UCC § 3-419(1)(c) accrued at time defendant bank wrongfully exercised do-

minion by cashing check notwithstanding payee's ignorance of facts constituting cause of action. *Fuscellaro v. Industrial Nat'l Corp.*, 117 R.I. 558, 368 A.2d 1227 (1977).

Payee's action against drawee bank was barred by limitations statute of 3 years; cause of action for conversion accrued when check was paid on forged endorsement. *Gerber v. Manufacturers Hanover Trust Co.*, 64 Misc. 2d 687 (1970).

RESEARCH REFERENCES

ALR. Nature of property or rights other than tangible chattels which may be subject of conversion. 44 A.L.R.2d 927.

Measure of damages for conversion or loss or commercial paper. 85 A.L.R.2d 1349.

Payee's right of recovery, in conversion under UCC § 3-419(1)(c), for money paid on unauthorized indorsement. 23 A.L.R.4th 855.

Bank's "reasonable commercial standards" defense under UCC § 3-419(3). 49 A.L.R.4th 888.

Liability of bank for diversion to benefit of presenter or third party of proceeds of

check drawn to bank's order by drawer not indebted to bank. 69 A.L.R.4th 778.

Payee's and drawer's right of recovery, in conversion under pre-1990 UCC § 3-419, or post-1990 UCC § 3-420 [rev], for money paid on unauthorized indorsement. 91 A.L.R.5th 89.

Am Jur. 18 Am. Jur. 2d, Conversion §§ 17, 136.

6 Am. Jur. Pl & Pr Forms (Rev), Commercial Paper, Form 3:661 (complaint, petition, or declaration — allegation — for conversion of note by maker).

CJS. 89 C.J.S., Trover and Conversion §§ 18, 12, 142.

PART 5.

DISHONOR.

SEC.

- 75-3-501. Presentment.
- 75-3-502. Dishonor.
- 75-3-503. Notice of dishonor.
- 75-3-504. Excused presentment and notice of dishonor.
- 75-3-505. Evidence of dishonor.
- 75-3-506 through 75-3-511. Repealed.

§ 75-3-501. Presentment.

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument (i) to pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, or (ii) to accept a draft made to the drawee.

(b) The following rules are subject to Chapter 4, agreement of the parties, and clearinghouse rules and the like:

- (1) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a

bank in the United States; may be made by any commercially reasonable means, including an oral, written, or electronic communication; is effective when the demand for payment or acceptance is received by the person to whom presentment is made; and is effective if made to any one (1) of two (2) or more makers, acceptors, drawees, or other payors.

(2) Upon demand of the person to whom presentment is made, the person making presentment must (i) exhibit the instrument, (ii) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so, and (iii) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) Without dishonoring the instrument, the party to whom presentment is made may (i) return the instrument for lack of a necessary indorsement, or (ii) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cut-off hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cut-off hour.

SOURCES: Former § 75-3-501: Codes, 1942, § 41A:3-501; Laws, 1966, ch. 316, § 3-501; Laws, 1992, ch. 420, § 59, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-501.

11. In general.

III. DECISIONS UNDER FORMER UCC § 75-3-503.

12. In general.

13. Time for presentment.

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IV. DECISIONS UNDER FORMER UCC § 75-3-504.

15. In general.

V. DECISIONS UNDER FORMER UCC § 75-3-505.

16. In general.

VI. DECISIONS UNDER FORMER STATUTES.

17. In general.

18. Decisions under Code 1942 § 112.

19. Decisions under Code 1942 § 130.

20. Decisions under Code 1942 § 159.

21. Decisions under Code 1942 § 227.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-501.

11. In general.

The mere drawing of a check or similar instrument creates no liability thereon, and the drawer's account may not be charged under UCC § 3-501(1)(c) until presentation for payment or demand on the instrument is made. *Kane v. Insurance Co. of N. Am.*, 38 Pa. Commw. 42, 392 A.2d 325 (1978).

Indorser is secondary party under UCC § 3-102(1)(d), and his liability is subject to preconditions of (1) presentment under UCC § 3-501(1)(b) and (2) proper notice of dishonor under UCC § 3-501(2)(a). Thus if, without excuse, any necessary presentment or notice of dishonor is delayed beyond time it is due, indorser is discharged from liability under UCC § 3-502(1)(a). *Nevada State Bank v. Fischer*, 93 Nev. 317, 565 P.2d 332 (1977).

Indorser of note who waived all notice of dishonor and right of protest became primarily liable along with maker and was not just surety with only contingent liability. *Crescent Credit Corp. v. Union Bank & Trust Co.*, 51 Ala. App. 683, 288 So. 2d 744 (Civ. App. 1974).

In action against endorser of dishonored check which covered part of purchase price of automobile under retail installment contract, plaintiff's claim was defeated by his failure to give timely notice of dishonor under UCC § 3-501(2)(a), thus discharging endorser from any liability on draft under UCC § 3-502(1)(a) as well as from liability on underlying obligation under UCC § 3-802(1)(b); argument that no notice of dishonor was required under UCC § 3-501(4) was rejected where draft was endorsed before, not after, maturity. *Chandler Motors, Inc. v. Dunham*, 127 N.J. Super. 320, 317 A.2d 386 (App. Div. 1974).

Payee of note payable at bank (treated as equivalent of draft drawn on bank under New York "Alternative A" to Code § 3-121) need not allege presentment and notice of dishonor in complaint against maker or drawer; although Code § 3-501(2) provides that unless excused, in case of drawer, notice of dishonor is necessary, failure to give such notice discharges drawer only as stated in Code § 3-502(1)(b) which becomes matter of defense to be pleaded in answer. *County Restaurant & Bar Equip. Co. v. Shaw Mechanical Contractors*, 56 Misc. 2d 832 (1968).

A secondary party cannot be held liable unless there has been compliance with UCC § 3-501(1)(b). *Standard Premium Plan Corp. v. Wolf*, 56 Misc. 2d 522 (1968).

Presentment and notice of dishonor are entirely excused when notes contain

waiver by party to be charged. *Katski v. Boehm*, 249 Md. 568, 241 A.2d 129 (1968).

No demand for payment on the makers of a demand note is necessary prior to the entry of a judgment thereon, and a judgment thus entered will not be stricken on the ground that no default of payment was alleged at or prior to the entry of such judgment. *Liberty Aluminum Prods. Co. v. Cortis*, 14 Pa. D. & C.2d 624 (1958).

III. DECISIONS UNDER FORMER UCC § 75-3-503.

12. In general.

Where depositary bank delivered check to clearing house on Thursday and clearing house in turn sent check to processing bank which had contract with payor bank to process payor bank's checks at its data processing center, where check was held over and not posted until Friday due to fact that routing numbers had been improperly encoded on face of check, through no fault of depositary bank, and, when check was delivered to payor bank on Monday, payor bank dishonored check and notified both depositary and processing banks that check was being returned, and where processing bank accepted return as timely dishonor and credited amount back, but depositary bank refused to accept back check and to reverse tentative settlement, claiming untimely dishonor, depositary bank was not liable to processing bank for amount of check in that (1) delivery by clearing house to processing bank on Thursday constituted presentment to payor bank; and (2) payor bank was obligated at time of presentment to dishonor checks before midnight of next banking day or be held accountable for amount of item regardless of number or complexity of steps taken by processing bank to make payor bank's checks machine processable for decision to pay or dishonor. *Capital City First Nat'l Bank v. Lewis State Bank*, 341 So. 2d 1025 (Fla. App. 1977), cert. denied, 357 So. 2d 186 (Fla. 1978).

A secondary party cannot be held liable unless there has been compliance with UCC § 3-503. *Standard Premium Plan Corp. v. Wolf*, 56 Misc. 2d 522 (1968).

The question of whether presentment of an instrument was made within a reason-

able time is to be determined by the nature of the instrument, any usage of business, and the facts of the particular case. *Lustbader v. Lustbader*, 48 Misc. 2d 133 (1965).

In a case in which it was held that the Negotiable Instruments Law did not abrogate the common-law rule that where an instrument was being collected by a bank on behalf of an indorsee, a written demand mailed by the bank to the maker of the instrument to pay the instrument at the bank on the due date was sufficient to make the offices of the bank the place of payment, so that the neglect of the maker to pay the note at the bank amounted to a dishonor of the instrument, a physical exhibition of the note not being required, it was said that the instant section, although not applicable to the case under consideration, would sanction the presentment procedure followed by the bank in the case under consideration. *Batchelder v. Granite Trust Co.*, 339 Mass. 20, 157 N.E.2d 540 (1959).

13. Time for presentment.

Collecting bank, which held for 52 days after presentment for payment three sight drafts drawn by bank's customer on third-party buyer of goods from bank's customer and such buyer's bank before giving customer notice of drafts' dishonor, acted "seasonably" within meaning of UCC § 4-202(2), since (1) prior course of dealing can establish seasonableness of party's action under UCC §§ 1-205(1) and 3-503(2); and (2) in present case, bank's collection of payment on three prior drafts of customer had been delayed for 48 days, and in seven other prior transactions, bank had experienced delays of nine to 45 days before obtaining payment of customer's drafts. *Southern Cotton Oil Co. v. Merchants Nat'l Bank*, 670 F.2d 548 (5th Cir. 1982).

Where insurance policy was issued on condition that check for premium be honored and check was dishonored after presentment for payment 14 days later, insurance company was not estopped from voiding policy on ground it unreasonably delayed in presenting check for payment as thirty days is presumed to be reasonable period for initiating collection of uncertified check under UCC 3-503(2).

Genua v. Kilmer, 37 Colo. App. 365, 546 P.2d 1279 (1976).

Trial court erred in granting directed verdict upon check in favor of payee where drawers testified that parties orally agreed that check was not to be effective and should not be presented for payment until drawees received insurance money from destruction of hay crops by fire. Parol evidence was admissible to show that check was not to be operative as binding obligation until occurrence of some condition precedent. Although insurance proceeds had been received by time of trial and, therefore, check was payable at that time, judgment in favor of payee could not be sustained since present action was on check, not on underlying debt, proper presentment to bank was conditioned precedent to drawers' liability and there was no evidence of any presentment subsequent to receipt by drawers of proceeds of insurance. *Engelcke v. Stoehsler*, 273 Or. 937, 544 P.2d 582 (1975).

Under UCC §§ 3-502 and 3-503(2), obligation of drawer of dishonored uncertified checks was not per se discharged by payee's presentment of checks for payment more than 30 days after date of issue, where record did not show that drawee bank had become insolvent during delay, thereby depriving drawer of funds with which to cover checks. *Grist v. Osgood*, 90 Nev. 165, 521 P.2d 368 (1974).

Seven days after indorsement is presumed to be a reasonable time within which indorsee must make presentment of dishonored checks to his indorser, and in the absence of such presentment even a holder in due course could not recover. *Dluge v. Robinson*, 204 Pa. Super. 404, 204 A.2d 279 (1964).

This section provides that presentation of a check within 30 days is presumed to be within a reasonable time. *Visnov v. Levy*, 2 Pa. D. & C.2d 686 (1955).

14. Other matters.

Where letter of credit provided that drafts issued against it must be negotiated by specified date and that the credit was subject to the Uniform Customs And Practice for Documentary Credits (1962 revision), and where provision of Uniform Customs And Practice for Documentary Credits stated only that documents must

be presented within "reasonable time" after issuance, court, in holding that timeliness of presentment of draft was issue of material fact, would take note of UCC § 1-204(2), dealing with reasonableness of time for taking any action, and UCC § 3-503(2), dealing with time for presenting commercial paper. *Flagship Cruises, Ltd. v. New England Merchants Nat'l Bank*, 569 F.2d 699 (1st Cir. Mass. 1978).

IV. DECISIONS UNDER FORMER UCC § 75-3-504.

15. In general.

Trial court did not err in failing to grant defendant's motion to transfer venue or for change of venue where debtors on mortgage were domiciled in county where property secured by deed of trust was located, but action was brought in different county; notes given by debtors on their face were payable in county where action was brought, and under § 75-3-504, where negotiable instrument is payable in two places, holder has option to present it at either and is not under obligation to notify maker at which of places demand will be made. *Haygood v. First Nat'l Bank*, 517 So. 2d 553 (Miss. 1987).

V. DECISIONS UNDER FORMER UCC § 75-3-505.

16. In general.

Code provision that drawee to whom the instrument is presented for payment may require identification and evidence of presenter's authority and signed receipt for partial or full payment does not purport to establish any duty on part of bank; specified precautions are merely made available to drawee without danger that dishonor of instrument will be found to have occurred. *Wright v. Bank of Cal.*, 276 Cal. App. 2d 485 (1st Dist. 1969).

VI. DECISIONS UNDER FORMER STATUTES.

17. In general.

Under this section, plaintiff in an action to recover damages for gross trespass and the forcible seizure of his automobile by a finance company had the right to demand that the original of the note and conditional sales contract be delivered up to him on and at the time of the payment of

the last instalment. *Commercial Credit Co. v. Spence*, 185 Miss. 293, 184 So. 439 (1938).

Presentment of note elsewhere than at bank, where payable, is insufficient to hold accommodation endorser. *Brewer v. Automobile Sales Co.*, 147 Miss. 603, 111 So. 578 (1927).

18. Decisions under Code 1942 § 112.

A contention that presentation of a note payable on demand, since it was overdue when it was indorsed and delivered to the plaintiff, was excused, in view of testimony of two witnesses that, in matters not related to the note, they had been unable to locate the maker, was untenable, such testimony falling far short of showing the exercise of that reasonable diligence by the holder which would excuse presentment. *Carter v. Jennings*, 134 Miss. 263, 98 So. 687 (1924).

19. Decisions under Code 1942 § 130.

Dishonor and notice must be alleged and proved to recover against indorsers; declaration simply alleging that defendant indorser without setting up dishonor and notice is insufficient. *Carter v. Jennings*, 134 Miss. 263, 98 So. 687 (1924).

Unless blank indorser given notice of dishonor of note by maker, he is discharged. *Gresham v. State Bank*, 31 Miss. 20, 95 So. 65 (1923).

Indorser not obliged to file plea denying dishonor and notice where declaration states no cause of action. *Gresham v. State Bank*, 31 Miss. 20, 95 So. 65 (1923).

20. Decisions under Code 1942 § 159.

Discharge of indorser whose name appears first on back of note, by receiver of bank on authority of chancery court discharged indorser whose name appeared second on note. *Thompson v. Gore*, 180 Miss. 560, 178 So. 81 (1938).

21. Decisions under Code 1942 § 227.

A check must be presented for payment within a reasonable time. *Presley v. American Guarantee & Liab. Ins. Co.*, 237 Miss. 807, 116 So. 2d 410 (1959).

One who receives in the regular course of business in good faith and for value, within a reasonable time after date, a check on a bank, drawn payable to order

and indorsed in blank by payee, takes it free from equities between original parties of which he had no notice. *Hancock v. State Nat'l Bank*, 213 Miss. 295, 56 So. 2d 819 (1952).

The transferee of a check is not put upon inquiry and chargeable with notice of possible equities in the drawer, by reason of the fact that the check was dated three, four or five days before the date of transfer. *Hancock v. State Nat'l Bank*, 213 Miss. 295, 56 So. 2d 819 (1952).

A check was not overdue when it was accepted by the bank and acceptance was timely where it was dated November 29 and was delivered to the bank on December 2, and was credited to the checking account of the party presenting the check, and then the check was forwarded through the banking channels for payment which was refused and check was returned with the words "payment stopped." Under such circumstances the first bank was a holder for value of the check and entitled to recover the amount from the drawer. *Hancock v. State Nat'l Bank*, 213 Miss. 295, 56 So. 2d 819 (1952).

Generally, reasonable time for presenting check on bank in same business community as recipient is next business day after receipt. *Sunflower Compress Co. v. Clark*, 165 Miss. 219, 144 So. 477 (1932), error overruled, 165 Miss. 230, 145 So. 617 (1933).

Declaration alleging taxpayer gave tax collector check on bank in collector's town December 12, but that collector did not present check before bank failed December 16, held good against demurrer. *Sunflower Compress Co. v. Clark*, 165 Miss. 219, 144 So. 477 (1932), error overruled, 165 Miss. 230, 145 So. 617 (1933).

Any damages recoverable by taxpayer for tax collector's failure to present check before failure of bank where such only as were allowed at common law, not under statute requiring presentment within reasonable time. *Sunflower Compress Co. v. Clark*, 165 Miss. 219, 144 So. 477 (1932), error overruled, 165 Miss. 230, 145 So. 617 (1933).

§ 75-3-502. Dishonor.

(a) Dishonor of a note is governed by the following rules:

(1) If the note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment.

(2) If the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later.

(3) If the note is not payable on demand and paragraph (2) does not apply, the note is dishonored if it is not paid on the day it becomes payable.

(b) Dishonor of an unaccepted draft other than a documentary draft is governed by the following rules:

(1) If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under Section 75-4-301 or 75-4-302, or becomes accountable for the amount of the check under Section 75-4-302.

(2) If a draft is payable on demand and paragraph (1) does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment.

(3) If a draft is payable on a date stated in the draft, the draft is dishonored if (i) presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later, or (ii) presentment for acceptance is duly made before the day the draft becomes payable and the draft is not accepted on the day of presentment.

(4) If a draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment.

(c) Dishonor of an unaccepted documentary draft occurs according to the rules stated in subsections (b)(2), (3), and (4), except that payment or acceptance may be delayed without dishonor until no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by those paragraphs.

(d) Dishonor of an accepted draft is governed by the following rules:

(1) If the draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment.

(2) If the draft is not payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and payment is not made on the day it becomes payable or the day of presentment, whichever is later.

(e) In any case in which presentment is otherwise required for dishonor under this section and presentment is excused under Section 75-3-504, dishonor occurs without presentment if the instrument is not duly accepted or paid.

(f) If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance the draft is treated as never having been dishonored.

SOURCES: Former § 75-3-502: Codes, 1942, § 41A:3-502; Laws, 1966, ch. 316, § 3-502; Laws, 1992, ch. 420, § 60, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-507.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

IV. DECISIONS UNDER FORMER UCC § 75-3-508.

13. Decisions under Code 1942 § 133.

14. Decisions under Code 1942 § 137.

15. Decisions under Code 1942 § 139.

16. Decisions under Code 1942 § 143.

17. Decisions under Code 1942 § 147.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-507.

11. In general.

In action by bank against indorser of check who had deposited check in his account with plaintiff after indorsing it, where (1) drawer lacked authority to draw such check, and (2) defendant indorser, after being informed of drawer's lack of authority, refused to pay plaintiff amount represented by check, court held (1) that plaintiff had never dishonored such check under UCC § 3-507(1)(a), (2) that plaintiff had made final payment of check because it had failed to return it or give notice of its dishonor before plaintiff's was not subrogated to such company's rights against defendant. *Dozier v. First Ala. Bank*, 363 So. 2d 781 (Ala. Civ. App. 1978).

Lack of acceptance by drawee bank was not defense to action by payee against drawer to recover on dishonored draft, since UCC § 3-507 gave holder immediate right of recourse against drawer upon drawee's refusal to accept draft and since drawer engaged under UCC § 3-413 to pay draft upon dishonor. *Baum v. Cotton States Mut. Ins. Co.*, 141 Ga. App. 636, 234 S.E.2d 178 (1977).

Bank which dishonored check upon presentment, although sufficient funds were in the account, owed no duty to holder of check, and holder's remedy was against drawer and not bank. *Stewart v. Citizens & S. Nat'l Bank*, 138 Ga. App. 209, 225 S.E.2d 761 (1976).

When an indorser has such knowledge or so participates in the affairs of the primary party that the indorser knows that the commercial paper will not be honored by the primary party it is not required that the holder go through the useless gesture of making a presentment and of notifying the secondary party in order to hold him liable. *Makel Textiles, Inc. v. Dolly Originals, Inc.*, 4 U.C.C. Rep. Serv. 95 (1967, NY Sup).

When an indorser is the principal officer of the corporate maker and knows personally that payment will not be made by the corporation, there is no necessity for making a presentment of the note for payment and giving the indorser notice of the dishonor. *Makel Textiles, Inc. v. Dolly Originals, Inc.*, 4 U.C.C. Rep. Serv. 95 (1967, NY Sup).

nals, Inc., 4 U.C.C. Rep. Serv. 95 (1967, NY Sup).

III. DECISIONS UNDER FORMER STATUTES.

12. In general.

Where excuse for presentment of negotiable instrument not shown overdue instrument is not dishonored for nonpayment. *Carter v. Jennings*, 134 Miss. 263, 98 So. 687 (1924).

IV. DECISIONS UNDER FORMER UCC § 75-3-508.

13. Decisions under Code 1942 § 133.

An indorser in blank of a note before its delivery is an accommodation indorser secondarily liable thereon, and is discharged to the extent that the payee receives payment on the note from the maker of it, from the proceeds of property conveyed to secure it, or from proceeds of insurance of such property against fire with loss payable to such payee. *Wright v. North River Ins. Co.*, 23 F.2d 548 (5th Cir. 1928), cert. denied, 277 U.S. 604, 48 S. Ct. 601, 72 L. Ed. 1011 (1928).

Liability as indorser of note as collateral security for another, not having matured at indorser's death, need not be probated as claim. *Sledge & Norfleet Co. v. Dye*, 140 Miss. 779, 106 So. 519 (1926).

14. Decisions under Code 1942 § 137.

Notice of dishonor, not showing note was presented at proper place, was insufficient. *Brewer v. Automobile Sales Co.*, 147 Miss. 603, 111 So. 578 (1927).

15. Decisions under Code 1942 § 139.

Notice of dishonor to indorser's administrator was not excused because indorser had no right to expect notes would be paid. *Sledge & Norfleet Co. v. Dye*, 151 Miss. 693, 118 So. 414 (1928).

16. Decisions under Code 1942 § 143.

No recovery against indorser of demand paper where notice of dishonor delayed more than 60 days when not excused by reasonable diligence. *Carter v. Jennings*, 134 Miss. 263, 98 So. 687 (1924).

17. Decisions under Code 1942 § 147.

The chancery court, upon dismissal of attachment against nonresident still had

jurisdiction to render a personal decree against the nonresident. *Myers v. Giroir*, 226 Miss. 335, 84 So. 2d 525 (1956).

§ 75-3-503. Notice of dishonor.

(a) The obligation of an indorser stated in Section 75-3-415(a) and the obligation of a drawer stated in Section 75-3-414(d) may not be enforced unless (i) the indorser or drawer is given notice of dishonor of the instrument complying with this section or (ii) notice of dishonor is excused under Section 75-3-504(b).

(b) Notice of dishonor may be given by any person; may be given by any commercially reasonable means, including an oral, written, or electronic communication; and is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted. Return of an instrument given to a bank for collection is sufficient notice of dishonor.

(c) Subject to Section 75-3-504(c), with respect to an instrument taken for collection by a collecting bank, notice of dishonor must be given (i) by the bank before midnight of the next banking day following the banking day on which the bank receives notice of dishonor of the instrument, or (ii) by any other person within thirty (30) days following the day on which the person receives notice of dishonor. With respect to any other instrument, notice of dishonor must be given within thirty (30) days following the day on which dishonor occurs.

SOURCES: Former § 75-3-503: Codes, 1942, § 41A:3-503; Laws, 1966, ch. 316, § 3-503; Laws, 1992, ch. 420, § 61, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-501.

11. In general.

III. DECISIONS UNDER FORMER UCC § 75-3-508.

12. In general.

13. Written notice.

14. Oral notice.

15. Timeliness of notice.

16. Certificate of protest as evidence of presentment and notice of dishonor.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-501.

11. In general.

Indorser is secondary party under UCC § 3-102(1)(d), and his liability is subject to preconditions of (1) presentment under UCC § 3-501(1)(b) and (2) proper notice of dishonor under UCC § 3-501(2)(a). Thus if, without excuse, any necessary presentment or notice of dishonor is delayed beyond time it is due, indorser is discharged from liability under UCC § 3-502(1)(a). *Nevada State Bank v. Fischer*, 93 Nev. 317, 565 P.2d 332 (1977).

Indorser of note who waived all notice of dishonor and right of protest became primarily liable along with maker and was not just surety with only contingent liability. *Crescent Credit Corp. v. Union Bank & Trust Co.*, 51 Ala. App. 683, 288 So. 2d 744 (Civ. App. 1974).

In action against endorser of dishonored check which covered part of purchase price of automobile under retail installment contract, plaintiff's claim was defeated by his failure to give timely notice of dishonor under UCC § 3-501(2)(a), thus discharging endorser from any liability on draft under UCC § 3-502(1)(a) as well as from liability on underlying obligation under UCC § 3-802(1)(b); argument that no notice of dishonor was required under UCC § 3-501(4) was rejected where draft was endorsed before, not after, maturity. *Chandler Motors, Inc. v. Dunham*, 127 N.J. Super. 320, 317 A.2d 386 (App. Div. 1974).

Payee of note payable at bank (treated as equivalent of draft drawn on bank under New York "Alternative A" to Code § 3-121) need not allege presentment and notice of dishonor in complaint against maker or drawer; although Code § 3-501(2) provides that unless excused, in case of drawer, notice of dishonor is necessary, failure to give such notice discharges drawer only as stated in Code § 3-502(1)(b) which becomes matter of defense to be pleaded in answer. *County Restaurant & Bar Equip. Co. v. Shaw Mechanical Contractors*, 56 Misc. 2d 832 (1968).

Presentment and notice of dishonor are entirely excused when notes contain waiver by party to be charged. *Katski v. Boehm*, 249 Md. 568, 241 A.2d 129 (1968).

III. DECISIONS UNDER FORMER UCC § 75-3-508.

12. In general.

Notice of dishonor may be given in any reasonable manner; it may be oral or written and in any terms which identify the instrument and state that it has been dishonored. *Leaderbrand v. Central State Bank*, 202 Kan. 450, 450 P.2d 1 (1969).

The provisions of paragraph (3) of the instant section that "notice may be given in any reasonable manner" and that "it

may be oral or written", and the provision of paragraph (4) that "Written notice is given when sent although it is not received", while couched in somewhat different language, follow, in substance the comparable provisions of the former Negotiable Instruments Law, relating to the form and manner of giving notice and the deposit of notice in the post office. *Durkin v. Siegel*, 340 Mass. 445, 165 N.E.2d 81 (1960).

13. Written notice.

Where (1) bank customer asked bank official, who was not a teller, how customer could get checks made payable to customer "taken care of," (2) official took checks and told another bank employee to put them in for collection and give customer receipts therefor, and (3) employee complied with such order and gave receipts to customer, bank could not successfully contend, in defense of its failure to give customer notice of dishonor of checks by bank's midnight deadline, that receipts constituted written notice of dishonor because (1) receipts were merely bank's written acknowledgment of its acceptance of checks for collection, and (2) since receipts did not indicate that checks had been dishonored, receipts did not comply with UCC § 3-508(3), which requires that written notice of dishonor must bear some terms stating the dishonor. *Available Iron & Metal Co. v. First Nat'l Bank*, 56 Ill. App. 3d 516, 371 N.E.2d 1032 (1st Dist. 1977).

Notice of dishonor required by UCC § 3-508 does not require inclusion of name of holder of dishonored instrument. *First-Stroudsburg Nat'l Bank v. Nixon*, 53 Pa. D. & C.2d 672 (1971).

14. Oral notice.

Under UCC § 3-508(3), an oral notice of dishonor must be given in a reasonable manner and in terms which state that the instrument has been dishonored. *Available Iron & Metal Co. v. First Nat'l Bank*, 56 Ill. App. 3d 516, 371 N.E.2d 1032 (1st Dist. 1977).

Collecting bank was not entitled to revoke settlement on dishonored checks and charge back account of depository bank where collecting bank gave depository bank only oral notice of dishonor, where

although UCC § 3-508 provides that notice of dishonor may be given in any reasonable manner and that it may be oral or written, and although UCC § 4-104(3) provides that § 3-508 applies to interbank transactions, UCC § 4-212, under which collecting bank may revoke settlement given in case of dishonor and charge back amount to its customer if it "sends" notification of fact, required notice of dishonor to be given in writing and, under UCC § 4-102(1), prevailed over conflicting provisions of UCC § 3-508. *Valley Bank & Trust Co. v. First Sec. Bank*, 538 P.2d 298 (Utah 1975).

Payor bank was not liable to collecting bank for conversion of checks which were returned unpaid to collecting bank, notwithstanding checks were marked "Uncollected funds" rather than "Insufficient Funds" while there were sufficient funds on deposit in customer's account to pay part of checks, where officer of payor bank talked with officer of collecting bank and informed him of payor bank's intention to dishonor checks and make offset against customer's account for obligations due to payor bank, since collecting bank had ample time thereafter to inquire into specifics of dishonor; payor bank gave proper notice under UCC § 3-508(3) and its action of dishonoring checks was legal and timely under clearinghouse rule. *Security Trust Co. v. First Nat'l Bank*, 79 Misc. 2d 523 (1974).

A telephone call from one of the makers of a note, stating that they would not pay unless certain things were done, was sufficient notice of dishonor, because notice under this section may be given in any reasonable manner, oral or written, and in any terms which identify the instrument and state that it has been dishonored. *First Pa. Banking & Trust Co. v. De Lise*, 186 Pa. Super. 398, 142 A.2d 401 (1958).

15. Timeliness of notice.

In action by plaintiff customer against depository and collecting bank for wrongfully debiting plaintiff's checking account

with amount of certain dishonored checks that had apparently been forged, where plaintiff introduced evidence which might indicate that bank had dishonored some or all of such checks after its midnight deadline for taking such action under UCC § 4-211(2) and giving notice of dishonor under UCC § 3-508(2), trial court's premature entry of judgment for bank at conclusion of direct and cross-examination of plaintiff's only witness deprived plaintiff of opportunity to establish prima facie case of proper deposit of such checks and improper debit thereof, so as to shift burden to bank of going forward and showing that it had acted within reasonable time in debiting plaintiff's account without the statutorily required notice within 24 hours following day of deposit. *Trading Assocs. v. Trust Co. Bank*, 142 Ga. App. 229, 235 S.E.2d 661 (1977).

A secondary party cannot be held liable unless there has been compliance with UCC § 3-508(2). *Standard Premium Plan Corp. v. Wolf*, 56 Misc. 2d 522 (1968).

16. Certificate of protest as evidence of presentment and notice of dishonor.

This section carries forward the provisions of § 261 of the Negotiable Instruments Law defining a protest as a certificate of dishonor made under the hand and seal of a notary public, and presence of the seal as well as the signature of the notary is essential to constitute such a notice evidence in and of itself of presentment and dishonor. *A. & L. Trading Co. v. Herald Square Bakers & Caterers, Inc.*, 40 Misc. 2d 72 (1963).

Indorsers of a promissory note given by a corporation could not be held liable thereon without due proof of notice of its presentment and dishonor, as to which the burden of proof was on plaintiff, and a certificate of protest signed, but not sealed, by a notary public was insufficient to satisfy the statutory requirement. *A. & L. Trading Co. v. Herald Square Bakers & Caterers, Inc.*, 40 Misc. 2d 72 (1963).

§ 75-3-504. Excused presentment and notice of dishonor.

(a) Presentment for payment or acceptance of an instrument is excused if (i) the person entitled to present the instrument cannot with reasonable diligence make presentment, (ii) the maker or acceptor has repudiated an

obligation to pay the instrument or is dead or in insolvency proceedings, (iii) by the terms of the instrument presentment is not necessary to enforce the obligation of indorsers or the drawer, (iv) the drawer or indorser whose obligation is being enforced has waived presentment or otherwise has no reason to expect or right to require that the instrument be paid or accepted, or (v) the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft.

(b) Notice of dishonor is excused if (i) by the terms of the instrument notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument, or (ii) the party whose obligation is being enforced waived notice of dishonor. A waiver of presentment is also a waiver of notice of dishonor.

(c) Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving the notice and the person giving the notice exercised reasonable diligence after the cause of the delay ceased to operate.

SOURCES: Former § 75-3-504: Codes, 1942, § 41A:3-504; Laws, 1966, ch. 316, § 3-504; Laws, 1992, ch. 420, § 62, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-511.

11. In general; express waiver.
12. Countermanding, dishonoring instrument.
13. Expectation of nonacceptance.
14. Refusal to pay or accept.
15. Dishonor by nonacceptance.
16. —Applicability to various instruments.
17. —Particular actions as waiver.
18. Waiver of protest; effect.

III. DECISIONS UNDER FORMER STATUTES.

19. Decisions under Code 1942 § 123.
20. Decisions under Code 1942 § 150.
21. Decisions under Code 1942 § 153.
22. Decisions under Code 1942 § 189.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-511.

11. In general; express waiver.

Where decedent signed two promissory

notes either as co-maker or endorser, both notes contained clause which accelerated payment on death of any of signators of notes, and both notes contained clause under which subscribing party waived presentment, demand for payment and notice of dishonor, upon decedent's death two notes became due at option of bank that held them and all subscribers of notes were liable for balance due; thus, when life insurance company paid over to bank proceeds of decedent's life insurance policy, under which bank had been named as beneficiary to secure loan to decedent, bank was at liberty to apply proceeds of policy toward payment of notes. In re Estate of Gruder, 89 Misc. 2d 477 (1977).

Indorser liability, absent disclaimer thereof, is secondary only because of rights of presentment and dishonor, notice of dishonor, and protest, which are specifically provided for by UCC § 3-414. However, under UCC § 3-511, such rights can be expressly waived by language on face of instrument. Bankers Trust of S.C. v. Culbertson, 268 S.C. 564, 235 S.E.2d 130 (S.C. 1977).

Under UCC § 3-511, presentment and notice of acceleration were not required of creditor prior to acceleration of maturity of installment note upon debtor's default,

where note and security agreement executed by debtor contained express waivers of presentment of note for payment, demand for payment and notice of intention to accelerate maturity. *Sylvester v. Watkins*, 538 S.W.2d 827 (Tex. Civ. App. 1976), ref. n.r.e. (Nov. 10, 1976).

Where indorsers of note indorsed instrument without clear indication of capacity or intention to qualify status, such signatory became indorser by virtue of UCC § 3-402 and liable for payment of instrument upon dishonor by its payor under UCC § 3-414(1); where note provided that "presentment for payment and notice of nonpayment are hereby waived", indorsers automatically waived presentment or notice pursuant to UCC § 3-511(2). *First New Haven Nat'l Bank v. Clarke*, 33 Conn. Supp. 179, 368 A.2d 613 (1976).

Indorser of note who waived all notice of dishonor and right of protest became primarily liable along with maker and was not just surety with only contingent liability. *Crescent Credit Corp. v. Union Bank & Trust Co.*, 51 Ala. App. 683, 288 So. 2d 744 (Civ. App. 1974).

Under UCC §§ 3-415(2) and 3-511(2), holder of 7 demand promissory notes made by corporate maker was entitled to enforcement against two individual accommodation indorsers without presentment, protest or notice of dishonor, where notes provided that maker and indorsers waived presentment, protest and notice of dishonor; there was nothing which permitted accommodation indorsers to escape from effect of waiver provision, which by its express terms was applicable to indorser, merely because they were accommodation indorsers; furthermore, individual accommodation indorsers were not entitled to assert defense of usury inasmuch as it was not available defense for corporate maker of notes. *Bank of Del. v. NMD Realty Co.*, 325 A.2d 108 (Del. Super. 1974).

Where note sued on and incorporation in complaint contained express waiver of presentment and notice, contention that complaint be dismissed for failure to allege presentment and notice of dishonor is without merit. *Fett Developing Co. v. Garvin*, 119 Ga. App. 569, 168 S.E.2d 212 (1969).

Where an indorsement is made under a waiver of notice of protest, no such notice is required and the indorser cannot object that the notice had been sent to a former address at which he no longer lived. *Lizza Asphalt Constr. Co. v. Greenvale Constr. Co.*, 4 U.C.C. Rep. Serv. 954 (1968, NY Sup).

Where the face of the paper contains a waiver of notice of dishonor and protest, a secondary party is not released by the failure to give such notice or make protest. *Abby Fin. Corp. v. Weydig Auto Supplies Unlimited, Inc.*, 4 U.C.C. Rep. Serv. 858 (1967, NY Sup).

Where promissory note stated on its face "protest waived," such waiver is binding upon all parties, and therefore fact that note was not presented for payment, was not protested for nonpayment, and no notice of protest or nonpayment was given to the indorser does not constitute defense to action to recover on such note. *Gerrity Co. v. Padalino*, 51 Misc. 2d 928 (1966).

12. Countermanding, dishonoring instrument.

Where buyer of automobile resold it to third party, received check in payment therefor, original seller took possession of automobile from third party and third party notified buyer he was canceling transaction, although ownership of car passed to third party at time payment was accepted and car was delivered, such payment was conditional under UCC § 2-511(3) and, although check was never presented for payment, third party in effect dishonored check and countermanded payment when he notified buyer he was canceling transaction; under UCC § 2-507(2), third party's right to retain or dispose of automobile was conditional upon his making payment due and thus, when his check was dishonored, buyer had right to reclaim automobile by maintaining action in trover against original owner. *Lawrence v. Graham*, 29 Md. App. 422, 349 A.2d 271 (1975).

Where defendant-indorser of note directed his bank not to honor note, neither he nor his corporation was entitled to notice of protest. *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 60 Misc. 2d 499 (1969).

The indorser of an instrument cannot require notice of dishonor when he had countermanded payment of the instrument. *General Bronze Corp. v. Barclay Towers, Inc.*, 4 U.C.C. Rep. Serv. 765 (1967, NY Sup).

A bank accepting a check from the payee for a deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor, is a holder of the check, taking for value, and entitled to recover from the drawer thereon. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

13. Expectation of nonacceptance.

In action by mother and son against father's executrix to recover on instrument in form of check payable to order of son for \$20,000, executed by father in 1969 and delivered to mother, post dated November 4, 1984, where check was endorsed by father to effect that \$20,000 should be taken from his estate at death for his son, since drawee bank was not authorized to pay check under UCC § 4-405 more than 10 days after drawer's death, if it knew of fact of death, presentment to bank was entirely excused under UCC § 3-511(2) as futile gesture and provision for direct payment merely restated result prescribed by law in accord with UCC §§ 3-413(2) and 3-507(1)(b). *Smith v. Gentilotti*, 371 Mass. 839, 359 N.E.2d 953 (1977).

Where single corporate officer acted on behalf of corporation as maker of note and on behalf of himself as indorser thereof, it cannot be concluded that dishonor which he made on behalf of corporation was not known to him individually as endorser or that request for extension and forbearance which he made on behalf of corporation was not known to him individually; therefore, he waived second and formal and useless presentment and notice and protest to himself individually as endorser. *Trafalgar Square, Ltd. v. Green*, 57 Pa. D. & C.2d 166 (1972).

When an indorser is the principal officer of the corporate maker and knows personally that payment will not be made by the corporation, there is no necessity for making a presentment of the note for payment and giving the indorser notice of the dis-

honor. *Makel Textiles, Inc. v. Dolly Originals, Inc.*, 4 U.C.C. Rep. Serv. 95 (1967, NY Sup).

Notice of dishonor is unnecessary where the party to whom notice would be given already has knowledge of the matters to which the notice would relate by virtue of his being an officer or a stockholder of the primary party. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

When an indorser is a person who is an officer of the primary party there is no need to notify him of a default by the primary party since he has such knowledge by virtue of his office. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

14. Refusal to pay or accept.

Conduct of makers and indorsers of note constituted waiver of any defect in presentment where both makers and indorsers requested extensions of time for payment of note. *Wiener v. Van Winkle*, 273 Cal. App. 2d 774 (2d Dist. 1969).

15. Dishonor by nonacceptance.

Where payor bank dishonored check by midnight deadline for reason of insufficient funds in checking account and account remained insufficient, payor bank was, under UCC § 3-511, excused upon subsequent presentment from dishonoring check by midnight deadline otherwise required under UCC §§ 4-104 and 4-302. *Goodman v. Norman Bank of Commerce*, 551 P.2d 661 (Okla. Ct. App. 1976).

Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for nonpayment are excused unless in the meantime the instrument has been accepted; reference to dishonor of a "draft" "by nonacceptance" includes the dishonor of a check by nonpayment. *Leaderbrand v. Central State Bank*, 202 Kan. 450, 450 P.2d 1 (1969).

16. —Applicability to various instruments.

Payor bank which did not return before its midnight deadline check that was re-presented to it for payment, after such check had previously been dishonored by payor bank for insufficient funds, was not

excused by UCC § 3-511(4) for not meeting midnight deadline because excuse rule of UCC § 3-511(4) applies only to time items, such as drafts, which have been dishonored by nonacceptance, and does not apply to demand items, such as checks, which have been dishonored by nonpayment. Furthermore, since check was not being held for protest, payor bank under UCC § 4-301(1) could revoke provisional settlement for check only by returning it before bank's midnight deadline and not by giving notice of check's dishonor. Therefore, even assuming that further notice of dishonor when check was re-presented was necessary to make drawer liable on check or to revive drawer's liability on underlying contract of sale, provisions of UCC § 3-511(4) excusing notice of dishonor could not apply because notice of dishonor was not available to payor bank as means of revoking its provisional settlement for check. *Blake v. Woodford Bank & Trust Co.*, 555 S.W.2d 589 (Ky. Ct. App. 1977).

In action by payees of dishonored checks against payor bank, under UCC § 4-302 bank was liable on 2 checks for violating "Midnight deadline" rule where bank's vital interest in drawer's financial condition required that it exercise greater degree of diligence under UCC § 4-108(2) than would be required under normal circumstances, where bank's only explanation of delay was vice-president's testimony as to normal operating procedures, and where in light of special relationship between payor bank and drawer, bank could not rely on UCC § 4-103 to escape strict liability rule of UCC § 4-302 by attempting to establish existence of agreement between parties under which payees acquiesced in bank's holding checks sent for collection past "midnight deadline"; bank was liable on remaining four checks which had been presented to bank and payment refused at least once before since under UCC § 3-511(4) notice of dishonor is not excused with respect to demand items; oral notice of dishonor was insufficient to release bank from strict liability rule due to bank's special interest in drawer's financial condition. *Sun River Cattle Co. v. Miners Bank*, 164 Mont. 237, 521 P.2d 679 (1974), supplemented, 164 Mont. 479, 525 P.2d 19 (1974).

Subsection (4) of Code 1942, § 41A:3-511 [UCC § 3-511] had no application to documentary drafts dishonored by nonpayment. *Wiley v. Peoples Bank & Trust Co.*, 438 F.2d 513 (5th Cir. 1971), on remand, 462 F.2d 179 (5th Cir. 1972).

17. —Particular actions as waiver.

Statement in letter which accompanied notes that the notes could be repaid in stock of the borrowing corporation and further stating that the letter was not intended to create any legally binding obligation between the parties did not constitute an abandonment of the lender's right to present the notes for payment. *Thor Dahl Indus. Corp. v. Christianssen*, 70 Misc. 2d 684 (1972).

18. Waiver of protest; effect.

Under the provisions of subsecs. (5) and (6) a waiver of protest is also a waiver of presentment and of notice of dishonor, and where the waiver is embodied in the note itself it is binding on all parties, and where note stated on its face that protest was waived, failure of holder to present it for payment, protest nonpayment, and give notice of protest were no defenses to its payment. *Gerrity Co. v. Padalino*, 51 Misc. 2d 928 (1966).

III. DECISIONS UNDER FORMER STATUTES.

19. Decisions under Code 1942 § 123.

Where excuse for presentment of negotiable instrument not shown overdue instrument is not dishonored for nonpayment. *Carter v. Jennings*, 134 Miss. 263, 98 So. 687 (1924).

20. Decisions under Code 1942 § 150.

Notice of dishonor or defect therein held waived by accommodation endorser, after maturity of note, promising to pay. *Brewer v. Automobile Sales Co.*, 147 Miss. 603, 111 So. 578 (1927).

21. Decisions under Code 1942 § 153.

Notice of dishonor is not dispensed with, where holder falls short of showing reasonable diligence on his own part in endeavoring to locate the maker, although two others, on independent missions, were unable to locate the maker. *Carter v. Jennings*, 134 Miss. 263, 98 So. 687 (1924).

22. Decisions under Code 1942 § 189.

Where a bank to which a draft had been forwarded for collection had acted in good faith and with due diligence in performance of its duties as collecting agent, and being unable to pay the draft because

the drawee had not accepted it, the bank was at liberty to apply the drawee's available funds to the payment of debt to the bank. *Thack v. First Nat'l Bank & Trust Co.*, 206 F.2d 180, 39 A.L.R.2d 1290 (5th Cir. 1953).

§ 75-3-505. Evidence of dishonor.

(a) The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor stated:

(1) A document regular in form as provided in subsection (b) which purports to be a protest;

(2) A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor;

(3) A book or record of the drawee, payor bank, or collecting bank, kept in the usual course of business which shows dishonor, even if there is no evidence of who made the entry.

(b) A protest is a certificate of dishonor made by a United States consul or vice-consul, or a notary public or other person authorized to administer oaths by the law of the place where dishonor occurs. It may be made upon information satisfactory to that person. The protest must identify the instrument and certify either that presentment has been made or, if not made, the reason why it was not made, and that the instrument has been dishonored by nonacceptance or nonpayment. The protest may also certify that notice of dishonor has been given to some or all parties.

SOURCES: Former § 75-3-505: Codes, 1942, § 41A:3-505; Laws, 1966, ch. 316, § 3-505; Laws, 1992, ch. 420, § 63, eff from and after January 1, 1993.

JUDICIAL DECISIONS**I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.**

1.-10. [Reserved for future use].

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC §§ 75-3-509, 75-3-510.

11. In general.

II. DECISIONS UNDER FORMER UCC §§ 75-3-509, 75-3-510.

11. In general.

III. DECISIONS UNDER FORMER STATUTES.

12. Decisions under Code 1942 § 194.

13. Decisions under Code 1942 § 199.

Under UCC § 3-510(b) and state statute governing admissibility of entries on records made in regular course of business, notation "account closed" on check deposited by customer of bank in customer's account was admissible as primary

evidence to establish fact stated in such notation. *Serve v. First Nat'l Bank*, 143 Ga. App. 239, 237 S.E.2d 719 (1977).

Purported stamp or writing of drawee bank on check or accompanying paper stating that acceptance or payment has been refused because there is "no account" is admissible in evidence and creates presumption of dishonor. *State v. Young*, 203 Kan. 296, 454 P.2d 724 (1969).

The requirement of the New York Negotiable Instruments Law that a protest must be made under the hand and seal of a notary making it is carried over by the instant provision of the Uniform Commercial Code defining a protest as a certificate of dishonor made under the hand and seal of a notary public. *A. & L. Trading Co. v. Herald Square Bakers & Caterers, Inc.*, 40 Misc. 2d 72 (1963).

A notary's unsealed certificate of dishonor is insufficient to establish due mail-

ing thereof to indorsers, and so is the notary's testimony where he did not, himself, attend to the mailing. *A. & L. Trading Co. v. Herald Square Bakers & Caterers, Inc.*, 40 Misc. 2d 72 (1963).

III. DECISIONS UNDER FORMER STATUTES.

12. Decisions under Code 1942 § 194.

Notice of dishonor, not showing note was presented at proper place, was insufficient. *Brewer v. Automobile Sales Co.*, 147 Miss. 603, 111 So. 578 (1927).

13. Decisions under Code 1942 § 199.

A defendant may not complain of errors made by the court in a co-defendant's case, so long as they do not affect his own rights. *Canton Broiler Farms, Inc. v. Warren*, 214 So. 2d 671 (Miss. 1968).

§§ 75-3-506 through 75-3-511. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

§ 75-3-506. [Codes, 1942, § 41A:3-506; Laws, 1966, ch. 316, § 3-506]

§ 75-3-507. [Codes, 1942, § 41A:3-507; Laws, 1966, ch. 316, § 3-507]

§ 75-3-508. [Codes, 1942, § 41A:3-508; Laws, 1966, ch. 316, § 3-508]

§ 75-3-509. [Codes, 1942, § 41A:3-509; Laws, 1966, ch. 316, § 3-509]

§ 75-3-510. [Codes, 1942, § 41A:3-510; Laws, 1966, ch. 316, § 3-510]

§ 75-3-511. [Codes, 1942, § 41A:3-511; Laws, 1966, ch. 316, § 3-511]

Editor's Note — Former § 75-3-506 stated the time allowed for acceptance or payment of instruments.

Former § 75-3-507 dealt with dishonor of instruments, holders' rights of recourse, and terms in instruments allowing re-presentation of them.

Former § 75-3-508 concerned notice of dishonor of instruments.

Former § 75-3-509 dealt with protest, and noting for protest, of instruments.

Former § 75-3-510 concerned evidence as to dishonor and notice of dishonor with respect to instruments.

Former § 75-3-511 dealt with waived or excused presentment, protest, or notice of dishonor or delay therein, with respect to instruments.

PART 6.

DISCHARGE AND PAYMENT.

SEC.

75-3-601. Discharge and effect of discharge.

- 75-3-602. Payment.
- 75-3-603. Tender of payment.
- 75-3-604. Discharge by cancellation or renunciation.
- 75-3-605. Discharge of indorsers and accommodation parties.
- 75-3-606. Repealed.

§ 75-3-601. Discharge and effect of discharge.

(a) The obligation of a party to pay the instrument is discharged as stated in this chapter or by an act or agreement with the party which would discharge an obligation to pay money under a simple contract.

(b) Discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument without notice of the discharge.

SOURCES: Former § 75-3-601: Codes, 1942, § 41A:3-601; Laws, 1966, ch. 316, § 3-601; Laws, 1992, ch. 420, § 64, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-601.

- 11. In general; payment as discharge.
- 12. Tender of payment.
- 13. Fraudulent and material alteration.
- 14. Discharge under simple contract rules.
- 15. Party reacquires instrument in own right.
- 16. Practice and procedure.
- 17. Unexcused delay; disclosure.
- 18. Decisions under Code 1942 § 160.
- 19. Decisions under Code 1942 § 161.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-601.

11. In general; payment as discharge.

Where bank accepted third party's payment of note, note was marked "Paid" and delivered to third party who later gave it to maker, maker's obligation to bank was effectively discharged under UCC §§ 3-601 and 3-603, notwithstanding third party paid note with funds that he was not authorized to use, especially in light of

fact that bank knew source of third party's funds and maker did not. *Jacobson v. Federal Deposit Ins. Corp.*, 407 F. Supp. 821 (S.D. Iowa 1976).

Payment of note by maker discharged liability of maker and all endorsers on note. *Cipra v. Seeger*, 215 Kan. 951, 529 P.2d 130 (1974).

Evidence that defendant comaker of note signed as accommodation for other comaker, that he received no benefits from loan, and that note was paid off by second comaker supported conclusion that first comaker was accommodation party under UCC § 3-415(1), who was discharged under UCC §§ 3-601(1)(a) and 3-603 when instrument was paid, and that any contract which may have existed to sue the first comaker on note was, therefore, unenforceable. *Marcus v. Wilson*, 16 Ill. App. 3d 724, 306 N.E.2d 554 (1st Dist. 1973).

12. Tender of payment.

Indorser of negotiable instrument is entitled to protection afforded him by any specific security for payment of debt that principal debtor may have given holder or which holder may have acquired by operation of law, and if holder releases or voluntarily destroys any part of such security, indorser is discharged to extent that such security would have gone to pay debt (holding that while subordination of second mortgage to rank of third mortgage

impaired subrogation rights of indorsers of handnote sued on, indorsers were not thereby discharged from liability on such note under UCC § 3-601(1)(d) and § 3-606(1)(b), since they completely failed to show extent of any prejudice from such subordination and also failed to show that collateral had been released without their knowledge or consent). *Poynot v. J & T Devs., Inc.*, 355 So. 2d 1052 (La. App. 1978).

13. Fraudulent and material alteration.

Where (1) maker of promissory notes negotiated them on strength of guarantor's guaranty thereof and willingness to pledge two certificates of deposit as security for their repayment, and (2) notes contained request by maker for credit life insurance which bank that made loan to maker did not obtain, court held that guarantor was not discharged as surety on notes under UCC § 3-601(1)(f), dealing with discharge of party from liability on an instrument by fraudulent and material alteration of instrument, since bank's failure to procure life insurance for maker did not constitute alteration of terms of notes but was, at most, a violation of bank's obligations thereunder (also holding that although bank's failure to procure the life insurance impaired collateral within meaning of UCC § 3-606(1)(b), guarantor expressly consented to such impairment when he signed guaranty agreement). *DeKalb County Bank v. Haldi*, 146 Ga. App. 257, 246 S.E.2d 116 (1978).

Where several banks orally agreed with peanut company to pay as presented company's checks to growers for peanut purchases, company got possession of checks when banks were reimbursed, not at later time when company, upon discovering forged indorsements on checks, paid grower-payee; and by getting grower-payee to indorse check already in company's possession, and which had ceased to be negotiable instrument, company did not relinquish its claim against bank for wrongfully paying check bearing forged indorsement; to the contrary, company's conduct went to prove damage which company suffered from bank's paying to another its check intended for grower, but of which grower never became holder.

Columbian Peanut Co. v. Frosteg, 472 F.2d 476 (5th Cir. Ga. 1973), reh'g denied, 474 F.2d 1347 (5th Cir. Ga. 1973), cert. denied, 414 U.S. 824, 94 S. Ct. 126, 38 L. Ed. 2d 57 (1973).

14. Discharge under simple contract rules.

Under UCC § 3-601(2), oral agreement to discharge party to negotiable instrument may be given effect where such agreement is supported by consideration. *Brannon v. Langston*, 375 So. 2d 231 (Miss. 1979).

The import of UCC § 3-601(2) is that in situations other than those listed in UCC § 3-601(1), the law providing for the discharge of a surety or guarantor of a simple contract for the payment of money applies equally to a surety or guarantor of a negotiable instrument. Therefore, a novation that would discharge a surety or guarantor of a simple contract for the payment of money will also discharge a surety or guarantor of a negotiable instrument. *Sewell v. Akins*, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

Where holder orally agreed to cancel two promissory notes in return for transfer and lease of maker's bowling alley business, notes were discharged by oral agreement under UCC § 3-601(2); since there was valuable consideration involved in oral agreement between holder and maker, such agreement was not required to be in writing in order to discharge two prior promissory notes; it is only when there is gratuitous discharge that UCC § 3-605(1), requiring a writing, applies. *Brunswick Corp. v. Briscoe*, 523 S.W.2d 115 (Mo. Ct. App. 1975).

Maker of note was not discharged by novation, although maker claimed that he had entered into new agreement with payee's representative to effect that payee would release him if he returned certain merchandise, where maker admitted that payee's representative stated he had no authority to enter into such agreement and where there was no evidence that payee had ratified agreement. *Ampex Corp. v. Appel Media, Inc.*, 374 F. Supp. 1114 (W.D. Pa. 1974).

Where undisputed evidence shows that farm was sold by foreclosure to someone other than lessor, there was an affirmative

showing of failure of consideration on lessor's part under lease and a corresponding discharge of lessee's obligation to pay rent thereunder, which in turn discharged lessee from liability on notes which had been executed in sum of yearly rental and assigned or transferred to bank. *Tallahassee Bank & Trust Co. v. Raines*, 125 Ga. App. 263, 187 S.E.2d 320 (1972).

15. Party reacquires instrument in own right.

Where amendments to real-estate sales contract and note were executed as part of same transaction and amendments expressly stated that time for closing transaction was being extended in consideration of note, parties to contract thus expressed intent to close sale at later date under same conditions and stipulations contained in contract. Thus, seller's failure to comply with condition precedent to buyer's obligation to close sale constituted failure of consideration for note, which was signed by buyer and buyer's comaker, and furnished comaker with complete defense as matter of law, since UCC § 3-601(2) codifies principle that failure of consideration on underlying contract discharges liability on note. *Hunter v. McLelland*, 143 Ga. App. 746, 240 S.E.2d 153 (1977).

Under UCC § 3-601(3)(a), liability of all parties on note was discharged when maker reacquired note in his own right by taking assignment thereof. *Best Fertilizers of Arizona, Inc. v. Burns*, 116 Ariz. 492, 570 P.2d 179 (1977).

Promissory notes, executed by closely held corporation and endorsed by stockholders of corporation, were not discharged when they were acquired from payee bank by executor of deceased endorser; among other things, instruments were acquired by executor, not by deceased endorser, and executor was, therefore, not prior party to instrument. *Eikel v. Bristow Corp.*, 529 S.W.2d 795 (Tex. Civ. App. 1975).

When the face of the paper authorizes extensions and declares that the secondary party shall not be released thereby, and extension does not release a secondary party. *Abby Fin. Corp. v. Weydig Auto Supplies Unlimited, Inc.*, 4 U.C.C. Rep. Serv. 858 (1967, NY Sup).

16. Practice and procedure.

In action by holder of promissory note executed by principal maker and two comakers against comakers, where note was stamped with legend indicating it had been paid but where there was scrawl in ink across area bearing stamped legend, case would be remanded for determination whether note had been discharged by payment or cancellation; under UCC § 3-603 maker of note does not lose right to assert that note was discharged by payment merely by leaving it in possession of payee when paying it; holder was not entitled to recover on note if it had been paid, but was entitled to recover if the stamp thereon was unintentional or made under mistake or without authority of holder. *Household Fin. Co. v. Watson*, 522 S.W.2d 111 (Mo. Ct. App. 1975).

In action to recover on notes, under UCC § 3-119 and 3-601, question of fact existed as to whether parties entered into written contract which relieved defendants of personal liability on notes, or whether parties performed under oral contract to same effect. *DiLeo v. Werb*, 50 A.D.2d 570 (2d Dep't 1975).

17. Unexcused delay; disclosure.

Indorser is secondary party under UCC § 3-102(1)(d), and his liability is subject to preconditions of (1) presentment under UCC § 3-501(1)(b) and (2) proper notice of dishonor under UCC § 3-501(2)(a). Thus if, without excuse, any necessary presentment or notice of dishonor is delayed beyond time it is due, indorser is discharged from liability under UCC § 3-502(1)(a). *Nevada State Bank v. Fischer*, 93 Nev. 317, 565 P.2d 332 (1977).

Where accommodation indorser, on May 1, 1970, indorsed check drawn on out-of-state bank which was made payable to drawer; where cashing bank cashed check for payee drawer and initiated collection on check through another bank on same day; where almost 90 days later, on July 28, 1970, collection bank notified cashing bank that check had been dishonored with notice stating "original lost in transit-account closed"; where on July 29, 1970, cashing bank debited accommodation indorser's account for amount of check and notified her in writing of payor bank's dishonor of check; and where record did

not disclose which of several banks involved in collection process had lost check or delayed taking action with regard to it, (1) accommodation indorser's liability was discharged under UCC § 3-502(1)(a) because notice of check's dishonor was unreasonably delayed by failure of unknown bank in collection process to observe its midnight deadline under UCC § 4-104(h) for giving such notice, and (2) cashing bank could look for recovery from such unknown bank which had committed violation of law involved. *Nevada State Bank v. Fischer*, 93 Nev. 317, 565 P.2d 332 (1977).

In action against endorser of dishonored check which covered part of purchase price of automobile under retail installment contract, plaintiff's claim was defeated by his failure to give timely notice of dishonor under UCC § 3-501(2)(a), thus discharging endorser from any liability on draft under UCC § 3-502(1)(a) as well as from liability on underlying obligation under UCC § 3-802(1)(b); argument that no notice of dishonor was required under UCC § 3-501(4) was rejected where draft was endorsed before, not after, maturity. *Chandler Motors, Inc. v. Dunham*, 127 N.J. Super. 320, 317 A.2d 386 (App. Div. 1974).

Under UCC §§ 3-502 and 3-503(2), obligation of drawer of dishonored uncertified checks was not per se discharged by payee's presentment of checks for payment more than 30 days after date of issue, where record did not show that drawee bank had become insolvent during delay, thereby depriving drawer of funds with which to cover checks. *Grist v. Osgood*, 90 Nev. 165, 521 P.2d 368 (1974).

Assignee's delay of almost 18 months in presenting note to endorser was unreasonable and endorsers were discharged thereon. *Hane v. Exten*, 255 Md. 668, 259 A.2d 290 (1969).

Complaint in action against maker of note was not insufficient for failure to allege presentment and dishonor. *County Restaurant & Bar Equip. Co. v. Shaw Mechanical Contractors*, 56 Misc. 2d 832 (1968).

Where notes were past due when endorsed and no presentment for payment was made within reasonable time after

endorsement, endorser was not bound. *Sledge & Norfleet Co. v. Dye*, 151 Miss. 693, 118 So. 414 (1928).

18. Decisions under Code 1942 § 160.

Mere possession alone by obligors under a note and deed of trust of the written evidence of their indebtedness was insufficient to meet the burden of proof resting on them to show payment, for the reasons that they had not thereby sufficiently proved, under paragraph (4) of this section, any act which would discharge a simple contract for the payment of money, and that they did not become the holders of the note at or after its maturity in their own rights, within the meaning of paragraph (5) of this section, since their complaint alleged, and their proof disclosed, that they came into possession of the note prior to its maturity, at a time when they were under no obligation to pay it. *McCaslin v. Willis*, 197 Miss. 366, 19 So. 2d 751, 156 A.L.R. 770 (1944).

Where the holder of accommodation paper, collateral for the note of the accommodated party, extended the time of payment of the latter's note by a binding agreement, without the knowledge or consent of the maker of the accommodation paper, the holder knowing the actual character of the paper at the time of the extension, the accommodation maker could not be held liable, notwithstanding that the accommodated party gave a cross note to the accommodation maker, since the latter was merely given to evidence the transaction. *Hederman v. Cox*, 188 Miss. 21, 193 So. 19 (1940).

Oral release of liability on promissory note for consideration was valid without instrument being delivered up to persons liable thereon. *Hazlehurst Oil Mill & Fertilizer Co. v. Booze*, 160 Miss. 136, 133 So. 120 (1931).

Statute providing for compromise with one of several joint and several debtors is not repealed by Negotiable Instruments Law. *Branton v. O.B. Crittenden & Co.*, 145 Miss. 531, 111 So. 150 (1927).

Statute providing how an instrument is discharged held not conflicting with statute as to release of one of several joint and several debtors; where one of two joint and several debtors has been released, obligation must be credited with half

thereof; plea setting up offset because of release of one of two joint and several debtors is good as partial defense. *Branton v. O.B. Crittenden & Co.*, 145 Miss. 531, 111 So. 150 (1927).

Breach of maker's contemporary agreement no defense against bona fide holder. *Despres, Bridges & Noel v. Hough Drug Co.*, 123 Miss. 598, 86 So. 359 (1920).

One signing note as surety held not estopped to claim benefit of payee bank's agreement that such note should be paid out of first money paid in by maker, because he was silent when after payment made to bank it pledged the note as collateral. *Davidson v. Plant*, 113 Miss. 482, 74 So. 328 (1917).

Bank's agreement that such note should be paid out of first money paid in by maker held valid. *Davidson v. Plant*, 113 Miss. 482, 74 So. 328 (1917).

Notes held released by execution and acceptance of new notes in renewal of obligation with a new principal obligor. *Davidson v. Plant*, 113 Miss. 482, 74 So. 328 (1917).

19. Decisions under Code 1942 § 161.

Stipulation over accommodation indorser's signature held not waiver of right to discharge from liability on creditor's failure to commence proceedings after notice. *First Nat'l Bank v. Rau*, 146 Miss. 520, 112 So. 688 (1927).

RESEARCH REFERENCES

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mercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-602. Payment.

(a) Subject to subsection (b), an instrument is paid to the extent payment is made (i) by or on behalf of a party obliged to pay the instrument, and (ii) to a person entitled to enforce the instrument. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under Section 75-3-306 by another person.

(b) The obligation of a party to pay the instrument is not discharged under subsection (a) if:

(1) A claim to the instrument under Section 75-3-306 is enforceable against the party receiving payment and (i) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case of an instrument other than a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

(2) The person making payment knows that the instrument is a stolen instrument and pays a person it knows is in wrongful possession of the instrument.

SOURCES: Former § 75-3-602: Codes, 1942, § 41A:3-602; Laws, 1966, ch. 316, § 3-602; Laws, 1992, ch. 420, § 65, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-511.

11. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-511.

11. In general.

Where decedent signed two promissory notes either as co-maker or endorser, both

notes contained clause which accelerated payment on death of any of signators of notes, and both notes contained clause under which subscribing party waived presentment, demand for payment and notice of dishonor, upon decedent's death, two notes became due at option of bank that held them and all subscribers of notes were liable for balance due; thus, when life insurance company paid over to bank proceeds of decedent's life insurance policy, under which bank had been named as beneficiary to secure loan to decedent, bank was at liberty to apply proceeds of policy toward payment of notes. In re Estate of Gruder, 89 Misc. 2d 477 (1977).

§ 75-3-603. Tender of payment.

(a) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument, the effect of tender is governed by principles of law applicable to tender of payment under a simple contract.

(b) If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, there is discharge, to the extent of the amount of the tender, of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates.

(c) If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged. If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument.

SOURCES: Former § 75-3-603: Codes, 1942, § 41A:3-603; Laws, 1966, ch. 316, § 3-603; Laws, 1992, ch. 420, § 66, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-603.

11. In general; what constitutes payment.

12. Payment as discharge.

13. —Discharge of accommodation maker.

14. —Effect of discharge.

15. Extent of discharge.

16. Drawer's liability.

17. Rights of transferee.

18. Practice and procedure.

III. DECISIONS UNDER FORMER UCC § 75-3-604.

- 19. Tender of payment.
- 20. Decisions under Code 1942 § 129.
- 21. Decisions under Code 1942 § 160.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-603.

11. In general; what constitutes payment.

Where check is made payable to two payees jointly, only proper negotiation, that is, endorsement by both, results in payment contemplated by Code § 3-603; and collecting bank which negotiated check with endorsement of only one of two joint payees received only such right as its transferor had, and its credit to transferor's account did not operate as discharge of its liability on check. *Feldman Constr. Co. v. Union Bank*, 28 Cal. App. 3d 731 (2d Dist. 1972).

Maker gave check to payee each month; after check cleared payee again loaned maker same sum in exchange for another note; held, new note was not intended as renewal note but as new and independent note. *National Bank of Commerce v. Green*, 1 Wash. App. 713, 463 P.2d 187 (1969).

12. Payment as discharge.

Where bank accepted third party's payment of note, note was marked "Paid" and delivered to third party who later gave it to maker, maker's obligation to bank was effectively discharged under UCC §§ 3-601 and 3-603, notwithstanding third party paid note with funds that he was not authorized to use, especially in light of fact that bank knew source of third party's funds and maker did not. *Jacobson v. Federal Deposit Ins. Corp.*, 407 F. Supp. 821 (S.D. Iowa 1976).

In action by holder of promissory note to recover payment from maker, maker could not assert defense that holder as trustee of trust estate acquired notes from trust estate in violation of statute; under UCC § 3-306(d), maker could not defend on basis of holder's alleged violation of his

fiduciary duty to beneficiary. Furthermore, maker's payment of debt, even though made with knowledge of holder's wrongful acquisition of notes, would discharge maker's liability thereon under UCC § 3-603(1). *Harvey v. Casebeer*, 531 S.W.2d 206 (Tex. Civ. App. 1975).

Payment of note by maker discharged liability of maker and all endorser on note. *Cipra v. Seeger*, 215 Kan. 951, 529 P.2d 130 (1974).

13. —Discharge of accommodation maker.

Evidence that defendant comaker of note signed as accommodation for other comaker, that he received no benefits from loan, and that note was paid off by second comaker supported conclusion that first comaker was accommodation party under UCC § 3-415(1), who was discharged under UCC §§ 3-601(1)(a) and 3-603 when instrument was paid, and that any contract which may have existed to sue the first comaker on note was, therefore, unenforceable. *Marcus v. Wilson*, 16 Ill. App. 3d 724, 306 N.E.2d 554 (1st Dist. 1973).

Payment of a note by the accommodation maker did not discharge the obligation which it evidenced, nor did it extinguish the lien of the real estate mortgage by which it was secured. *Simson v. Bilderbeck, Inc.*, 76 N.M. 667, 417 P.2d 803 (1966).

14. —Effect of discharge.

In action by Federal Deposit Insurance Corporation (FDIC), as owner-holder of note purchased from bank for which FDIC was receiver, to recover on such note from defendant maker, (1) defendant under UCC § 3-306(d) could not assert FDIC's allegedly illegal acquisition of note as defense, since only the bank in receivership or such bank's shareholders had standing to assert such defense, and (2) if defendant satisfied note by payment to FDIC, he would not risk double liability on note in event bank's sale of note to FDIC should be set aside, but would be discharged from liability under UCC § 3-603(1) (applying South Carolina law; also holding that oral agreement to extend time for paying note was unenforceable under non-UCC statute of frauds). FDIC

v. Moore, 448 F. Supp. 493 (D.C.S.C. 1978).

In suit by purchaser of promissory note to recover thereon, where note was executed in favor of bank by defendants husband and wife as comakers together with defendant husband's partner and partner's wife to consolidate partnership's outstanding notes; where defendant's partner and partner's wife, who were not parties to suit, executed mortgage to bank on two parcels of realty owned by them as security for such note; where first parcel was subject to prior mortgage of third party and judgment of foreclosure had been entered thereon; where plaintiff at suggestion of partner's wife became sole owner of first parcel by redeeming it and having it conveyed to her by means of a "straw" transaction; where plaintiff found buyer for first parcel, buyer's title search discovered bank's mortgage thereon and note for which such mortgage was given, plaintiff purchased note in order to convey marketable title to buyer, note was indorsed by bank to plaintiff, mortgage on first parcel was released and discharged, mortgage on second parcel was assigned to plaintiff, and plaintiff sold first parcel for substantial profit, (1) under UCC § 3-302, plaintiff was holder in due course of note in suit and could recover thereon unless defendants could establish defense to note; (2) only defense raised by defendants was alleged satisfaction of such note on theory that plaintiff had been made whole by virtue of her resale of collateral property (first parcel); and (3) such defense failed since defendants, although benefiting from proceeds of note to extent of their interest in partnership, had never had any title or interest in the collateral property (first parcel), were not subjected in any way to double liability on note, and their liability thereon would be completely discharged under UCC § 3-603 by paying note (stating that any further dispute about liability in the case would have to be settled in separate action). *Ryan v. Stearns*, 135 Vt. 385, 376 A.2d 728 (1977), but see *Licursi v. Sweeney*, 156 Vt. 418, 594 A.2d 396 (1991).

15. Extent of discharge.

Where defendants executed promissory note which was delivered to bank, note

was guaranteed by Small Business Administration, defendants defaulted on payments under note, and note was assigned in accord with guarantee agreement to S.B.A., which made payment to bank of 50 per cent of unpaid balance of note, fact that government did not own entire equitable interest in note did not prevent government from maintaining suit on note as its legal owner and holder. *United States v. Sellers*, 487 F.2d 1268 (5th Cir. Tex. 1973).

16. Drawer's liability.

Where checks are returned by the drawee bank to the customer's bank, the latter is the holder as to such checks which it has in its possession but if by inadvertence it returns any of them to the payee, the latter may receive a settlement payment from the drawer of the check which will discharge the checks and bar a subsequent suit by the customer's bank against the drawer, and this is so without regard to the good faith or absence of notice of any defect in title. *Chenoweth v. Bank of Dardanelle*, 243 Ark. 310, 419 S.W.2d 792 (1967).

Although the drawer of a check has the right to stop payment of it at any time before it has been certified or paid by the drawee, the drawer remains liable, unless he has a defense which is good against the holder. *Tidwell v. Bank of Tifton*, 115 Ga. App. 555, 155 S.E.2d 451 (1967).

A bank accepting a check from the payee for deposit, crediting the amount thereof to the payee's account and permitting him to withdraw the full amount thereof prior to notice of dishonor is a holder of the check, taking for value, and entitled to recover from the drawer thereon. *Pazol v. Citizens Nat'l Bank*, 110 Ga. App. 319, 138 S.E.2d 442 (1964).

17. Rights of transferee.

Assignee of guarantor of promissory note, who paid amount due on note and concurrently received note from payee with payee's assignment endorsed thereon, was entitled to sue payor on instrument; UCC § 3-415 and UCC § 3-603 give both accommodation party and stranger to instrument, respectively, rights of recourse on instrument against payor after they have paid or satisfied

note. *Collection Control Bureau v. Weiss*, 50 Cal. App. 3d 865 (2d Dist. 1975).

18. Practice and procedure.

In action on note against two comakers summary judgment against one comaker was improper where other comaker made un rebutted allegation of payment; under UCC § 3-603(2), comaker's defense of payment inured to benefit of other comaker. *Barnes v. York*, 526 S.W.2d 404 (Mo. Ct. App. 1975).

In action by holder of promissory note executed by principal maker and two comakers against comakers, where note was stamped with legend indicating it had been paid but where there was scrawl in ink across area bearing stamped legend, case would be remanded for determination whether note had been discharged by payment or cancellation; under UCC § 3-603 maker of note does not lose right to assert that note was discharged by payment merely by leaving it in possession of payee when paying it; holder was not entitled to recover on note if it had been paid, but was entitled to recover if the stamp thereon was unintentional or made under mistake or without authority of holder. *Household Fin. Co. v. Watson*, 522 S.W.2d 111 (Mo. Ct. App. 1975).

Where corporation paid note signed by corporation president but not by corporation, corporation acquired rights of transferee and could not enforce note against maker until date when it could have been enforced by transferor; so that corporation as account debtor was not entitled to set-off, since it had had notification of assignment of accounts more than 3 months before claim against assignor on note accrued. *Commercial Sav. Bank v. G & J Wood Prods. Co.*, 46 Mich. App. 133, 207 N.W.2d 401 (1973).

III. DECISIONS UNDER FORMER UCC § 75-3-604.

19. Tender of payment.

Accrual of interest on amount due under promissory note was not stopped under UCC § 3-604(1) by tender of less than full amount owed before the amount tendered was due to be paid. *Kohlenberg v. American Plumbing Supply Co.*, 82 Wis. 2d 384, 263 N.W.2d 496 (1978).

Trial court improperly denied motion to open judgment by confession on promissory note, where maker alleged that he had notice of assignment, he tendered payment to assignees when due, and was ready, willing and able to pay instrument. *Lewis v. Palmer*, 20 Ill. App. 3d 237, 313 N.E.2d 656 (4th Dist. 1974).

When a party makes a tender of full payment to the holder of a promissory note when or after it is due, he is discharged to the extent of all subsequent liability for interest, costs, and attorney's fees. *Still v. Plaza Marina Com. Corp.*, 21 Cal. App. 3d 378 (5th Dist. 1971).

Reasonable counsel fees incurred by holder of promissory note in successful defense of appeal from judgment for holder may recover from obligor who has expressly agreed to pay such fees in case of default, even though such appeal was prosecuted by co-defendant of obligor; obligor's submission to judgment and his non-participation in prior appeal are not enough to terminate his liability for cost of additional legal services—statute requires tender of full payment. *Washington Trust Co. v. Fatone*, 106 R.I. 168, 256 A.2d 490 (1969).

20. Decisions under Code 1942 § 129.

Notice given by maker of negotiable notes to payee, of intent to make prepayment, pursuant to provision of mortgage giving privilege to debtor of maturing notes by notice to payee, held not to constitute payee agent of holder of notes to receive payment, where holder was ignorant of giving of notice. *Adler v. Interstate Trust & Banking Co.*, 166 Miss. 215, 146 So. 107, 87 A.L.R. 347 (1933).

Payment to bank of notes made payable there but not left with bank for collection or presented there is not satisfaction, and maker must see that payment is made to legal holder. *Adler v. Interstate Trust & Banking Co.*, 166 Miss. 215, 146 So. 107, 87 A.L.R. 347 (1933).

Maker is charged with notice of defect in title of person in possession of note without endorsement by payee; maker must determine at his peril whether person in possession of note without endorsement by payee is authorized to receive payment. *Anderson v. Wm. R. Moore Dry*

Goods Co., 152 Miss. 312, 119 So. 914 (1929).

"Holder" as used in law relating to payment of negotiable instruments, means person legally in possession thereof, either by indorsement or delivery. *Anderson v. Wm. R. Moore Dry Goods Co.*, 152 Miss. 312, 119 So. 914 (1929).

Payment before maturity binding only on parties receiving payment and privies; duty of maker to require production before making payment. *Union Station Trust Co. v. Bostick*, 133 Miss. 627, 98 So. 105 (1923).

21. Decisions under Code 1942 § 160.

No presumption that a promissory note has been paid arises from the maker's possession where acquired prior to its maturity. *McCaslin v. Willis*, 197 Miss. 366, 19 So. 2d 751, 156 A.L.R. 770 (1944).

In action to cancel as cloud on title a deed of trust securing a note claimed by the maker to have been paid in the payee's

lifetime, brought against his administratrix, in which the maker introduced testimony as to statements by the payee indicating that the note had been paid, privilege attaching to communications between attorney and client did not make the payee's attorney, who also was the trustee named in the deed of trust, incompetent to testify on behalf of the administratrix as to payee's subsequent instructions in the event that a foreclosure should become necessary. *McCaslin v. Willis*, 197 Miss. 366, 19 So. 2d 751, 156 A.L.R. 770 (1944).

Where makers of notes, in support of their claim that it had been paid, introduced testimony as to statement of deceased payee against interest that the note was paid, the other party should be permitted to prove contrary statements made by the decedent at a later time. *McCaslin v. Willis*, 197 Miss. 366, 19 So. 2d 751, 156 A.L.R. 770 (1944).

§ 75-3-604. Discharge by cancellation or renunciation.

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed writing.

(b) Cancellation or striking out of an indorsement pursuant to subsection (a) does not affect the status and rights of a party derived from the indorsement.

SOURCES: Former § 75-3-604: Codes, 1942, § 41A:3-604; Laws, 1966, ch. 316, § 3-604; Laws, 1992, ch. 420, § 67, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-605.

11. In general.

12. Cancellation or renunciation on face of instrument.

13. —Intent.

14. Written renunciation; delivery.

15. Surrender of instrument.

16. Oral cancellation or renunciation.

17. Other matters.

III. DECISIONS UNDER FORMER STATUTES.

18. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-605.

11. In general.

UCC § 3-605(1)(b) allows the holder of an instrument to discharge a party thereto to the extent of the holder's interest in the instrument. However, under UCC § 3-116(b), the holder cannot discharge all interests under an instrument that is payable, but not in the alternative, to both himself and another party (holding that UCC § 3-605(1)(b) does not prohibit person from discharging his interest in an instrument by a renunciation contained in a properly executed will). *Cantonwine v. Fehling*, 582 P.2d 592 (Wyo. 1978).

12. Cancellation or renunciation on face of instrument.

In action by accommodation maker against accommodated party to recover amount paid to holder of note, where holder, after such payment, stamped "paid" on note and delivered it to accommodation maker, (1) under UCC § 3-605(1)(a), holder's indorsement on face of note (by stamping "paid" on note) discharged accommodation maker's liability thereon, (2) such indorsement did not discharge accommodated party's obligation to accommodation maker, since such discharge was not apparent on face of instrument, (3) holder's delivery of note to accommodation maker also did not discharge accommodated party's obligation to accommodation maker under UCC § 3-605(1)(b), (4) under UCC § 3-415(5), accommodation maker, on paying note, had right of recourse thereon against accommodated party, and (5) since accommodation maker was entitled to proceed on the written instrument, trial court erred in applying three-year statute of limitations applicable to actions on oral contracts. *Payne v. Payne*, 219 Va. 12, 245 S.E.2d 133 (1978).

13. —Intent.

Since UCC § 3-605(1)(a) provides that holder of instrument can discharge debtor by intentionally cancelling instrument,

borrower's obligation to lender on note was not extinguished where note, by clerical error, was stamped paid and returned to borrower (holding that lender's writing off borrower's account as bad debt was mere internal accounting procedure that also did not discharge debtor). *First Galesburg Nat'l Bank & Trust Co. v. Martin*, 58 Ill. App. 3d 113, 373 N.E.2d 1075 (3d Dist. 1978).

Where promissory note was unintentionally marked paid by creditor's employees and sent to debtors, debtors were not discharged from liability under UCC § 3-605(1)(b), since surrender of instrument was not accompanied by creditor's intent to discharge. *Peoples Bank of S.C., Inc. v. Robinson*, 272 S.C. 155, 249 S.E.2d 784 (1978).

14. Written renunciation; delivery.

UCC § 3-605(1)(b) does not require that delivery of writing renouncing holder's rights in instrument must occur contemporaneously with written renunciation itself, or that such delivery must occur during payee's lifetime (holding that all requirements for effective renunciation of deceased holder's interest in certain promissory notes, as to which holder's will directed forgiveness of makers' liability for payment, were met when will was admitted to probate). *Cantonwine v. Fehling*, 582 P.2d 592 (Wyo. 1978).

Even though it was payee's intention to release balance due on note if maker survived payee, failure to deliver written release could not be rectified merely by noting abortive attempt to carry out intention. *Greene v. Cotton*, 457 S.W.2d 493 (Ky. 1970).

15. Surrender of instrument.

Where husband and wife executed promissory note payable to husband's uncle, note was secured by deed of trust on makers' home, and uncle subsequently delivered note to makers, telling them that they should pay him as long as he lived but that after he was gone the home would be theirs, there was sufficient evidence to show that payee renounced his rights by surrendering instrument to parties to be discharged as contemplated by UCC § 3-605. *First Nat'l Bank v. Cobler*,

215 Va. 852, 213 S.E.2d 800, 96 A.L.R.3d 1137 (1975).

Instrument providing "I will surrender my notes in the amount of \$8,500 to John F. Kennedy College" and signed by payee did not indicate outright renunciation of payee's rights under notes, rather, it appeared to refer to UCC § 3-605(1)(b) regarding discharge by surrender of notes; viewed in this light, instrument was unenforceable promise, made without consideration, to surrender notes at some future time and, without actual surrender of notes, they were not discharged. *Gorham v. John F. Kennedy College, Inc.*, 191 Neb. 790, 217 N.W.2d 919 (1974).

16. Oral cancellation or renunciation.

Where holder orally agreed to cancel two promissory notes in return for transfer and lease of maker's bowling alley business, notes were discharged by oral agreement under UCC § 3-601(2); since there was valuable consideration involved in oral agreement between holder and maker, such agreement was not required to be in writing in order to discharge two prior promissory notes; it is only when there is gratuitous discharge that UCC § 3-605(1), requiring a writing, applies. *Brunswick Corp. v. Briscoe*, 523 S.W.2d 115 (Mo. Ct. App. 1975).

Where defendant signed promissory note payable to her stepfather, now deceased, loan funds came from joint bank account of her mother and stepfather, although funds derived from mother, and defendant alleged cancellation of obligation by mother prior to her death, summary judgment was properly granted to step-father's executor in action on note since depositions established that alleged cancellation by mother was oral and that check for loan was signed by stepfather as drawer; promissory note may not be effectively canceled by simple oral statement. *Community Nat'l Bank & Trust Co. v. Gold*, 45 A.D.2d 947 (1st Dep't 1974), *aff'd*, 37 N.Y.2d 831, 378 N.Y.S.2d 29, 340 N.E.2d 465 (1975).

The instant section was referred to in actions upon promissory notes under the prior law, in connection with the plaintiff's contention that an oral release of the notes would not extinguish the notes.

Sherman v. Koufman, 349 Mass. 606, 211 N.E.2d 220 (1965).

17. Other matters.

Where debtor executed new note consolidating amounts owed creditor under several prior notes and, in action on new note following default thereon, defended liability on ground that creditor had not delivered prior notes to debtor, and where creditor's affidavit stated that prior notes had been cancelled and that debtor was not liable on any of them, court held that creditor, under UCC § 3-605(1)(b), effectively renounced its rights under prior notes and that such renunciation would constitute effective defense for debtor in any later action on prior notes. *Farmers & Merchants State Bank v. Lloyd*, 99 Idaho 416, 582 P.2d 1094 (1978).

Evidence that no specific representations were made to maker of note that he would be relieved of his obligation to bank that held note and that third person would be substituted in his stead, although there was evidence that some understanding had been reached with bank whereby bank would be afforded right to intercept proceeds of maker's stock sale to third person and to deduct amount of note from such funds, did not establish defense of renunciation under UCC § 3-605. *Russell v. Northeast Bank*, 527 S.W.2d 783 (Tex. Civ. App. 1975), *ref. n.r.e.* (Jan. 7, 1976).

Bank that issued cashiers' check which was purchased by corporation and made payable to it and plaintiff, a third party, was liable to plaintiff where it allowed corporation to return cashiers' check without plaintiff's indorsement and issued two new cashiers' checks payable to corporation only; although bank would have been justified in relying on presumption of continued ownership of check by corporation, absent any unusual circumstances, there were unusual circumstances in present case sufficient to raise duty of inquiry where, *inter alia*, bank refused to issue original \$25,000 cashiers' check to corporation as drawer-purchaser until plaintiff's earnest money check for \$25,000, which was deposited in corporation's account, had cleared, corporation at that time had balance of only \$13,000 in its account, and, when plaintiff's \$25,000

check cleared, bank issued \$25,000 cashiers' check payable to plaintiff and corporation; where president of corporation returned cashiers' check for \$25,000 about one month later, notified bank that it had not been used for intended purpose, and requested two new cashiers' checks (one for \$15,000 and one for \$10,000) payable only to corporation, and, at bank's request, president wrote "not used for purpose issued" on reverse side of \$25,000 cashiers' check; where plaintiff, a joint payee, did not indorse cashiers' check for \$25,000; and where bank failed to make any inquiry and issued \$15,000 and \$10,000 cashiers' checks payable to corporation only, as requested, and thereby made possible conversion by corporation of \$25,000 of plaintiff's money. *Gillespie v.*

Riley Mgt. Corp., 59 Ill. 2d 211, 319 N.E.2d 753 (1974).

III. DECISIONS UNDER FORMER STATUTES.

18. In general.

Word "renounce," in Negotiable Instruments Law providing renunciation must be in writing unless instrument is delivered up, means release without consideration. *Hazlehurst Oil Mill & Fertilizer Co. v. Booze*, 160 Miss. 136, 133 So. 120 (1931).

Oral release of liability on promissory note for consideration was valid without instrument being delivered up to persons liable thereon. *Hazlehurst Oil Mill & Fertilizer Co. v. Booze*, 160 Miss. 136, 133 So. 120 (1931).

RESEARCH REFERENCES

Law Reviews. 1979 Mississippi Supreme Court Review: Corporate & Commercial Law. 50 Miss. L. J. 741, December, 1979.

§ 75-3-605. Discharge of indorsers and accommodation parties.

(a) In this section, the term "indorser" includes a drawer having the obligation described in Section 75-3-414(d).

(b) Discharge, under Section 75-3-604, of the obligation of a party to pay an instrument does not discharge the obligation of an indorser or accommodation party having a right of recourse against the discharged party.

(c) If a person entitled to enforce an instrument agrees, with or without consideration, to an extension of the due date of the obligation of a party to pay the instrument, the extension discharges an indorser or accommodation party having a right of recourse against the party whose obligation is extended to the extent the indorser or accommodation party proves that the extension caused loss to the indorser or accommodation party with respect to the right of recourse.

(d) If a person entitled to enforce an instrument agrees, with or without consideration, to a material modification of the obligation of a party other than an extension of the due date, the modification discharges the obligation of an indorser or accommodation party having a right of recourse against the person whose obligation is modified to the extent the modification causes loss to the indorser or accommodation party with respect to the right of recourse. The loss suffered by the indorser or accommodation party as a result of the modification is equal to the amount of the right of recourse unless the person enforcing the instrument proves that no loss was caused by the modification or that the loss caused by the modification was an amount less than the amount of the right of recourse.

(e) If the obligation of a party to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an indorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment. The value of an interest in collateral is impaired to the extent (i) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (ii) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest. The burden of proving impairment is on the party asserting discharge.

(f) If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred. If the party asserting discharge is an accommodation party not entitled to discharge under subsection (e), the party is deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment is on the party asserting discharge.

(g) Under subsection (e) or (f), impairing value of an interest in collateral includes (i) failure to obtain or maintain perfection or recordation of the interest in collateral, (ii) release of collateral without substitution of collateral of equal value, (iii) failure to perform a duty to preserve the value of collateral owed, under Chapter 9 or other law, to a debtor or surety or other person secondarily liable, or (iv) failure to comply with applicable law in disposing of collateral.

(h) An accommodation party is not discharged under subsection (c), (d), or (e) unless the person entitled to enforce the instrument knows of the accommodation or has notice under Section 75-3-419(c) that the instrument was signed for accommodation.

(i) A party is not discharged under this section if (i) the party asserting discharge consents to the event or conduct that is the basis of the discharge, or (ii) the instrument or a separate agreement of the party provides for waiver of discharge under this section either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral.

SOURCES: Former § 75-3-605; Codes, 1942, § 41A:3-605; Laws, 1966, ch. 316, § 3-605; Laws, 1992, ch. 420, § 68, eff from and after January 1, 1993.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-606.

11. In general.

12. Applicability.
13. Party to instrument.
14. Discharge of surety.
15. Discharge of original parties.
16. Impairment of collateral.
17. —Notice of impairment.
18. Extent of discharge.
19. Actions not impairing collateral.
20. Express reservation vitiating impairment.
21. Express reservation; notice.
22. Practice and procedure.

III. DECISIONS UNDER FORMER STATUTES.

23. In general.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1.-10. [Reserved for future use].

II. DECISIONS UNDER FORMER UCC § 75-3-606.

11. In general.

This section does not impose duty upon mortgagee, in mortgage covering real estate collateral, who is not in possession of real estate, to look after, care for, maintain and upkeep same, because to do so would have chilling effect on business. *West Point Corp. v. New N. Miss. Fed. Sav. & Loan Ass'n*, 506 So. 2d 241 (Miss. 1986).

This section recognizes that release of one guarantor does not release another when release is made with consent of latter; specific agreement at time of execution of note as to liability notwithstanding release of any other guarantor is equivalent to such consent and is binding. *Rauch v. First Nat'l Bank*, 244 Ark. 941, 428 S.W.2d 89 (1968).

It is immaterial whether or not the surety is compensated in applying § 3-606. *Philco Fin. Co. v. Patton*, 248 Or. 310, 432 P.2d 686 (1967).

The fact that a second commercial paper is executed for the original debt does not in itself discharge the original paper. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

12. Applicability.

In action by payee against guarantors of promissory note, where guaranties sued

on expressly provided that each guaranty applied to renewals of note, that payee could change or renew the original credit, and that payee could release any one or more of the guarantors without notice or demand and without affecting guarantors' liability, guarantors were not released or discharged from liability by UCC § 3-118(f) and UCC § 3-606(1)(a), since these sections of the Uniform Commercial Code apply only to negotiable instruments and do not apply to guaranty contracts, which are not negotiable. *First Nat'l Bank v. Energy Equities Inc.*, 91 N.M. 11, 569 P.2d 421 (Ct. App. 1977).

Although term "any party" as used in UCC § 3-606 was intended to include parties who sign negotiable instruments ostensibly as makers but who are in fact sureties or accommodation makers, provisions of § 3-606(1)(b) do not apply to comakers; thus, defense of impairment of collateral under § 3-606 was not available to individuals who cosigned corporate note where they executed note as comakers rather than as accommodation parties. *Wohlhuter v. St. Charles Lumber & Fuel Co.*, 62 Ill. 2d 16, 338 N.E.2d 179, 93 A.L.R.3d 1278 (1975).

13. Party to instrument.

Where purchaser of airplane executed chattel mortgage and promissory note in favor of bank, guarantors executed guarantee and bank failed to record chattel mortgage with federal aviation authority for more than two years; guarantors were not "[parties] to the instrument" within meaning of UCC § 3-606, since guarantee, signed by guarantors, was not negotiable instrument and promissory note in question did not incorporate or even make reference to guarantee. *National Bank v. Alford*, 65 Mich. App. 634, 237 N.W.2d 592 (1975).

Phrase, "any party to the instrument," as used in UCC § 3-606 embraces parties to instrument in addition to drawers and indorsers if they are in position of known surety, but maker of note secured by mortgage does not become surety following transfer of mortgaged property and assumption of debt by another; thus, in action by holder of note secured by mortgage to recover deficiency following default in payment and foreclosure sale,

where mortgaged premises had been sold to assuming grantee, discharge benefits of UCC § 3-606 were not available to maker. *Commerce Union Bank v. May*, 503 S.W.2d 112 (Tenn. 1973).

In action by bank, as payee of notes executed by used car purchasers, against used car dealer to recover unpaid balance due on notes after purchasers defaulted, where dealer had signed notes on back but was not otherwise party to instrument: (1) dealer's signature constituted indorsement of note under UCC § 3-402; (2) since indorsement was not in chain of title, dealer was accommodation indorser under UCC § 3-415 and, since bank took notes with knowledge that he was accommodation indorser, dealer's liability was that of surety; (3) as such, dealer was entitled to such defenses to liability on notes as were afforded to sureties by statute, including UCC § 3-606. *First Nat'l Bank v. Hargrove*, 503 S.W.2d 856 (Tex. Civ. App. 1973).

The term "any parts to an instrument" is broad enough to include all makers and indorsers. *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968).

Where a corporate note was executed by its president who endorsed it personally, subsequent agreements extending the time of payment signed by the president only in his corporate capacity were not effective to release him from his personal liability as endorser. *London Leasing Corp. v. Interfina, Inc.*, 53 Misc. 2d 657 (1967).

14. Discharge of surety.

Plaintiff bank's failure to perfect its security interest in certain inventory and equipment of defendants, makers of two promissory notes delivered to plaintiff, unjustifiably impaired the collateral (Uniform Commercial Code, § 3-606) and pro tanto discharged the defendants as accommodation parties; although the fine print of the provisions in the notes on which the plaintiff relied to excuse its failure to secure the collateral did not render those provisions unenforceable since the print is not illegible and the defendants could be expected to understand the provisions in the notes, the creditor's failure to file a lien resulting in a loss of collateral pro tanto discharges

the surety, unless excused by clear and unequivocal language in the agreement between the parties. Plaintiff's failure to properly file the financing statement was not relieved by the consent of the defendants, since a release of collateral, which defendants had consented to in the notes, is not equated with the failure to file a lien, and the provisions in the notes that no omission to do any act not requested by the obligors shall be deemed a failure to exercise reasonable care and that the bank shall not be deemed to waive any of its rights or remedies unless in writing and signed are directed toward a waiver of the plaintiff's rights, not the performance of an obligation of the plaintiff owing to the defendants. Additionally, although defendants could have filed the financing statement themselves, the creditor has an obligation to preserve the value and validity of the lien of collateral, and defendants could well have assumed that plaintiff would file properly; as between plaintiff and defendants, the loss for failure to file should fall on the party whose conduct was primarily responsible for the incidence of the loss. *Executive Bank v. Tighe*, 66 A.D.2d 70 (2d Dep't 1978).

Where (1) maker of promissory notes negotiated them on strength of guarantor's guaranty thereof and willingness to pledge two certificates of deposit as security for their repayment, and (2) notes contained request by maker for credit life insurance which bank that made loan to maker did not obtain, court held that guarantor was not discharged as surety on notes under UCC § 3-601(1)(f), dealing with discharge of party from liability on an instrument by fraudulent and material alteration of instrument, since bank's failure to procure life insurance for maker did not constitute alteration of terms of notes but was, at most, a violation of bank's obligations thereunder (also holding that although bank's failure to procure the life insurance impaired collateral within meaning of UCC § 3-606(1)(b), guarantor expressly consented to such impairment when he signed guaranty agreement). *DeKalb County Bank v. Haldi*, 146 Ga. App. 257, 246 S.E.2d 116 (1978).

Contention of guarantor of note that he was discharged from liability under UCC

§ 3-606(1)(a) - providing that party to instrument is discharged from liability if holder releases certain other parties without such party's consent—because signature of coguarantor was forged was not sustainable, since holder's failure to insure genuineness of signatures on note did not constitute release of party whose signature was forged or agreement by holder not to sue such party. *Residential Indus. Loan Co. v. Brown*, 559 F.2d 438 (5th Cir. Ga. 1977).

An agreement by the holder of a note to suspend the right to enforce for 113 days, 21 days longer than the period of the original note, was an extension beyond that authorized by UCC § 3-118(f) and when made without the consent of the endorser discharges the endorser under UCC § 3-606(1)(a). *Citizens State Bank v. Beermann Bros. Dehy*, 188 Neb. 597, 198 N.W.2d 458 (1972).

Under the Code, an accommodation party is released by an extension granted a secondary party in the absence of an effective reservation of rights against him. *Parnes v. Celia's, Inc.*, 99 N.J. Super. 179, 239 A.2d 19 (App. Div. 1968).

15. Discharge of original parties.

Notwithstanding that technically there remained on paper sufficient realty-collateral to secure the loan, the holder of a promissory note unreasonably impaired the value of realty-security so as to release the original maker when he subsequently executed an agreement subordinating his right to payment, released a part of the realty-security in exchange for partial payment of note's principal, and allowed an increase in the interest rate. *Hughes v. Tyler*, 485 So. 2d 1026 (Miss. 1986).

Where (1) law partnership, prior to dissolution, borrowed money by means of unsecured note that was executed by all three partners, (2) after dissolution of partnership and default on note, renewal note was executed and signed by all partners, (3) thereafter, all subsequent renewal notes were signed only by one partner, and (4) issue was whether last renewal note so signed was binding on all partners or only on partner who signed such note, court held that under UCC § 3-606(1)(a), acceptance by lender (plaintiff) of renewal notes signed only by one

partner without knowledge and consent of other partners, even if executed by signing partner on behalf of partnership, discharged nonsigning partners, since under the statute, "any party to the instrument" (including party primarily liable as well as one secondarily liable) would be discharged under such circumstances. *United Counties Trust Co. v. Podvey*, 160 N.J. Super. 244, 389 A.2d 515 (L. Div. 1978).

Husband, who was comaker with wife of promissory note secured by automobile owned by wife, was not discharged under UCC § 3-606(1)(a) by note holder's release of collateral to wife where husband failed to show that he had right of contribution or recourse against wife in event he was compelled to pay note. *Beneficial Fin. Co. v. Husner*, 82 Misc. 2d 550 (1975).

Where sole stockholders of corporation signed promissory note in both personal and corporate capacity, loan was important to preservation of their interest in corporation and note contained clause stating that all signers were principals, individuals signed note in capacity of comakers and knowingly incurred personal liability; accordingly, defenses enumerated in UCC § 3-606 and, in particular, defense that there was unjustifiable impairment of collateral, was not available to them. *Wohlhuter v. St. Charles Lumber & Fuel Co.*, 25 Ill. App. 3d 812, 323 N.E.2d 134 (2d Dist. 1975), *aff'd*, 62 Ill. 2d 16, 338 N.E.2d 179, 93 A.L.R.3d 1278 (1975).

Where bank held partnership note and where two or three days before note was due bank was informed that one partner was buying other partner's interest in partnership and was assuming all liabilities of business and that withdrawing partner did not want note extended and would not sign renewal note, evidence that bank twice accepted payment of interest from continuing partner after note was due did not establish that bank made enforceable promise not to sue continuing partner and, thus, withdrawing partner was not discharged under UCC § 3-606. *Glover v. National Bank of Commerce*, 258 Ark. 771, 529 S.W.2d 333 (1975).

In action on promissory note against husband and wife as comakers in which

plaintiffs entered into joint stipulation dismissing with prejudice claim against husband after he received discharge in bankruptcy, such dismissal by plaintiffs of their action against husband did not operate to discharge wife under UCC § 3-606 because any judgment taken against husband on indebtedness already discharged in bankruptcy would have been rendered null and void under Bankruptcy Act. *Wirth v. Heavey*, 508 S.W.2d 263 (Mo. Ct. App. 1974).

Payee renounced his rights to \$2,000 of \$10,000 note by letter to maker of note stating that it was payee's "understanding" that \$2,000 was to be applied against debt of third party to maker and that in exchange third party would pay payee \$2,000. *Ferguson v. D.S.A. Inc.*, 430 S.W.2d 553 (Tex. Civ. App. 1968).

This section, discharging "any party to the instrument" for impairment of recourse or of collateral without such party's consent, is broad enough to include all makers and endorser; whether party seeking relief is accommodation endorser is immaterial. *Rushton v. U.M. & M. Credit Corp.*, 245 Ark. 703, 434 S.W.2d 81 (1968).

The execution of a refinancing modification and extension agreement does not in itself discharge the parties to the original note. *A.J. Armstrong Co. v. Janburt Embroidery Corp.*, 97 N.J. Super. 246, 234 A.2d 737 (L. Div. 1967).

16. Impairment of collateral.

Notwithstanding that technically there remained on paper sufficient realty-collateral to secure the loan, the holder of a promissory note unreasonably impaired the value of realty-security so as to release the original maker when he subsequently executed an agreement subordinating his right to payment, released a part of the realty-security in exchange for partial payment of note's principal, and allowed an increase in the interest rate. *Hughes v. Tyler*, 485 So. 2d 1026 (Miss. 1986).

A holder of a promissory note is not at liberty to dispose of the collateral as he sees fit to the detriment of a nonprotected party, and then expect the nonprotected party to make up the difference between the impaired collateral and the debt.

Hughes v. Tyler, 485 So. 2d 1026 (Miss. 1986).

Bank's assignment of partnership note to corporation in consideration for execution of corporation note to bank while retaining deed of trust which is collateral for partnership note does not impermissibly impair collateral where deed of trust is still in full force and effect and may be foreclosed at proper time and where if corporation pays note to bank it will be entitled to assignment of deed of trust by bank. *Smith & Hitt Constr. Co. v. Fowler*, 466 So. 2d 896 (Miss. 1985).

In an action by a bank against the endorser of two promissory notes executed by the corporate maker of whom the endorser was secretary and treasurer, the trial court erred in failing to direct a verdict for the endorser where the bank neglected to file its security interest with the office of the secretary of state as required by § 75-9-401(c) even though the collateral agreement included all furniture, appliances and fixtures owned by the maker and where the bank thereby discharged the endorser by impairing the collateral as provided in § 75-3-606(1)(b). *Huey v. Port Gibson Bank*, 390 So. 2d 1005 (Miss. 1980).

Under UCC § 3-606(1)(b), the unjustifiable impairment of collateral for the instrument must be without the consent of the party claiming discharge on the instrument. Accordingly, an accommodation party cannot successfully claim discharge on a note under UCC § 3-606(1)(b) where the note specifically provided that the holder of the instrument could surrender any collateral therefor without affecting the accommodation party's liability (where secured party surrendered collateral for note by failing to perfect its security interest). *Haney v. Deposit Guar. Nat'l Bank*, 362 So. 2d 1250 (Miss. 1978).

Availability of defense of impairment of collateral under UCC § 3-606(1)(b) is not limited to accommodation party, but is expressly made available to any party to the instrument. *Mikanis Trading Corp. v. Block*, 59 A.D.2d 689 (1st Dep't 1977).

Bank was not entitled to recover against endorser of two promissory notes where bank breached its duty to endorser when it released collateral under security

agreement securing notes without knowledge or consent of endorser and where value of collateral released by bank was sufficient to satisfy outstanding indebtedness represented by notes which endorser had endorsed. *Guida v. Exchange Nat'l Bank*, 308 So. 2d 148 (Fla. App. 1975).

Where automobile dealer assigned and indorsed contract of sale and note to bank, together with insurance policy which was itself collateral for note, and bank failed to replace policy after it was canceled, or to notify dealer of policy's cancellation, bank impaired collateral under UCC § 3-606(1)(b) and thus discharged dealer's indorsement. *Arlington Bank & Trust v. Nowell Motors, Inc.*, 511 S.W.2d 415 (Tex. Civ. App. 1974).

In suit by automobile dealership against bank to recover funds paid bank under assigned and indorsed contract of sale when purchaser of vehicle failed to pay in accordance with provisions of note, automobile dealership was entitled to discharge on its indorsement under UCC § 3-606(a)(2) where bank violated contractual duty to preserve insurance policy which was collateral for note by failing to replace policy which had been canceled. *Arlington Bank & Trust v. Nowell Motors, Inc.*, 511 S.W.2d 415 (Tex. Civ. App. 1974).

Plaintiff's failure to file financing statement in accordance with Article 9 of Code rendered his security interest in collateral subordinate to that of Trustee in Bankruptcy, and produced unjustifiable impairment of collateral, discharging defendants from obligation as personal guarantors of indebtedness on chattel mortgage notes. *First Bank & Trust Co. v. Post*, 10 Ill. App. 3d 127, 293 N.E.2d 907 (1st Dist. 1973).

Car salesman, who had taken chattel mortgage as security for payment of note but failed or neglected to file mortgage, leaving accommodation maker of note unprotected, discharged accommodation maker, since chattel mortgage was impaired "collateral". *Shaffer v. Davidson*, 445 P.2d 13 (Wyo. 1968).

The instant section was referred to, for comparison purposes, in a case decided under the prior law in which it was held that an accommodation maker was not in the position of a surety so as to be discharged by an impairment of collateral by

the payee. In the same case the court pointed out that under the Uniform Commercial Code "an accommodation party is always a surety" and that the "suretyship defenses ... are not limited to parties who are 'secondarily liable', but are available to any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so." *Rose v. Homsey*, 347 Mass. 259, 197 N.E.2d 603 (1964).

17. —Notice of impairment.

Guarantor of note was not discharged from liability by UCC § 3-606(1)(b), despite his contention that collateral securing underlying debt had been impaired by holder of note, where (1) alleged impairment of collateral—namely, mechanic's lien filed against realty constituting collateral—had occurred before guarantor signed guarantee of note, and (2) promisee had had nothing to do with filing of such lien. *Residential Indus. Loan Co. v. Brown*, 559 F.2d 438 (5th Cir. Ga. 1977).

18. Extent of discharge.

Indorser of negotiable instrument is entitled to protection afforded him by any specific security for payment of debt that principal debtor may have given holder or which holder may have acquired by operation of law, and if holder releases or voluntarily destroys any part of such security, indorser is discharged to extent that such security would have gone to pay debt (holding that while subordination of second mortgage to rank of third mortgage impaired subrogation rights of indorsers of handnote sued on, indorsers were not thereby discharged from liability on such note under UCC § 3-601(1)(d) and § 3-606(1)(b), since they completely failed to show extent of any prejudice from such subordination and also failed to show that collateral had been released without their knowledge or consent). *Poynot v. J & T Devs., Inc.*, 355 So. 2d 1052 (La. App. 1978).

Where co-debtor who had guaranteed loans to corporation brought action against bank and other debtor alleging that bank and other debtor conspired to impair collateral for notes by disposing of inventory without proper payment ar-

rangements, among other things, but where alleged indebtedness of corporation to bank was settled and compromised subsequent to award of damages by jury, pursuant to UCC § 3-606 co-debtor was entitled to relief only to extent impairment affected his liability on behalf of corporation and, thus, co-debtor was not entitled to affirmative relief as there was no indebtedness to bank by corporation at time of judgment. *Cleburne Nat'l Bank v. Kenedco, Inc.*, 547 S.W.2d 67 (Tex. Civ. App. 1977), writ ref'd n.r.e., (June 22, 1977).

In action by holder against individual indorser and guarantor of promissory note in which defendant contended that he had been completely discharged from liability under UCC § 3-606(1)(b) because of holder's unjustifiable impairment of collateral by failing to perfect security interest therein, defendant was discharged from liability only to extent of such unjustifiable impairment. Thus, since extent of impairment of collateral was its value as evidenced by amount for which it was sold at public auction, plaintiff was still entitled to judgment for difference between amount outstanding on note and amount realized on sale of collateral, plus interest. *Mikanis Trading Corp. v. Block*, 59 A.D.2d 689 (1st Dep't 1977).

In creditor's suit against guarantor of note secured by mortgage on debtor's realty, creditor's failure to record mortgage for one year impaired both value of such collateral and also guarantor's right as surety to be subrogated to all of creditor's rights against debtor, including right to proceed against any security of debtor in creditor's hands. In such case under UCC § 3-606(1)(b), if impairment of collateral can be measured in monetary terms, monetary amount of impairment will measure extent of guarantor's discharge from liability on note. However, if monetary amount of impairment cannot be ascertained, guarantor will be discharged of all liability on instrument (remanding cause for determination of extent of impairment of collateral). *Langeveld v. L.R.Z.H. Corp.*, 74 N.J. 45, 376 A.2d 931, 95 A.L.R.3d 949 (1977).

Notwithstanding accommodation party who signed note as maker would other-

wise have been jointly and severally liable on note as co-maker under UCC § 3-118 and § 3-415, accommodation party was totally discharged under UCC §§ 3-606 and 9-306 by secured creditor's impairment of collateral where collateral, which was not in possession of secured creditor, was sold by principal debtor with express authority of secured creditor and value of collateral exceeded value of debt. *Beneficial Fin. Co. v. Marshall*, 551 P.2d 315 (Okla. Ct. App. 1976).

Payee discharged maker of note to extent of security released to one guarantor as part of transaction in which payee obtained part payment, where maker had not consented to release of security. *Magnolia Homes Mfg. Corp. v. Montgomery*, 451 F.2d 934 (8th Cir. Mo. 1971).

On discharge, guarantor has right to sell collateral at public or private sale without notice, but under UCC § 3-606 they could not dispose of the collateral at substantially less than its reasonable value without consent of maker of note. *Magnolia Homes Mfg. Corp. v. Montgomery*, 451 F.2d 934 (8th Cir. Mo. 1971).

19. Actions not impairing collateral.

Airplane seller's surety obligations under aircraft repurchase agreement, executed in connection with seller's assignment of aircraft security agreement covering purchase price of airplane to secured party, were not discharged under UCC § 3-606 by secured party's failure to repossess despite buyer's lateness in making payments and secured party's knowledge that buyer was permitting aircraft to be used for commercial purposes; UCC does not impose duties upon creditors not in possession of collateral. *Commercial Credit Equip. Corp. v. Hatton*, 429 F. Supp. 997 (N.D. Tex. 1977).

Note owner's unjustifiable delay in recording mortgage, which occasioned a loss of priority of mortgage, impaired value of mortgage as collateral, and diminished right of subrogation of guarantor, will discharge such guarantor to degree commensurate with impairment of said collateral measured by monetary loss, or will completely discharge such guarantor where impairment not capable of measurement by monetary loss. *Langeveld v.*

L.R.Z.H. Corp., 74 N.J. 45, 376 A.2d 931, 95 A.L.R.3d 949 (1977).

Holder of promissory note had no obligation to demand additional collateral from defaulting debtor before he proceeded against accommodation indorser; holder's failure to record note did not constitute "unjustifiable impairment of collateral" under UCC § 3-606(1)(b), relieving accommodation indorser of any further obligation on note, since recording of promissory note would not convert it into security interest in obligor's property, absent collateral, and no collateral accompanied note in question. *First State Bank v. Raiton*, 377 F. Supp. 859 (E.D. Pa. 1974).

Where bank took promissory note which was signed by defendant, corporation president, in her representative capacity and also personally indorsed by her, in exchange for \$5,600 corporate loan which was secured by security interest in corporation's inventory and stock in trade, evidence did not establish that bank unjustifiably impaired collateral so as to discharge defendant within meaning of UCC § 3-606(1)(b), since defendant, as corporate president, was in better position than bank to protect collateral in possession of corporation. *Tampa Bay Bank v. Loveday*, 526 S.W.2d 480 (Tenn. Ct. App. 1974).

Payee-holder of note, executed by corporate debtor and secured by security agreement covering equipment and fixtures, had no duty under UCC to accommodation indorsers to file security agreement to protect collateral for indorsers; nor did payee-holder's failure to file security agreement constitute unjustifiable impairment of collateral under UCC § 3-606, thus discharging accommodation indorsers upon bankruptcy of debtor, where security agreement itself provided that debtor would pay cost of filing security agreement, where payee-holder was not relying on collateral primarily but was relying on indorsers, where indorsers were interested in loan, one indorser being seller of equipment and lessor of building in which it was located and others being officers and directors of corporate debtor, and where bankruptcy of corporate debtor was voluntary, indicating that

indorsers had knowledge of financial situation of maker of note. *First Citizens Bank & Trust Co. v. Larson*, 22 N.C. App. 371, 206 S.E.2d 775 (1974), cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

Bank's failure to record leases and assignment did not impair collateral (assigned leases) so as to release unconditional indorser of promissory note. *Hurt v. Citizens Trust Co.*, 128 Ga. App. 224, 196 S.E.2d 349 (1973).

20. Express reservation vitiating impairment.

In action against guarantor to recover balance due on loan, where guarantor, instead of making good on its guaranty, advised creditor to dispose of collateral over extended period of time through liquidator specially recommended by guarantor, but creditor sold collateral at public auction and net proceeds of sale were insufficient to pay off balance due on loan, guarantor could not successfully contend that because of creditor's failure to follow guarantor's recommendation for disposing of collateral, collateral was thereby unjustifiably impaired so as to discharge guarantor under UCC § 3-606(1)(b), since guarantor had waived its right to claim such discharge by consenting in its guaranty to auction sale as appropriate method for disposal of collateral. Moreover, such consent was not vitiated by creditor's alleged failure to meet its obligation under UCC § 9-504(3) to dispose of collateral in commercially reasonable manner—which obligation assertedly was not met because of creditor's failure to follow guarantor's recommendation which purportedly would have resulted in a higher price for the collateral—since UCC § 9-507(2) expressly states that fact that different method of disposition would have produced a better price does not of itself establish that sale was not made in a commercially reasonable manner. In addition, UCC § 9-507(2) also states that disposition of collateral that has been approved in any judicial proceeding shall conclusively be deemed to be commercially reasonable, and in present case sale of collateral had been approved by court in debtor's receivership proceedings, and guarantor had not attempted to restrain such sale after creditor had committed

itself to an auction sale. *Rhode Island Hosp. Trust Nat'l Bank v. National Health Found.*, 119 R.I. 823, 384 A.2d 301 (1978).

In suit on installment note and security agreement executed by defendant as note's comaker, defendant was not discharged from liability under UCC § 3-606(1)(b) on ground that plaintiff had wrongfully impaired note's collateral where instrument contained provision authorizing plaintiff to release collateral without consent of or notice to defendant and without any effect on defendant's liability. In such case, consent is deemed to have been given in advance and right to claim discharge from liability is waived. *McBurnett v. National City Bank*, 142 Ga. App. 505, 236 S.E.2d 179 (1977).

Where payee assigned promissory note to credit corporation with recourse and subject to agreement that credit corporation could, without notice to payee, grant extension of time for payment, where maker defaulted after several extensions of time had been granted by credit corporation, and where credit corporation sued payee for indebtedness represented by note and assignment, payee was precluded from relying on defense that credit corporation had unjustifiably impaired collateral under UCC § 3-606(1)(b) by granting extensions of time to maker since payee had given its consent to such extensions of time, without notice. *Commercial Credit Equip. Corp. v. Southeastern Uni-Loader, Inc.*, 134 Ga. App. 156, 213 S.E.2d 536 (1975).

In action by bank on corporate notes made in connection with \$100,000 corporate loan, against guarantors of those notes following maker-corporation's bankruptcy, bank's failure to perfect its security interest in corporation's liquor license did not constitute impairment of collateral sufficient to discharge sureties under UCC § 3-606(1)(b) on theory that had bank perfected, sureties, as bank's subrogees, would have prevailed over corporation's trustee in bankruptcy, where, under guaranty agreement, bank was not required to perfect or even to acquire security interests in any of corporation's property as prerequisite to guarantors' liability, guarantors had waived their right to subrogation, bank had expressly

reserved right to waive and release security at any time, there was no absence of good faith on part of bank within meaning of UCC § 1-201(19), and there was nothing unreasonable in terms of guaranty agreement. *American Bank of Commerce v. Covolo*, 88 N.M. 405, 540 P.2d 1294 (1975).

Endorsers and guarantors of note secured by deed of trust on 2 separate properties were not discharged as guarantors by holder's release of one property as collateral, where note contained advance consent contemplated by § 3-606. *Tolzman v. Gwynn*, 22 Md. App. 564, 324 A.2d 179 (1974).

Guarantor-indorser of note secured by collateral was not discharged thereon by bank's failure to file financing statement where, under provisions of guaranty agreement and collateral note, guarantor consented to impairment of collateral. *Greene v. Bank of Upson*, 231 Ga. 287, 201 S.E.2d 463 (1973).

Even if bank disbursed funds from account without authority, such action would not have discharged guarantors under § 3-606(1)(b), where guaranty agreement and note contained provision authorizing bank to surrender or release collateral. *Twisdale v. Georgia R.R. Bank & Trust Co.*, 129 Ga. App. 18, 198 S.E.2d 396 (1973).

Where loan for which note was given was also secured by bill of sale conveying certain furnishings and equipment, and note provided that holder might without notice surrender all or any part of collateral, temporary loan of equipment by maker to another would not effect pro tanto discharge as to guarantors of note. *Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc.*, 346 F. Supp. 888 (S.D. Ga. 1972).

Evidence that when 1965 model automobile which was pledged as collateral for note burned, insurance company with consent of holder of note provided owner with 1966 model automobile in substitution, would support finding that collateral was not impaired by substitution so as to discharge cosigner from his obligation upon default. *Hunter v. Community Loan & Inv. Corp.*, 127 Ga. App. 142, 193 S.E.2d 55 (1972).

Failure to file a security interest did not release endorers of a promissory note where they had consented to a release of the collateral by the creditors. *Lafayette Bank & Trust Co. v. Silver*, 58 Misc. 2d 891 (1969).

Under terms of instrument in question defendant had consented to surrender or release of collateral and could not urge Code provisions regarding unjustifiable impairment of collateral, as grounds for discharge; hence, trial judge did not err in granting plaintiff's motion for summary judgment. *Reeves v. Hunnicutt*, 119 Ga. App. 806, 168 S.E.2d 663 (1969).

21. Express reservation; notice.

"Agreement not to execute" entered into by comaker and holder of note did not serve to discharge other comaker since agreement contained express reservation of rights against other comaker; and notification to other comaker was not prerequisite to validity of reservation of rights against comaker. *Hallowell v. Turner*, 95 Idaho 392, 509 P.2d 1313 (1973).

There is no requirement under the Code that notice be given an accommodation party that rights against him have been reserved when an extension of time is given the primary party. *Parnes v. Celia's, Inc.*, 99 N.J. Super. 179, 239 A.2d 19 (App. Div. 1968).

Indorsers upon a note given by a conditional buyer to a conditional seller were not discharged under subsection (1)(a) of this section by the creditor's assent to an assignment for benefit of creditors by the debtor, nor by the creditor's acceptance of a dividend thereunder, where the creditor made an express reservation of rights against the indorsers both in the note and in the letter of assent to the assignment. *Priggen Steel Bldgs. Co. v. Parsons*, 350 Mass. 62, 213 N.E.2d 252 (1966).

22. Practice and procedure.

Where bank held partnership note and where two or three days before note was due bank was informed that one partner was buying other partner's interest in partnership and was assuming all liabilities of business and that withdrawing partner did not want note extended and would not sign renewal note, evidence that bank twice accepted payment of in-

terest from continuing partner after note was due did not establish that bank made enforceable promise not to sue continuing partner and, thus, withdrawing partner was not discharged under UCC § 3-606. *Glover v. National Bank of Commerce*, 258 Ark. 771, 529 S.W.2d 333 (1975).

In action by bank as holder of promissory note against corporation and two individuals who signed note: (1) failure of bank to perfect purchase money security interest in collateral given as security for note by properly filing financing statement in manner prescribed by UCC § 9-401 was unjustifiable impairment of collateral as contemplated by UCC § 3-606; (2) however, discharge of party to negotiable instrument by reason of unjustifiable impairment of collateral was defense available only to secondary and accommodation parties; (3) where it was clear from face of instrument that individual signers intended to sign note other than as endorers but there was dispute as to which capacity, parol evidence was admissible to show intention of parties as to capacity in which instrument was signed; and (4) evidence that loan in present case was made directly to two individual signers as principal debtors (i.e., makers), together with evidence concerning structure of corporation, active solicitation of loan by individual signers, and fact that one individual signor was director of bank, was sufficient to show that individual signers signed note as makers rather than accommodation parties. *Peoples Bank v. Pied Piper Retreat, Inc.*, 158 W. Va. 170, 209 S.E.2d 573 (1974).

There was no direct evidence of value of property covered by corporate co-maker's mortgage released by payee without individual maker's consent; even assuming that generally value of mortgaged property exceeded amount of debt, it was not error for trial court to have found that individual maker had failed to prove value of security released. *Christensen v. McAtee*, 256 Or. 333, 473 P.2d 659 (1970).

When it is claimed that there has been a reservation of rights against an accommodation party, such reservation may be shown by a letter written by the holder to the accommodated party and other circumstances of the transaction. *Parnes v.*

Celia's, Inc., 99 N.J. Super. 179, 239 A.2d 19 (App. Div. 1968).

Judgment in action on note could be rendered against surety on pleadings, where surety alleged substitution of collateral by principal but failed to timely allege that substitution increased surety's risk by impairing collateral. *Buffington v. Nalley Disct. Co.*, 117 Ga. App. 820, 162 S.E.2d 212 (1968).

Defense asserting oral agreement to forgive debt not germane since there was no written renunciation of note or surrender thereof; therefore motion to strike defense from answer, granted. *Bihlmire v. Hahn*, 43 F.R.D. 503 (E.D. Wis. 1967).

III. DECISIONS UNDER FORMER STATUTES.

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Release of an unlimited indorser after judgment discharges subsequent limited indorsers. *Fish Meal Co. v. Brondum*, 242 Miss. 573, 135 So. 2d 825 (1961).

So long as the holder of a promissory note does not put himself in a position whereby he could not sue immediately for the amount due, an extension of the time of payment does not discharge an endorser. *Barnett v. First Nat'l Bank*, 201 Miss. 613, 29 So. 2d 922 (1947).

When the holder of accommodation paper extends the time of its payment by a binding agreement with the accommodated party without the knowledge or consent of the maker or indorser, the holder knowing the actual character of the paper at the time of the extension, the accommodation maker or indorser is thereby discharged from liability. *Hederman v. Cox*, 188 Miss. 21, 193 So. 19 (1940).

Agreement to extend time of payment must be positive, and supported by new and valuable consideration, in order to release surety. *Graham v. Pepple*, 132 Miss. 612, 97 So. 180, 30 A.L.R. 1278 (1923).

RESEARCH REFERENCES

Law Reviews. 1985 Mississippi Supreme Court Review — Contracts and

Commercial Law. 55 Miss. L. J. 775, December, 1985.

§ 75-3-606. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

[Codes, 1942, § 41A:3-606; Laws, 1966, ch. 316, § 3-606]

Editor's Note — Former § 75-3-606 concerned discharge of a party and impairment of recourse or of collateral.

PART 7.

ADVICE OF INTERNATIONAL SIGHT DRAFT [REPEALED].

SEC.

75-3-701. Repealed.

§ 75-3-701. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

[Codes, 1942, § 41A:3-701; Laws, 1966, ch. 316, § 3-701]

Editor's Note — Former § 75-3-701 dealt with letters of advice of international sight draft.

PART 8.

MISCELLANEOUS

[REPEALED].

SEC.

75-3-801 through 75-3-805. Repealed.

§§ 75-3-801 through 75-3-805. Repealed.

Repealed by Laws, 1992, ch. 420, § 112, eff from and after January 1, 1993.

§ 75-3-801. [Codes, 1942, § 41A:3-801; Laws, 1966, ch. 316, § 3-801]

§ 75-3-802. [Codes, 1942, § 41A:3-802; Laws, 1966, ch. 316, § 3-802]

§ 75-3-803. [Codes, 1942, § 41A:3-803; Laws, 1966, ch. 316, § 3-803]

§ 75-3-804. [Codes, 1942, § 41A:3-804; Laws, 1966, ch. 316, § 3-804]

§ 75-3-805. [Codes, 1942, § 41A:3-805; Laws, 1966, ch. 316, § 3-805]

Editor's Note — Former § 75-3-801 concerned drafts drawn in a set of parts.

Former § 75-3-802 stated the effect of instruments on the obligations for which such instruments were given.

Former § 75-3-803 provided for the giving of notice of litigation to third parties.

Former § 75-3-804 dealt with lost, destroyed or stolen instruments.

Former § 75-3-805 made the chapter applicable to instruments not payable to order or to bearer.

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